# DECISIONS

## COMMISSION IMPLEMENTING DECISION (EU) 2020/737

**of 27 May 2020**

**on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for activities related to the provision of certain postal services in Denmark**

*(notified under document C(2020) 3335)*

**(Only the Danish text is authentic)**

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([1]), and in particular Article 35(3) thereof,

After consulting the Advisory Committee for Public Contracts,

Whereas:

### 1. **FACTS**

(1) On 19 December 2019, Denmark ('the Applicant') submitted to the Commission by email a request pursuant to Article 35(1) of Directive 2014/25/EU ('the Request'). The Request complies with Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ([2]).

(2) The Request concerns certain postal services in Denmark. The services concerned are described as follows in the Request:

(a) National business to consumer (B2C) parcel delivery services – standard parcel deliveries from a business with a delivery contract in Denmark sent to a consumer (door to door or to a collection point in Denmark);

(b) International business to consumer (B2C) parcel delivery services:

— standard parcel deliveries originating from a business with delivery contracts in Denmark sent to a consumer located outside Denmark (door to door or to a parcel collection point);

— standard parcel deliveries originating from an international business sent to a Danish consumer (door to door or to a collection point in Denmark).

(3) The Danish Competition and Consumer Authority ('the DCAA'), which is an independent entity of the Danish Ministry of Industry, Business and Financial Affairs, submitted the Request on behalf of Denmark. The Request was initiated by PostNord ([3]), which is the only entity active in the postal sector in Denmark, subject to public procurement rules.

([1]) OJ L 94, 28.3.2014, p. 243.

([2]) Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 275, 12.10.2016, p. 39).

([3]) PostNord AB is the name of the holding company of the two merged postal companies Posten AB and Post Danmark that were officially merged on 24 June 2009. Post Danmark is a the subsidiary of PostNord which is established and active in Denmark.

(4) The Request included a reasoned and substantiated position by the DCAA. The DCAA that is competent in relation to the activities concerned, has thoroughly analysed the conditions for the applicability of Article 34(1) of Directive 2014/25/EU to the activities concerned, in accordance with paragraphs 2 and 3 of Article 34 of that Directive. The position of the DCAA was based on a questionnaire survey to the actual market players as well as potential competitors on the Danish markets for national and international business to consumer standard parcel delivery services.

(5) On 3 February 2020, the Commission requested additional information from the Applicant. The Applicant's response was received on 10 February 2020. On 16 March 2020, the Applicant submitted further information on the state of competition on the market for international B2C parcel delivery services.

(6) In accordance with point 1(a) of Annex IV to Directive 2014/25/EU, the implementing acts referred to in Article 35 of that Directive are to be adopted within 90 working days where free access to a given market is presumed on the basis of the first subparagraph of Article 34(3) of Directive 2014/25/EU. In accordance with the third paragraph of point 1 of Annex IV to Directive 2014/25/EU, the deadline for adoption of the implementing acts is to commence on the first working day following the date on which the Commission receives the request referred to in Article 35 (1) of that Directive or, where the information to be supplied with the request is incomplete, on the working day following the receipt of the complete information. The initial deadline therefore expired on 11 May 2020 ([4]). This deadline was extended, by the Commission with the agreement of the Applicant, until 29 May 2020.

## 2. **LEGAL FRAMEWORK**

(7) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to postal services, unless the activity is exempted pursuant to Article 34 of that Directive.

(8) Under Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which Directive 2014/25/EU applies are not to be subject to that Directive if, in the Member State in which the activity is carried out, it is directly exposed to competition on markets to which access is unrestricted. Direct exposure to competition is assessed on the basis of objective criteria, which may include the characteristics of the products or services concerned, the existence of alternative products or services considered to be substitutable on the supply side or demand side, the prices and the presence of more than one supplier of the products or provider of the services in question.

## 3. **ASSESSMENT**

### 3.1. **Unrestricted access to the market**

(9) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it to competition. That legislation is listed in Annex III to Directive 2014/25/EU, which includes, as regards postal services, Directive 97/67/EC of the European Parliament and of the Council ([5]).

