The BdKEP decision: the application of competition law to the partially liberalised postal sector

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1. Introduction

On 20 October 2004, the Commission adopted a decision based on Article 86 regarding certain provisions of Germany's postal regulatory framework which bar commercial mail preparation firms from earning discounts for handing over pre-sorted letters at Deutsche Post AG's (DPAG) sorting centres (1). The case was prompted by a complaint on 20 May 2003 from the Bundesverband der Kurier-Express-Post Dienste e.V. (BdKEP), a German association of courier, express and postal service providers.

The Commission found that the incriminated provisions of the German Postal Law induce DPAG to abuse its dominant position, thus to infringe Article 82, in two ways: First, they induce DPAG to discriminate between, on the one hand, bulk mailers who have access to the downstream sorting centres and the related discounts and, on the other, commercial providers of such services who do not have access to these discounts. Second, the provisions prompt DPAG to extend its market power from the (reserved) market for basic postal services upstream into the (liberalised) market for mail preparation services.

2. Mail preparation services and discounted postal tariffs

DPAG has the exclusive right to clear, sort, transport and deliver letters weighing less than 100 grams (the so-called reserved area). The market for mail preparation services is upstream of the reserved area. It involves the making up of postal items (printing, enveloping, labelling, franking), collecting, placing them in mailbags or containers complying with certain standards, bundling and sorting them to a greater or lesser degree by destination and delivering them to access points of the universal service provider. These activities were traditionally performed by the senders themselves. They are now increasingly outsourced to specialised mail preparation firms and warrant a huge potential for market growth in Germany.

Since local post offices in Germany are not equipped to process bulk mail, mail preparation firms transport the letters directly to DPAG's sorting centres where they are fed into the public postal network. The German postal legislation provides for a graduated system of discounted postal tariffs for large customers which feed self-prepared mail into the postal network at sorting centres. The level of discount depends on the number of items per category and on whether the letters are handed over at the outbound sorting centre (i.e. closest to the sender) or the inbound sorting centre (i.e. closest to the recipient). The discounts, which reflect the costs avoided by DPAG, are fixed by the German postal regulator RegTP and reviewed once a year. Mail preparation firms which — as the overwhelming majority — work on behalf of several senders and consolidate their letters before feeding them into the public network are barred from these discounts as far as letters falling within the reserved area are concerned. Yet the costs savings for DPAG are the same irrespective of whether the mail is brought by customers themselves or by commercial providers acting on their behalf.

3. Article 82 complaints to the Bundeskartellamt

In the framework of the European Competition Network (ECN), the German Federal Cartel Office (Bundeskartellamt) informed the Commission that it had received two complaints under Article 82 and/or the German equivalent which related to the same subject-matter. Indeed, the complainants challenged DPAG's refusal to grant them quantity-based discounts for reserved mail items at the incumbent's sorting centres. DPAG's practice was however so far covered by the German postal

(1) Text of the decision available at: http://europa.eu.int/comm/competition/liberalization/decisions/
regulatory framework and in particular by the provisions under investigation by the Commission. The compatibility of the German provisions with Community law was thus a preliminary question for any further action at the national level.

The Bundeskartellamt and the Commission therefore agreed to closely co-ordinate their actions, proceeding in two stages and at two levels. First, the Commission would finalise the infringement proceedings under Article 86 and take a definitive view as to whether the German postal provisions infringe the competition rules. Should the Commission come to the conclusion that the provisions are contrary to Community law, the Commission decision would lift the obstacle of the justification of DPAG’s behaviour through the German Postal Law. Indeed, under the ECJ’s CIF case law (1), national competition authorities are required to set aside the application of national law which contravenes Community law. A Commission decision ruling against the incriminated provisions in the German Postal Law would be a sufficient indication that these provisions contravene Community law. The Bundeskartellamt’s action at the national level would be a perfect supplement to an Article 86 decision which, in itself, would not have any immediate bearing on DPAG’s behaviour. Thereby, the competitive disadvantage placed on mail preparation firms — if confirmed by the Commission’s investigation — could in practice rapidly be removed.

4. Infringement of articles 86-82 of the EC Treaty

The Decision finds that the contested provisions induce DPAG to abuse its dominant position, thus breaching Article 82, in two ways.

4.1. Discrimination

First, they induce DPAG to discriminate between, on the one hand, large customers who have access to the downstream mail preparation discounts and, on the other, commercial providers of such services who do not have access to these discounts. This amounts to not treating like cases alike, thereby discriminating between senders. Both major senders and commercial firms hand over similar volumes of mail at sorting centres, pre-sorted and presented in the same way and leading to the same savings in handling operations and efficiency gains for DPAG.

This finding is fully corroborated by Article 12 5th indent of the Postal Directive (2) which lays down a tariff non-discrimination principle for different types of large mailers: ‘Whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions.’

