Commission Decision (EU) 2020/613 of 7 February 2020 on the measure SA.17653 – C36/2007 (ex NN 25/2007) implemented by Germany for Deutsche Post AG (notified under document C(2020) 593) (Only the German text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2020/613

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on the measure SA.17653 – C36/2007 (ex NN 25/2007) implemented by Germany for Deutsche Post AG

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

1.1. Relevant summary of State aid procedures

1.1.1. *Opening Decision*

(1) In 1994, United Parcel Service ('UPS') filed a complaint concerning the granting of unlawful State aid to Deutsche Bundespost POSTDIENST ('POSTDIENST').

(2) The Commission opened the formal investigation procedure on 23 October 1999 ('the Opening Decision') with regard to various State measures: compensations granted for the universal service obligation, a State guarantee and pension subsidies for the period from 1995 to 1999.

(3) The Opening Decision was published in the *Official Journal of the European Union*[2]. The Commission invited interested parties to submit comments.

(4) Germany submitted comments on 16 September 1999.

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(5) Following publication, the Commission received comments from 14 interested parties, which were duly transmitted to the German Government by letter dated 15 December 1999 providing it with an opportunity to make its own observations concerning these comments.

(6) The German authorities responded by letter dated 1 February 2000, which was registered as received on 2 February 2000.

1.1.2. *2002 Decision*

(7) On 19 June 2002, the Commission adopted Decision 2002/753/EC[3] ('the 2002 Decision') finding that POSTDIENST and its successor Deutsche Post AG ('DPAG', while POSTDIENST and DPAG will be jointly referred to as 'Deutsche Post') priced door-to-door parcels below incremental costs and that its aggressive pricing policy did not fall within Deutsche Post's universal service obligation.

(8) The Commission considered that the resulting losses of EUR 572 million were ultimately financed, in contravention of Articles 106 and 107 of the Treaty on the Functioning of the European Union (TFEU), by State resources which were granted to Deutsche Post in various forms (e.g. public transfers from sister company Deutsche Bundespost TELEKOM ('TELEKOM'), public guarantees for loans, and public subsidies to finance the civil servants' pensions).

(9) Following the 2002 Decision, Germany recovered the incompatible State aid of EUR 572 million from DPAG. Deutsche Post challenged the decision in the Union Courts.

1.1.3. *Further complaints after the 2002 Decision*

(10) On 13 May 2004, UPS lodged a further complaint concerning unlawful State aid granted to Deutsche Post following the 2002 Decision. UPS argues that the 2002 Decision failed to examine all measures listed in the original 1994 complaint, and that Deutsche Post enjoyed significantly higher financial benefits than the incompatible aid of EUR 572 million. In addition, UPS is of the opinion that Deutsche Post used State resources to expand its parcel operations (e.g. for the purchase of other companies) and to sell services at excessively low transfer prices to its subsidiaries Postbank AG ('POSTBANK') and Deutsche Post Euro Express GmbH & Co OHG, which have been active respectively in banking services and marketing of business parcels under the brand name 'DHL'.

(11) The Commission services sent information requests to Germany on 9 November 2004 and 1 April 2005. Germany submitted its answers on 2 December 2004 and 3 June 2005 respectively.

(12) On 16 July 2004, TNT Post AG & Co KG ('TNT') filed a complaint also alleging that Deutsche Post sold services at excessively low transfer prices to POSTBANK. It claimed that, whereas POSTBANK only paid variable costs for the

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provided services, Deutsche Post financed the common fixed costs of the distribution network entirely out of the revenues of its letter monopoly.

(13) The Commission services sent information requests to Germany on 11 November 2004 and 25 April 2005. Germany submitted its answers on 17 December 2004 and 23 June 2005 respectively.

1.1.4. *2007 Extension Decision*

(14) Following the further complaints, the Commission informed Germany by letter of 12 September 2007[4] of its decision to extend the proceedings that had originally been initiated in 1999 ('the 2007 Extension Decision').

(15) The objective of the 2007 Extension Decision was to include the newly submitted information and to comprehensively address all potential distortions of competition which resulted from the public measures that were granted to Deutsche Post.

(16) Germany submitted its comments on 14 December 2007 and Deutsche Post challenged the validity of the 2007 Extension Decision[5]. On 16 November 2007, UPS and TNT submitted their comments. After an initial request for a deadline extension on 20 December 2007, Germany eventually submitted on 12 March 2008 its comments on UPS' and TNT's observations.

1.1.5. *Information request of 17 July 2008*

(17) The Commission sent an information request to Germany on 17 July 2008 on all public measures under investigation including a questionnaire on revenues and costs of Deutsche Post for the period from 1989 to 2007. On 5 August 2008, Germany asked for an undefined deadline extension because the availability of certain data would have to be checked before a reply could be provided.

(18) On 12 August 2008, the Commission explained why the investigation on the revenues and costs of Deutsche Post should be effected within the period from 1989 to 2007 and insisted on the submission of the requested information.