(10) As confirmed by the Applicant ([6]), and based on the information available to the Commission, Denmark has transposed ([7]) and applies Directive 97/67/EC. Consequently, access to the relevant market is deemed to be unrestricted in accordance with Article 34(3) of Directive 2014/25/EU.

### 3.2. **Direct exposure to competition**

(11) Direct exposure to competition should 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. As the conditions vary for the different activities that are covered by the Request, the examination of the competitive situation should take into account the different situations in the relevant markets.

([4]) OJ C 64, 27.2.2020, p. 55.
([5]) Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21.1.1998, p. 14).
([6]) See Request, Section 4.1 and Appendix 1 to the Request.
([7]) National transposition act: Postal Law (Lovbekendtgoreste 2017-08-30, nr. 1040 Postlov)

(12) This Decision is without prejudice to the application of the rules on competition and to other fields of Union law. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 101 or 102 of the Treaty on the Functioning of the European Union or under Council Regulation (EC) No 139/2004 ([8]) as confirmed by the General Court ([9]).

(13) The aim of this Decision is to establish whether the activities concerned by the Request are exposed to a level of competition, on markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU, which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, procurement for the pursuit of the activities concerned by the Request 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 is important to mention that, in the markets concerned, not all market players are subject to public procurement rules. On the markets subject to the Request, only PostNord is a contracting entity in the sense of Article 4(1) of Directive 2014/25/EU and, hence, is subject to public procurement rules. The companies which are not subject to those rules, when acting on those markets, would normally have the possibility to exert competitive pressure on the market players which are subject to public procurement rules.

### 3.3. **Definition of the relevant product market**

(15) The Commission has held in previous decisions ([10]) that the market for parcel delivery services can be segmented into express and standard (also referred to as 'deferred') parcel delivery services. This segmentation takes into account that express services are faster and more reliable than a standard service, that each of those services requires a different infrastructure and that express services comprise additional value added service features, such as track and trace services, and are usually more expensive.

(16) In a previous decision ([11]), the Commission has also made a distinction between domestic and international parcel delivery services. The Commission held that domestic parcel delivery services are provided by companies operating national distribution networks whereas international parcel delivery consists in collecting parcels to be transported and delivered abroad and are provided by companies that have access to networks in the destination countries.

(17) The Commission held in previous decisions that standard parcel delivery services to consumers (C2X, i.e. C2C and C2B) and businesses (B2X, i.e. B2B and B2C) constitute distinct product markets. The provision of services to consumers (C2X) and the provision of services to businesses (B2X) require a different infrastructure (and in particular a network of post offices available to private consumers) ([12]).

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

([9]) Judgment of 27 April 2016, *Österreichische Post AG v. Commission*, T-463/14, EU:T:2016:243, paragraph 28.

([10]) Commission Implementing Decision 2013/154/EU of 22 March 2013 exempting certain 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 (OJ L 86, 26.3.2013, p. 22); M.5152 of 21 April 2009 – Posten AB/Post Danmark A/S; M.6570 – UPS/TNT Express of 30 January 2013 and M.7630 – FedEx/TNT Express of 8 January 2016.

([11]) See M.5152 – Posten AB/Post Danmark A/S, of 21 April 2009, paragraphs 54-57, Case M 6570- UPS/TNT of 30 January 2013, paragraphs 165-182, Case M.7630 – FedEx/TNT of 8 January 2016, paragraphs 81-89. See also Commission Decision 2009/46/EC of 19 December 2008 exempting certain services in the postal sector in Sweden from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 19, 23.1.2009, p. 50) and Commission Implementing Decision 2013/154/EU of 22 March 2013 exempting certain 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 (OJ L 86, 26.3.2013, p. 22).

([12]) See COMP/M.5152 – Posten AB/Post Danmark A/S, of 21 April 2009, paragraphs 60; Case AT. 35.141 Deutsche Post AG, paragraph 29; Commission Decision 2007/564/EC of 6 August 2007 exempting certain services in the postal sector in Finland, excluding the Åland Islands, from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 215, 18.8.2007, p. 21); Decision 2009/46/EC and Commission Decision 2010/142/EU of 3 March 2010 exempting certain services in the postal sector in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council (OJ L 56, 6.3.2010, p. 8).

