

POSTAL SERVICES AND COMPETITION

Introduction

Since the beginning of the 90s, the European Union's process of liberalisation of public utilities has been characterised by its pragmatic and sector-by-sector approach. Liberalisation and the creation of a Single Market in these services were the objectives, but the arrangements and the timetable were to be adapted to the economic, technological and social characteristics of each sector. This vision was set out many times by Van Miert, Competition Commissioner in the European Commission from 1993 to 1999 and is contained in the two notices of the Commission of September 1996 and September 2000.

In this context, this article aims to review the specific issues raised by the opening up of postal services to competition.

First, it examines the traditional economic and social background of this process, which can explain its difficulties (especially when compared for instance, to telecommunications) but also emphasises the new trends which are supporting the objective of more competition and more European integration.

Secondly, it sets out the recent political agreement on the new liberalisation package, which represents a significant step forward, especially as regards the "new" postal services, which have a higher growth potential.

Finally, it explains why competition policy is more and more important in this sector and illustrates this new trend with recent Commission decisions.

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I The economic and social background : the traditional characteristics of the postal services vis-à-vis the liberalisation process and the new trends.

1°) The traditional characteristics of the postal services vis-à-vis the liberalization process.

The most interesting comparison between two public utility sectors is probably to be found between telecommunications and postal services. In telecommunications, the technological revolution made the theory of the natural monopoly obsolete. Moreover, the high-growth potential due to these technological changes and notably the possibility of convergence with media and Internet, was to be supported by a full opening to competition of networks

* *The views expressed in this presentation are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.*

and services, crucial for the European economy (as it was already underlined in the White Paper for Growth and Employment of the Delors Commission in 1993). The timetable for this liberalisation process was decided in 1994 and led to full competition in most EU members states in 1998. In 2000 the process was extended with the adoption of a regulation to unbundle the local loop by the end of 2001.

In postal services, liberalisation of the traditional letters service has always been less self evident and more controversial. Amongst the developed countries, only Finland, Sweden, Australia and New Zealand, have largely on fully opened the competition within this sector.

The reasons commonly advanced against liberalization are that this sector is still a labour intensive industry without significant technical progress and without a high growth potential. Moreover, the cost of the universal service is supposed to be higher than in other public utilities, given the very high marginal costs for delivering mail to isolated persons (in the countryside, mountainous regios or islands). Last, but not least – in particular for political leaders – the number of people employed by the public postal operators in Europe is very high (1,3 million) making any reform sensitive.

2°) New trends in postal services

The trends that have characterised the postal sector in the last years show stability of the traditional letter post service but a strong growth of other postal services. This is true in particular of hybrid mail services as well as of all those value added features (tracking and tracing, delivery to the addressee in person) which more and more characterise mail services for letters as well as for parcels (these ones growing in line with e-commerce).

In this context, it is also important to underline the always bigger tendency of public postal operators (PPO) to expand beyond their national boundaries, opening subsidiaries in other Member States and merging with other operators, in order to develop their businesses and to prepare themselves for the complete opening of the European postal market to competition in the future.

II. The 2000 agreement on the new legal framework.

The new regulatory rules on post are principally based on the common position adopted by the Council on 15 October 2001 and confirmed by the European Parliament in April 2002.

To reach such a compromise was a very difficult task given the wide differences in the positions of the Member States in the Council. These differences reflect the diversity of the postal sector in Europe with some PPOs strongly committed in expanding themselves in other national markets as well as international ones and other PPOs trying to ameliorate their quality of service in order to maintain their existing market share ahead of liberalisation.

In this respect, we have to thank the Belgian Presidency of the Council whose strong commitment to this important file finally enabled the Council to reach a compromise.

The major changes that the new regulatory package will bring are the following :

The timetable for further market opening: The price and weight limit of the reserved area will be reduced in two steps (in 2003 and in 2006) down to 50g and 2.5 times the standard tariff.

Final step for liberalisation: The full opening of the sector to competition has not yet been decided. It was agreed that, on the basis of a study regarding the impact on the universal service in each Member State of the previous market openings, the Commission shall - if appropriate - table by 31 December 2006 a proposal for a further, “decisive step” towards market opening in 2009. This Commission proposal shall be adopted by the Council and the European Parliament by 31 December 2007.

Outgoing cross-border mail: The Council has accepted the Commission's proposal of opening outgoing cross-border mail to competition. However, the Council has added the provision that these services may continue to be reserved if the revenue is necessary to ensure the provision of the universal service.

The definition of special services: It is worth noting that, although a definition of special services (*i.e.* services that are clearly distinct from the universal service, which meet particular customer requirements and which offer additional added-value service features not offered by the standard postal service) was present in the Commission's proposal, the Council's common position does not contain such a definition. Some Member States considered the definition too vague and were afraid that it would have jeopardised the universal service.

The consequence of the lack of a definition of special services in the wording of the common position will be that the Commission will continue to evaluate special services on the basis of the rules contained in the old Directive. (see Italian "Riposta" case below).

