Commission Implementing Decision (EU) 2019/1204 of 12 July 2019 concerning the applicability of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for certain activities related to the provision of certain postal services and other services than postal services in Croatia (notified under document C(2019) 5194) (Only the Croatian text is authentic) (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2019/1204

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(notified under document C(2019) 5194)

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(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:

I. **FACTS**

(1) On 7 December 2018, Hrvatska pošta (‘Croatian Post’, hereinafter referred to as ‘the Applicant’) submitted to the Commission by email a request[(2)] pursuant to Article 35(1) of Directive 2014/25/EU (hereinafter referred to as ‘the Request’). In accordance with Article 35(2) of that Directive, the Commission informed Croatia thereof by email of 7 February 2019. Croatia replied by email of 26 February 2019. The Commission requested additional information to the Applicant on 16 May 2019 and the Applicant's responses were received on 17 May 2019 and on 21 May 2019. Moreover, the Commission requested additional information to the Croatian authorities on 24 May 2019 with a deadline for reply on 31 May 2019 and the Croatian authorities response was received on 11 June 2019.

(2) The Request concerns certain postal services as well as certain services other than postal services, as referred to in Article 13(1) of Directive 2014/25/EU, provided by the Applicant in the territory of Croatia. The services concerned are described as follows in the Request:

Changes to legislation: *There are currently no known outstanding effects for the Commission Implementing Decision (EU) 2019/1204. (See end of Document for details)*

Postal services:

(a) express parcel delivery services consisting of clearance, sorting, transporting and delivering of parcels with added value (e.g. faster delivery time than standard delivery time; time certain delivery) on the domestic market;

(b) express parcel delivery services consisting of clearance, sorting, transporting and delivering of parcels with added value on the international market;

(c) delivering of press and newspapers, magazines and books to customers on the domestic market.

The last category concerns other services than postal services, namely the mass distribution of unaddressed printed advertising, marketing or publicity material on the domestic market.

(3) The Request was not accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activities concerned, which thoroughly analyses the condition for the applicability of Article 34(1) of Directive 2014/25/EU to the activities concerned, in accordance with paragraphs 2 and 3 of that Article. In accordance with point 1 of Annex IV to Directive 2014/25/EU, the Commission has to adopt an Implementing Decision on the Request within 105 working days. The initial deadline expires on 23 May 2019[(3)]. This deadline was extended by the Commission with the agreement of the Applicant until 4 July 2019 and it was further suspended, in accordance with second paragraph of Annex IV to Directive 2014/25/EU, until 12 July 2019.

(4) On 13 June 2019, the Applicant withdrew the Request in so far as it extends to the market for delivery of press and newspapers, magazines and books to customers on the domestic market. Apart from this, the Request was maintained in respect to the other services listed under recital 2 above.

II. LEGAL FRAMEWORK

(5) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to postal services and other services than postal services on condition that the latter services are provided by an entity which also provides postal services within the meaning of Directive 2014/25/EU, unless the activity is exempted pursuant to Article 34 of that Directive.

(6) Under Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which the Directive applies are not to be subject to the 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 actual or potential presence of more than one supplier of the products or provider of the services in question.

III. ASSESSMENT

3.1. Unrestricted access to the market

(7) 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[(4)].

(8) As confirmed by Croatia[(5)], and on the basis of the information available to the Commission, Croatia has implemented[(6)] 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

(9) Direct exposure to competition should be evaluated on the basis of various indicators, 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. As the conditions vary for the different activities that are concerned by the Request, the examination of the competitive situation should take into account the different situations in the relevant markets.

(10) This Decision is without prejudice to the application of the rules on competition and 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[(7)]. This has been confirmed by the General Court[(8)].

(11) 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.

(12) In this context, it is important to mention that, in the markets concerned, not all market players are subject to public procurement rules. Therefore, 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[(9)].