(18) In addition, the Commission held in previous decisions that B2B and B2C deliveries are not substitutable. From the supply side perspective, B2C delivery requires a denser network to reach private consignees as oppose to business consignees who are often located in dense clusters. Consequently, the distance between business consignees is shorter than the distance between consumers. The consequences in terms of network coverage and costs may be very significant, differentiating therefore B2B and B2C parcel delivery markets ([13]).

(19) The Applicant's product market definition is in line with the Commission's previous practice.

(20) Based on recitals 15 to 19 for the purposes of the assessment under this Decision and without prejudice to competition law, it can be considered that the relevant product markets are:

(a) the market for domestic B2C standard parcel delivery services;

(b) the market for international B2C standard parcel delivery services.

### 3.4. **Definition of the relevant geographic market**

(21) In its previous practice ([14]), the Commission took the view that the markets for B2C parcel delivery, irrespective of the distinction between domestic and international delivery services, are national in scope. The Applicant's position is in line with the Commission's practice.

(22) In the absence of any indication of a different scope of the geographic market, for the purposes of the assessment under this Decision and without prejudice to competition law, the Commission considers that the geographic scope of the domestic and international B2C parcel delivery services covers the territory of Denmark.

### 3.5. **Market analysis – domestic B2C parcel delivery services**

(23) The Commission notes that, similar to the majority of the Member States, the Danish market registered a significant growth of parcel volumes in the recent years, mainly due to the impact of e-commerce. According to available information, between 2016 and 2018, the market share of PostNord dropped […] ([15]), from […] % in terms of value and […] % in terms of volume, to […] % in terms of value ([16]) and […] % in terms of volume ([17]).

(24) While the market shares of PostNord decreased over the observed period, the market shares of […] competitors increased […] over the observed period. Between 2016 and 2018 the market shares of the […] competitor, […], increased from […] % to […] % in terms of value and from […] % to […] % in terms of volume ([18]). Similarly, in the same period, the market shares of […] increased from […] % to […] % in terms of value and from […] % to […] % in terms of volume ([19]). […]. On this basis, it can be considered that they (i.e. […]) would be able to exert significant competitive pressure on PostNord. In this context, it is important to observe as well that […] managed to increase their market […] in a rather short time period, which suggests that […] provide an important competitive constraint on PostNord.

(25) Furthermore, the Commission notes that in the last five years new operators entered the market: DAO365 and Burd Delivery ([20]) and […] in the last three years.

(26) For the purposes of this Decision and without prejudice to competition law, the factors described in recitals 23, 24 and 25, should be taken as an indication of exposure to competition of that activity in Denmark. Consequently, since the conditions set out in Article 34 of Directive 2014/25/EU are met, it should be established that Directive 2014/25/EU should not apply to contracts intended to enable the pursuit of the activity in Denmark.

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([13]) See COMP/M.5152 – Posten AB/Post Danmark A/S, of 21 April 2009, paragraphs 61 and 62.
([14]) Case COMP/M.5152 – Posten AB/Post Danmark A/S, of 21 April 2009, paragraphs 64-74.
([15]) […] – confidential information
([16]) See Request, p. 11, table 5.
([17]) See Request, p. 11, table 6.
([18]) See Request, p. 11, tables 5 and 6.
([19]) See Request, p. 11, tables 5 and 6.
([20]) See Request, p. 16, Section 5.3.1.

### 3.6. **Market analysis – international B2C parcel delivery services**

(27) The Commission notes that, similar to the domestic B2C parcel delivery market, the international B2C parcel delivery market registered a significant growth in the recent years. However, contrary to the competitive developments observed on a domestic B2C parcel delivery market, the market share of PostNord in the international B2C parcel delivery market remains relatively stable in the last three years both in terms of value ([21]) ([…] % in 2016, […] % in 2017 and […] % in 2018) and in terms of volume ([22]) ([…] % in 2016, […] % in 2017 and […] % in 2018) ([23]).

