Extension of postal monopolies: the Slovak law reserving hybrid mail delivery services for Slovenská Pošta infringed Article 86 in conjunction with Article 82

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1. Context of the procedure

On 7 October 2008, the Commission addressed to the Slovak Republic a decision based on Article 86 in conjunction with Article 82 of the EC Treaty finding that the extension of the postal monopoly in Slovakia was illegal. (2)

The Slovak Postal Act of 15 February 2008, which entered into force on 1 April 2008, reserved hybrid mail delivery services for the postal incumbent Slovenská Pošta. Hybrid mail is defined as a service whereby the content of communications is electronically transmitted to the service provider, electronically processed and converted into the physical form of a letter mail item (printed and enveloped) and then physically delivered to the addressee.

Slovenská Pošta is the provider of the universal postal service in Slovakia. It consequently has the obligation to provide delivery services to all Slovak households every working day as well as the obligation to maintain a network of postal boxes and postal offices (3). It also benefits from a reserved area, i.e. the exclusive right to distribute certain items of less than 50 g, and certain intangible advantages such as a VAT exemption or the right to issue stamps.

Before the adoption of the amendment, chiefly two postal companies started providing hybrid mail services in Slovakia: Prvá Dorucovacia (PD), which was already active in 2005, and Slovak Mail Services (SMS). These companies covered respectively 65% and 87% of the Slovak population. They still relied on the network of Slovenská Pošta for postal items falling outside their territorial coverage.

The amendment had dramatic consequences on these companies, which were prevented from engaging in their most profitable activities. They urged the Commission to open infringement proceedings against Slovakia.

The Commission sent the Slovak authorities a letter of formal notice on 18 June 2008 and addressed a copy to Slovenská Pošta. After assessing and taking account of the observations of the Slovak Government and Slovenská Pošta, on 7 October it adopted a decision based on Article 86(3) of the EC Treaty.

2. Extension of the postal monopoly

2.1. Slovak legislation before the amendment of the Postal Act

Before the amendment, Section 7(2) of the Postal Act No 15/2004 stipulated that “The postal reservation comprises clearance (collection) and distribution of items of correspondence and direct mail items up to 50 g in weight”. The wording of the law thus confirmed that the postal reservation did not apply to hybrid mail services, since hybrid mail items are in principle not collected.

Any possible doubts regarding the interpretation of the law were dispelled when the Postal Regulatory Office published on 5 March 2005 a General Authorisation which explicitly confirmed that “hybrid mail does not fulfil the criteria laid down in Sections 2 and 4 of Act No 507/2001 on postal services as amended by Act No 15/2004 (hereafter referred to as ‘the Act’) and is not considered as forming part of the postal service according the Act.”

Moreover, the Government and the Postal Regulatory Office issued a number of statements that fully confirmed the legal situation as described above:

- Three days after the adoption of the General Authorisation, PD sent a letter to the Postal Regulatory Office. PD sought to obtain confirmation in writing that it could distribute postal items prepared and packaged internally.
- On 22 March 2005, the regulator answered in writing. The Postal Regulatory Office drew a distinction between postal items that the distribution company received in paper and hybrid mail items which the postal operator also printed. For the latter category, the Postal Regulatory Office confirmed explicitly that the distribution of hybrid mail items was outside the scope of

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.
the postal reservation: “if the item is delivered in electronic form and you transform it into written form, the provisions of Section 4(4) on correspondence and the related provisions of Section 7(2) on the collection and distribution of correspondence will not be satisfied. A postal service provided in such a way is not subject to the postal reservation”.

- This interpretation was shared by the Government, which stated in its resolution No 376 of 10 May 2005 that “only a business activity involving all four stages mentioned above [i.e. clearance, sorting, transport and delivery of postal items] can be regarded as a postal service”.

- On 8 September 2006, the Postal Regulatory Office proposed an amendment of the General Authorisation in order to include hybrid mail in the reserved area. However, this proposal was criticised by the Government, the Anti-Monopoly Office and TNT. In its observations on the draft General Authorisation, the latter stated that “collection of the postal item pursuant to Section 4(1) of the Act on Postal Services therefore does not take place in the case of hybrid mail”. The Postal Regulatory Office subsequently did not amend its General Authorisation.

- On July 2007, Slovenská Pošta lodged a complaint with the Postal Regulatory Office for alleged breach of the postal reservation by PD and its parent company which provided hybrid mail services. However, on 25 September 2007, the Office rejected the complaint on the basis that “According to Section 5 of the Act, a postal service is provided only if an undertaking performs collection and distribution of mail (material object within the meaning of Section 4)”.

2.2. The extension of the monopoly

On 5 November 2007, Slovak Telekom issued a tender in order to select a postal service provider to deliver invoices with hybrid mail technologies. Slovak Telekom received four responses from different postal operators and decided to engage in exclusive negotiations with SMS.

However, on 8 November 2007, members of the Slovak Parliament introduced a legislative proposal aimed at reserving the delivery of hybrid mail for Slovenská Pošta.

Despite previous decisions of the Postal Regulatory Office, on 30 November 2007 the President of the Office issued a statement entitled “Viewpoint on hybrid mail” according to which it now considered that hybrid mail belonged to the reserved area and that it would “assess the activity of providers of services related to hybrid mail in the light of this viewpoint as of its publication on 30 November 2007”. The President of the Postal Regulatory Office subsequently repealed on 22 January 2008 the decision of 25 September 2007.