4.2. Extension of a dominant position

Second, the relevant provisions induce DPAG to extend its market power on the (reserved) market for basic postal services into the market for mail preparation services where it is also a key player. DPAG charges the full postal tariff for professionally pre-sorted and prepared bulk mail delivered to a downstream access point which, in terms of volume and quality of preparation, would have given rise to the maximum available discount had it been handed over by the bulk mailer itself. DPAG thus enjoys the cost savings without any compensation for the mail preparation firms. At the same time, mail preparation firms which compete with DPAG do not have the possibility to procure their clients savings on postage which is a key argument in the cost savings-driven market for mail preparation services.

4.3. No interference with Article 7 of the Postal Directive

During the proceedings, DPAG’s main argument was that part of the mail preparation services as defined by the Commission, namely the pre-sorting of the mail and its transport from the sender’s premises to a DPAG sorting centre on behalf of several senders, fall within the ambit of

(1) Judgment of the Court dated 9 September 2003 in Case C-198/01, Consorzio Industrie Fiammiferi (CIF) and Autorità Garante della Concorrenza del Mercato.

the reserved area of the Postal Directive and that, as a consequence, Articles 86 and 82 do not apply to the services concerned.

The Decision demonstrates why this allegation, if at all justified in law, is unfounded in the actual circumstances at hand. Pursuant to Article 7(1) of the Postal Directive, the scope of the reserved services includes the ‘clearance, sorting, transport and delivery’ of certain items of correspondence. The reserved area thus has a clear beginning, the ‘clearance’, and an ending, the ‘delivery’, both chronologically and geographically. Both terms are defined by the Directive (1).

Not only letter boxes and postal offices, but also DPAG’s sorting centres are ‘access points’ under the Directive since all clients, whether senders or mail preparation firms, can deposit their bulk mail items at these points. This means that in the case of bulk mail the reserved area only starts with the handing over of the mail items at the sorting centre. All activities which take place beforehand, in particular the pre-sorting and the transport from the sender’s premises to the sorting centre, cannot be reserved (2). The Commission has already taken this view in the 2001 SNELPD decision (3) and its 1998 Notice on the application of the competition rules to the postal sector (4).

4.4. No negative impact on DPAG’s financial equilibrium

The incriminated provisions are not justified under Article 86(1) where the application of the rules of competition would obstruct the performance of the particular tasks assigned to the undertaking which has been granted exclusive or special rights. First, the Postal Directive determines a maximum scope of services for which Member States can grant exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service. Article 7 Postal Directive could thus be seen as a lex specialis to Article 86(2) in the realm of the postal sector. As the mail preparation activities under investigation do not fall within the ambit of the reserved services, there is a presumption that any special right in relation to these is not justified under Article 86(2).

More importantly, even on substance DPAG failed to demonstrate that removing the incriminated provisions would actually have any impact on the performance of the universal postal service. The German system of discounted postal tariffs is precisely designed not to obstruct the performance of DPAG’s universal service obligations. The discounts are regularly reviewed by RegTP and mirror the avoided costs in each case and, in particular, take into account the fixed network costs which DPAG continues to bear even if part of it is not used or less used because of upstream consolidation.

5. Conclusion

The BdKEP decision is the 15th decision based on Article 86 adopted by the Commission and the first one ever addressed to Germany. It shows that the Commission is determined to use this legal basis whenever Member States adopt or maintain in force provisions which induce dominant undertakings to abuse their position. This is particularly important in the postal sector, where the Community legislator has decided a gradual and controlled liberalisation that Member States should not frustrate. After the SNELPD decision mentioned above and the Italian hybrid mail case (5), this is the third illustration of the interaction between Article 86 and postal sector-specific regulation since the entry into force of the Postal Directive. In

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(1) Clearance is the ‘operation of collecting postal items deposited at access points’ (Article 2(4)), i.e. ‘physical facilities [...] where postal items may be deposited with the public postal network by customers’ (Article 2(3)). Delivery or distribution (the equivalence of both terms can be derived from the French and German language version) is the ‘process from sorting at the distribution centre to delivery of postal items to their addresssees’. The activities of ‘sorting’ and ‘transport’ can be reserved to the extent to which they take place between the beginning and ending defined by the Directive.

(2) This is confirmed by a comparison with the scope of the universal service defined in Article 3 of the Postal Directive. The universal service provider is under the obligation to ensure the ‘clearance, sorting, transport and distribution of postal items up to two kilograms’ at all points in the national territory on every working day and not less than five days a week. If ‘transport’ was construed as comprising the conveyance of mail items from the sender’s premises to the sorting centre as alleged by DPAG, DPAG would be obliged to pick up mail items from all households and companies everywhere in Germany.

(3) Commission Decision of 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services, OJ L 120, 7.5.2002, p. 19.

(4) Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ C 39 of 6.2.1998, page 2. See in particular footnote 30: ‘Even in a monopoly situation, senders will have the freedom to use of particular services provided by an intermediary, such as (pre-)sorting before deposit with the postal operator.’

(5) 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 L 63, 3.3.2001, p. 59.
terms of procedure, the BdKEP decision and the warning letter which the Bundeskartellamt addressed to DPAG in November 2004, demonstrate the ever closer co-operation between the Commission and the national competition authorities within the new framework laid down by Regulation 1/2003. The Federal Republic of Germany and DPAG have filed an application for annulment of the Decision before the CFI (Cases T-490/04 and T-493/04).