(28) In parallel, the aggregate market share […] in terms of value and […] in terms of volumes. At those levels, it can neither be concluded that these competitors would be able to exert significant competitive pressure on PostNord nor that the market situation may change soon in view of relatively stable market shares of PostNord in the observed period.

(29) The Applicant argues that an important share of the international B2C parcel delivery services are […]. According to the Request ([24]), it appears that the […].

(30) However, even under the conservative approach […], the market share of PostNord in terms of volume is still […]. Since […], it is unlikely that the competitive situation will change in the near future.

(31) The Applicant indicates ([25]) that […]. It also suggests that given the growing market for e-commerce in Denmark and in Europe, the demand for international B2C parcel delivery is expected to grow. Finally, the Applicant informed the Commission on 16 March 2020 that PostNord identified additional providers of international B2C parcel delivery services.

(32) However, the Applicant clarified that, based on the information provided by PostNord, some of these providers (i.e. Prime Cargo, Blue Water, Scan Logistics, GTX Logistics and Link Logistics) do not themselves directly provide parcel service delivery, but instead offer logistics solutions, which includes selling the services of parcel distributors such as PostNord. Additionally, it seems that some other providers (i.e. United Broker, Shipmondo and pakke.dk) offers 'consolidation services', i.e. IT solutions and platforms. The Applicant also acknowledged that the Danish market have a limited scope in terms of size, which may limit the number of parcel delivery services providers.

(33) The Commission notes that a new competitor, DAO 365, entered the international B2C parcel market in 2019, but there is no available data yet as regards its performance in this market. While companies, such as those identified in recital 32 above may exercise some competitive constraint on PostNord, even if not providing international B2C parcel delivery services themselves, the information provided by the Applicant does not allow to conclude that this is indeed the case. The extent of such potential competitive constraint is particularly uncertain since, as shown in recital 27 above, the market share in terms of both volume and value of PostNord remains stable in the observed period.

(34) In view of the factors examined in recitals 27 to 33 it cannot be concluded that the international B2C parcel delivery services are directly exposed to competition in Denmark. Consequently, Directive 2014/25/EU should continue to apply to contracts intended to enable the pursuit of those activities in Denmark.

## 4. **CONCLUSION**

(35) This Decision is based on the legal and factual situation as of December 2019 to March 2020 as it appears from the information submitted by the Applicant, and the information publicly available ([26]). It may be revised, should the conditions for the applicability of Article 34 of Directive 2014/25/EU be no longer met, following significant changes in the legal or factual situation.

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([21]) See Request, p. 12 table 7.
([22]) See Request, p. 12 table 8.
([23]) See Request, p. 21 first chart.
([24]) See Request, p. 13, paragraphs 2 and 3.
([25]) See reply of the Applicant of 10 February 2020 to the Commission's request for information of 3 February 2020, p. 2.
([26]) See *'Development of Cross-border E-commerce through Parcel Delivery'* – Study for the European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs by WIK Consult, February 2019; *'Annual and Sustainability Report'* 2018 PostNord; *'Main Developments in the Postal Sector (2013-2016)'* Study for the European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, by Copenhagen Economics, July 2018.

(36) Since the services related to international B2C parcel delivery services should continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 6 of that Directive. 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 2014/25/EU and activities not exempted therefrom, 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 are not exempted, the provisions of Directive 2014/25/EU 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 laid down in Article 6(3) of Directive 2014/25/EU,

HAS ADOPTED THIS DECISION:

*Article 1*

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable activities related to domestic business to consumer (B2C) standard parcel delivery services to be carried out in the territory of Denmark.

*Article 2*

Directive 2014/25/EU shall continue to apply to contracts awarded by contracting entities and intended to enable the activities related to international B2C standard parcel delivery services to be carried out in the territory of Denmark.

*Article 3*

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 27 May 2020.

*For the Commission*
Thierry BRETON
*Member of the Commission*