(19) In its submission of 14 August 2008, Germany maintained that there was no reason for examining the revenues and costs of Deutsche Post for the period after 1994. On 22 August 2008, the Commission reserved the right to adopt an information injunction pursuant to Article 10(3) of Council Regulation (EC) No 659/1999[6] if Germany did not provide the requested information.

(20) On 2 October 2008, Germany presented the results of a further expert opinion to support the position that an accounting analysis after 1994 was not necessary and therefore the appropriate investigation period should be from 1990 to 1994.

(21) On 28 October 2008, Germany submitted information on the public guarantee and the pension measure.

1.1.6. *Information injunction of 30 October 2008*

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(22) The Commission did not accept Germany's arguments and insisted that an analysis until 2007 was necessary to fully appreciate the competitive effects of the implemented public measures. Following the two reminders for information of 12 August 2008 and 22 August 2008, the Commission issued an information injunction on 30 October 2008 to enjoin Germany to deliver all necessary accounting information for the whole period from 1989 to 2007.

(23) Germany and Deutsche Post challenged the validity of the information injunction[7].

(24) On 27 November 2008, Germany submitted the requested accounting information for the period from 1989 to 1994. On 5 and 16 December 2008, Germany updated the accounting information which had been submitted on 27 November 2008.

1.1.7. *Submission of accounting information for the period from 1989 to 2007*

(25) After a meeting between the responsible German Secretary of State, the CEO of DPAG and the Commissioner with responsibility for Competition Policy on 6 February 2009, Germany and Deutsche Post agreed to provide accounting information for the period after 1994.

(26) On 3 March 2009, Germany submitted a first set of accounting information for the whole investigation period from 1989 to 2007

(27) Meetings between Deutsche Post and the Commission services took place on 3 March 2009 in Brussels as well as on 12 March 2009, 2 April 2009, 28 May 2009, 23 June 2009, and 18 September 2009 in Bonn. Germany submitted further information by Deutsche Post on 26 March 2009, 7 May 2009, and 22 June 2009.

(28) Following those meetings and two lists of questions which the Commission services submitted to Deutsche Post on 4 June 2009 and 30 July 2009, Germany provided updated accounting information and further clarifications on 9 July 2009, 31 July 2009, 17 August 2009, 8 September 2009, 10 September 2009 and 15 October 2009.

(29) On 16 and 24 September 2009, the Commission services submitted further questions to which Germany provided the answers on 14 October 2009.

1.1.8. *2011 Extension Decision*

(30) By letter dated 10 May 2011[8], the Commission notified Germany of its decision to extend the procedure laid down in Article 108(2) TFEU that had originally been initiated in 1999 and extended in 2007, in order to conduct an in-depth investigation with regard to the pension subsidies that Deutsche Post has received since 1995 ('the 2011 Extension Decision').

(31) After an initial request for a deadline extension on 23 May 2011, Germany submitted its comments on 29 July 2011.

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(32) On 4 October 2011, UPS submitted its comments. They were followed by comments submitted by Free and Fair Post Initiative on 5 October 2011 and comments submitted by Bundesverband Internationaler Express und Kurierdienste ('BIEK') on 7 October 2011. On 13 October 2011, the Commission communicated the comments by interested parties to Germany.

(33) On 14 November 2011, Germany submitted its comments on the third parties' observations.

(34) On 18 November 2011, the Commission sent a further information request concerning details of the pension financing for the period after 2007. On 2 January 2012 and 19 January 2012, Germany submitted replies. On 16 December 2011, the Commission submitted to Germany an expert study by Charles River Associates concerning profit benchmarking[9] for comments to which Germany replied on 16 January 2012.

1.1.9. *2012 Decision*

(35) On 25 January 2012, the Commission adopted Decision 2012/636/EU-[10] ('the 2012 Decision').

(36) In that Decision, the Commission concluded with regard to the pension measure that the measure constitutes unlawful and incompatible State aid and ordered recovery of the aid for the period from 1 January 2003 until the comparative advantage has been brought to an end. With regard to the aid for the period from 1995 to 2002, the Commission concluded that it was impossible to quantify the amount of incompatible aid. Consequently, the Commission did not order recovery of the aid with regard to this period.

(37) With regard to the public transfers, the Commission concluded that they were unlawfully granted by Germany in breach of Article 108(3) TFEU, but are compatible with the internal market. With regard to the public guarantee, the Commission concluded that the measure constitutes existing aid to Deutsche Post pursuant to Articles 107(1) and 108(3) TFEU.

1.2. **Summary of relevant Court procedures**

1.2.1. *Annulment of the 2002 Decision*

(38) In its 2008 judgment[11], the General Court annulled the 2002 Decision because the Commission failed to carry out a comprehensive analysis of all universal service revenues and costs to determine whether Deutsche Post had been under- or overcompensated.

(39) Germany subsequently paid back the recovered State aid of EUR 572 million plus accrued interest to Deutsche Post.

(40) On 2 September 2010, the Court of Justice dismissed the Commission's appeal against the General Court's judgment[12].