In reaction to Parliament’s legislative proposal of 8 November 2007, the Department of Approximation of Laws, the unit in charge of reviewing compliance of national law with EC law within the Governmental Legislation Division of the Slovak Republic Government Office, warned about the risk of illegality of such law in its opinion dated 3 January 2008. So too did the Anti-Monopoly Office on the same day. On 30 January 2008, the Legislative Council of the Government, which is in charge of ensuring the government of the legality of all new legislation, also took a negative stance on the proposed extension of the postal monopoly.

In spite of these reactions, the proposal was eventually adopted in second and third reading on 15 February 2008 and entered into force on 1 April 2008.

2.3. Impact on the provision of value-added services

The state measure at hand had severe consequences on private postal operators which had invested in order to provide hybrid mail services to their clients as from 2005.

It also had a negative impact on the offer of services available in Slovakia. The services provided by private postal operators better matched the needs of certain companies. In particular, private postal operators provided “track and trace services”, a reporting system enabling senders to gather information on whether and when mail items have been distributed to the addressee.

These value-added services, which were decisive selection criteria in tenders, were thereafter no longer available on the market.

3. Infringement of Article 86 in relation to Article 82

3.1. Restriction of competition

According to the Court of Justice of the European Communities, an abuse within the meaning of Article 82 is committed where, without any objective justification, an undertaking holding a dominant position on a particular market reserves to itself other ancillary activities in neighbouring but distinct markets, although these activities could also be carried out by another undertaking as part of its activities.
on this neighbouring but separate market(7). With regard to Article 86(1) in conjunction with Article 82, it is settled case law that the extension by means of a measure adopted by the State of a monopoly into a neighbouring and competitive market, without any objective justification, is prohibited as such by Article 86(1) in conjunction with Article 82(8).

The objective of the Amendment is precisely to extend the postal monopoly already in force on the market for traditional mail services to hybrid mail services. The Amendment thus constituted an infringement within the meaning of Article 86(1) in conjunction with Article 82(9).

Moreover, the reservation of hybrid mail delivery deprives customers of the value-added services provided exclusively by certain competitors of Slovenská Pošta. It is settled case law that “an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it” (10).

3.2. Lack of objective justification under Article 86(2)

Under Article 86(2) of the Treaty, a restriction of competition is justified if it is necessary for the provision of a service of general economic interest. As the Court has held in a number of cases, it is incumbent on a Member State which invokes Article 86(2), as a derogation from the fundamental rules of the Treaty, to show that the conditions for application of that provision are fulfilled (11).

Slovenská Pošta is the provider of the universal postal service in Slovakia. It is also entrusted with other services of general economic interest such as the provision of postal financial services throughout Slovak territory. However, pursuant to the Postal Directive (12), the extension or even the maintenance of the postal monopoly may not finance a service of general economic interest other than the postal universal service.

In International Mail Spain (13), the Court further clarified the conditions under which Member States may extend the postal monopoly. They need to “establish that, in the absence of such a reservation, achievement of that universal service would be precluded, or that reservation is necessary to enable that service to be carried out under economically acceptable conditions”.

No reliable estimate of the cost of providing the universal service

In its letter of 28 August, Slovenská Pošta submitted several studies based on the Net Avoided Cost (NAC) methodology according to which the cost of the universal service in Slovakia was at least SKK 1.5 billion.

However, after careful assessment of the said studies, the Commission came to the conclusion that the methodology used suffered from a number of fundamental defects and failed to take account of a number of relevant key points. Therefore, the Commission concluded that it could not accept that methodology.

Against this background, not only had the Slovak authorities not provided a reasonable estimate of the cost for providing the universal service in Slovakia, but they had also failed to demonstrate that the provision of this service in Slovakia is actually a burden.

No proof that the achievement of the universal service would be precluded or could not be carried out under economically acceptable conditions

The Slovak Government conceded that Slovenská Pošta was profitable in the period covered by the procedure. However, Slovenská Pošta submitted estimates on the loss of revenues which would derive from the opening of hybrid mail delivery services. Such a loss of revenue would derive from both a general price decrease on the one hand, and the loss of market share to the benefit of competitors on the other hand. According to Slovenská Pošta, this situation would not occur immediately but would likely happen as early as in 2010.

The Commission found, however, that Slovenská Pošta’s forecasts were based on several premises or assumptions which proved to be untrue or unrealistic.

On the basis of the above, the assumption according to which Slovenská Pošta’s financial situation

(7) Case 3H/84 CBEM [1985] ECR 3261, at para. 27; see also Commission Decision of 21 December 2000 concerning proceedings pursuant to Article 86 of the EC Treaty in relation to the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy, OJ I. 63, 3.3.2001, p. 59, paras 24-28.


(12) Article 7 of the Directive reads “to the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s)”.

Antitrust

would deteriorate to the extent that Slovenská Pošta would not be in a position to provide the universal postal service was not supported by facts.

3.3. Remedies

The Commission found that the Amendment to the Postal Act No 507/2001, as amended, the amendment to the General Authorisation, the interpretation of these acts and their preceding versions by the Slovak authorities, in particular by the Postal Regulatory Office, as well as enforcement measures undertaken against private operators, were contrary to Article 86(1) of the EC Treaty, read in conjunction with Article 82 of the EC Treaty. The Slovak Republic had to inform the Commission, within one month of being notified of the decision, of the measures it had taken to put an end to the infringement.

The Decision has binding effects and can be directly applied by national courts.