III Competition policy decisions

A number of important decision applying competition rules in the postal sector have been taken in the last two years which mainly go in the direction of protecting competition in the markets open to competition and in the markets which have the higher growth potential.

- 1) As regards mergers, the TPO/TPG/Singapore Post joint venture agreement was authorised by the Commission in March 2001. It concerned the creation of two joint ventures with world-wide activities for outbound cross-border mail.

In its decision, the Commission evaluated the effects of the joint venture in the UK and Dutch markets separately.

As regards the UK, it concluded that the concentration would not have led to the creation or strengthening of a dominant position. In fact, although the parties would have had relatively high market shares in the market for

outbound cross-border business mail, there were a number of other players in this market with significant shares, including consolidators and third country PPOs.

As regards the Netherlands the Commission found that the market for outbound cross-border business mail in the Netherlands had fewer operators than on the UK market, and that they were relatively small with the exception of TPO itself. As a consequence the concentration would have had the effect of eliminating competition between the dominant player, TPG, and the largest entrant into the Dutch market, TPO.

For these reasons the Commission imposed the divestment of TPG cross-border mail activities in the Netherlands which have been acquired by Swiss Post.

In conclusion we can say that, given the present tendency towards restructuring between European PPOs, merger control rules will need to be carefully applied in this sector. As the above mentioned case shows, however, the approach of the Commission will be a reasoned one, limiting operators' freedom to merge only in cases where this will create artificial barriers to the entry of new operators.

- 2) As regards the implementation of the antitrust rules, the recent case law of the Commission demonstrate a series of major competition concerns in the postal sector.

Monopoly extension: (added value hybrid mail services in Italy “Risposta”)

In some cases legislation transposing the postal directive was enacted in a way that actually *increased* the scope of the monopoly reserved for the incumbent operator. The Commission has adopted a decision opposing such an attempt by the Italian State to extend its postal monopoly to added value hybrid mail services. The Commission took the view that the Italian Law establishing those arrangements, prevented private suppliers from offering the full range of hybrid mail services.

Lack of independent national regulation: (SNELPD)

The progressive construction of the internal postal market will make always more crucial the role played by national regulators. Some Member States have adopted legislation that in some respects fails to meet the requirements of the Postal Directive for what regards the independence of these institutions. The Commission has adopted a decision which addresses this problem – the “SNELPD” case which concerns the necessity of an independent regulatory authority, notably to avoid that the French Post Office could discriminate between its own services and contracting competitors. The decision, which concerned the relationship between the French Post Office and so-called mail preparation firms, was based on the jurisprudence of the Court of Justice regarding the notion of conflict-of-interest.¹

¹ Case C-18/88 GB-Inno BM, judgement of 13 December 1991, [1991] ECR I-5941, para. 25.

Predatory pricing, cross-subsidisation, tying and excessive pricing: (Deutsche Post/UPS – La Poste/Hays)

A number of complaints were filed with the Commission concerning the behaviour of PPOs in markets outside the scope of the postal monopolies. These complaints alleged that incumbent operators compete with very low prices in markets subject to competition and that incumbents' sales of services subject to competition have been combined with rebates for monopoly services (so-called tying of monopoly and non-monopoly services). This is in particular the case in the so called "Deutsche Post I" decision, where monopoly revenue from the letters market was used to cover losses in the parcels market which is open to competition, and of the "Hays" decision, which concerned tying practices between products in competitive and non-competitive markets. The Deutsche Post I and the Hays Decisions resulted in the imposition of fines amounting to 24m Euro and 2.5m Euro respectively.

The most significant outcome of the "Deutsche Post I" decision is probably the structural separation of certain competitive postal services covered by the postal monopoly. To take into account the Commission's concerns with respect to cross-subsidisation and predatory pricing, Deutsche Post undertook to create a separate legal entity for the provision of its non-universal parcel services.

Remuneration for international mail traffic: (BPO/Deutsche Post AG)

The Commission has received a number of complaints in which it is claimed that normal cross-border mail has been intercepted, surcharged and delayed in an abusive manner by certain PPOs. The Commission decision in the "Deutsche Post II" has for the first time condemned Deutsche Post for such practices and will be an important precedent for the future application of Article 82 to this particular behaviour. The Commission, however, whilst condemning Deutsche Post for its behaviour, was convinced by its undertaking to no longer intercept, surcharge or delay international mail of the type concerned by the case (i.e. virtual A-B-A remail) and imposed a symbolic fine of EUR 1,000.

IV Conclusions:

The new regulatory package and the recent competition law decisions will help the Commission to sustain the gradual opening of the reserved areas and to improve the level of competition in the markets already liberalised, while respecting fully universal service.

It is also worth underlining that, in this sector, PPOs have a crucial role to play to increase competition by expanding their activities in other product and geographical markets.

However, it is fundamental that any improvement or expansion of activities by the incumbent operators must not threaten the construction and maintenance of a level playing field on which other operators and, above all new entrants, will be able to compete on a level playing field.

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