3.2.1. *Express parcel delivery services (domestic express parcel delivery services and international express parcel delivery services)*

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(13) The Commission has held in previous decisions[10] that the market for mail delivery services can be segmented into express and standard (also referred to as 'deferred') 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 also more expensive.

(14) The Commission has also made in a previous decision[11] 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.

(15) The Applicant takes the view that the relevant product markets for express parcel delivery services correspond to the two types of postal services regarding packages which are covered by the Request and are set out in points (a) and (b) of recital 2. This approach is in line with Commission previous practice.

(16) Based on recitals 13, 14 and 15, for the purposes of the assessment under this Decision and without prejudice to competition law, it can be considered that the relevant product markets for express parcel delivery services are the market for domestic express parcel delivery services and the market for international express parcel delivery services.

(17) As regards the geographical market, in its previous practice[12], the Commission took the view that the markets for express parcel delivery, irrespective of the distinction between domestic and international express delivery services, are national in scope. The Applicant's position is in line with Commission practice.

(18) The Applicant provides both domestic and international parcel delivery services in Croatia.

(19) 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 geographic scope of the domestic and international express parcel delivery services can be considered to cover the territory of Croatia.

3.2.1.1. *Domestic express parcel delivery services - market analysis*

(20) Regarding the assessment whether the activity is directly exposed to competition, it can be established that there are over 20 operators[13] active in the domestic express parcel delivery services, including international market operators, such as DHL and GLS. According to available information, the market share of the Applicant in this segment of the market was […][14] % in 2015, […] % in 2016 and […] % in 2017 in terms of volume[15] and was of […] % in 2015, […] % in 2016 and […] % in 2017 in terms of value[16].

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(21) The market shares of the competitors of the Applicant are comparable to those of the Applicant. The market shares of the biggest competitors in terms of value[17] are as follows: DHL […] % in 2015, […] % in 2016 and […] % in 2017; Overseas […] % in 2015, […] % in 2016 and […] % in 2017; and GLS […] % in 2015 and […] % in 2016 and 2017[18].

(22) As regards market entry, over the last 5 years, the Commission notes the entry into this market of new market operators: Cash on Delivery Express, Gebruder Weiss, Orbis Express and Schenker[19].

(23) The Croatian Regulatory Authority for Network Industry indicated[20] that the postal services related to express parcel delivery in domestic and international circulation are competitive and that the Applicant faces competition in the performance of those services on the territory of Croatia.

(24) For the purposes of this Decision and without prejudice to competition law, the factors described in recitals 20, 21, 22 and 23 should be taken as an indication of exposure to competition of that activity in Croatia. 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 does not apply to contracts intended to enable the pursuit of the activity in Croatia.

3.2.1.2. *International express parcel delivery services - market analysis*

(25) There are currently over 20 operators[21] active in the international express parcel delivery services, including international market operators, such as DHL and DPD. According to available information, the market share of the Applicant in this segment of the market was […] % in 2015, […] % in 2016 and […] % in 2017 in terms of volume[22] and was of […] % in 2015, […] % in 2016 and […] % in 2017 in terms of value[23].

(26) The Applicant is not amongst the first three market operators in this market segment. The first market operator, DHL, had, in terms of value[24], market shares of […] % in 2015, […] % in 2016 and […] % in 2017. DPD had […] % in 2015, […] % in 2016 and […] % in 2017. Overseas had a steady market share of […] % in 2015, 2016 and 2017[25].

(27) As regards market entry, over the last 5 years, the Commission notes the entry into this market of new market operators: Cash on Delivery Express, Gebruder Weiss, Orbis Express and Schenker[26].

(28) The Croatian Regulatory Authority for Network Industry indicated[27] that the postal services related to express parcel delivery in domestic and international circulation are competitive and that the Applicant faces competition in the performance of those services on the territory of Croatia.

(29) For the purposes of this Decision and without prejudice to competition law, the factors listed in recitals 25, 26, 27 and 28 should be taken as an indication of exposure