



LE GROUPE LA POSTE

DIRECTION DE LA REGULATION EUROPEENNE ET NATIONALE

5th september 2012

Answer of “Le Groupe La Poste” to the public consultation launched by the ERGP on “access” to the postal network and elements of postal infrastructure

Introduction

The report published by the ERGP on the subject of access to the postal network and elements of postal infrastructure mainly addresses two different issues: access to the postal infrastructure and commercial discounts. “Le Groupe La Poste” welcomes the opportunity offered to the stakeholders of the postal sector to reflect on these two important issues. The experience of the French market has shown that adopting good practices in these two areas has proven to be an important factor for the development of a successful postal market (for the incumbent, the mailers and the consolidators). We also welcome the methodology announced by the ERGP for this report; the objective of a discussion on access cannot be to advocate a particular access regime for all countries but should be to identify some best practices. However, the report also introduces some unfortunate confusions that will be described in this contribution.

Identification of best practices

There is only one paragraph in the report that seems concerned by the identification of successful national access regimes (p.36). In this brief paragraph the ERGP observes that:

“Measured in terms of turnover handled by consolidators the British and French markets are the largest in Europe. Their turnover accounts for about 5 per cent of the total postal sector. More than 200 firms in France offer consolidation services. In the other European countries the role of consolidators is smaller in relation to the size of domestic postal market.”

The French model is one of successful models identified by the ERGP. This observation has been consistently supported by the studies commissioned by the DG MARKT. For example WIK-ITA (2009)¹ considers that the French upstream market is the most competitive in Europe. PWC (2006)² notes that “an important feature of the French market is the significance of upstream competition”. WIK (2006)³ also notes that “consolidators play a significantly more important part in France than in most other member states”. Copenhagen Economics (2010)⁴ also notes that “in terms of turnover handled by consolidators, the French market for consolidation is the largest in Europe.”

If the objective of the ERGP was to identify some best practices, it could have investigated the specificities of the French regime that could have led to such a success. Namely, an access provided by the incumbent on a voluntary basis, an efficient worksharing system and the existence of commercial rebates granted to the mailers. But

¹ “The evolution of the European Postal Market since 1997”, Annex and country fiches. WIK-ITA

² “The Impact on Universal Service of the Full Market Accomplishment of the Postal Internal Market in 2009”, Annexes, PWC.

³ “Main developments in the postal sector (2004-2006)”. WIK.

⁴ “Main developments in the postal sector (2008-2010)”. Copenhagen Economics.

instead, the ERGP concludes its section on the commercial rebates offered by La Poste by considering that the French system could present a danger for competition:

"Indeed, the risk exists that the incumbent could try to pass off rebates for mail preparation as demand based rebates, reducing the incentive for bulk senders to use mail houses and potentially (if indirectly) contributing to ousting the latter parties."

The ERGP identifies only one country where the current regime could pose a threat to upstream competition, and this country is surprisingly the country that has been acknowledged by all observers and by the ERGP itself as the country with the most developed, successful and competitive upstream market. We therefore think that the ERGP comment is disconnected from the reality. Moreover, even on a theoretical level the anticompetitive practice feared by the ERGP could not be implemented. Indeed it is not possible to pass off rebates for mail preparation as demand based rebates since these two categories of rebates will present very distinct forms. Indeed, by definition, operational rebates are conditioned upon the characteristics of the mail deposit (presorting...) while commercial rebates are not. Finally, the comment of the ERGP fails to take into account the fact that postal operators do not have any incentive to exclude upstream operators from the market. On the contrary, there exists overwhelming evidences of the advantages that incumbent operators can enjoy from access agreements⁵. As noted by the ERGP (p.39) it is the presence of regulatory interferences (for example an ex-ante regulation of access based on LRIC) that could lead the incumbent to act in an anticompetitive way. When access is provided on a voluntary basis it is a win-win situation that benefits all parties, the mailers, the incumbent and the upstream companies.

Interpretation of Article 12.5 of the Directive

The report introduces some confusion that could lead to an erroneous interpretation of the directive and the Vedat Deniz case law. The ERGP correctly notes that the European Court of Justice ruled that *"if a USP applies special tariffs, it must, in order to observe the principles of transparency and non-discrimination, apply them equally in particular as between third parties. Whenever a USP applies special tariffs to businesses and/or bulk mailers, consolidators of mail from different customers are entitled to enjoy the same tariffs under the same conditions"*. The ERGP however introduces in its report a terminological confusion by considering in several instances that commercial discounts would constitute special tariffs and would be concerned by the provisions of Article 12.5 of the Directive. This seems to lead the ERGP to consider that:

"Limiting the discount opportunity for discounts to original mailers, however, may collide with the principle of non-discrimination. This would be the case where incumbents use a "per sender" model that calculates the level of commercial discounts on the basis of the volume of mails posted by each sender (...)".

We want to remind that such an interpretation would be in contradiction with the European and French case laws. First, the Vedat Deniz ruling of the Court clearly shows that the "special tariffs" mentioned in the directive refer to operational discounts since they are based on avoided costs:

⁵ See for example M.Crew and P. Kleindorfer (2011) "Competitive strategies under FMO and intermodal competition", in *Reinventing the postal sector in an electronic age*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar.

37. In that regard, it is sufficient to point out that, under the fifth indent of Article 12 of Directive 97/67, the special tariffs 'shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items'.

The exact same interpretation has also been adopted by the European Commission in the BdKEP case (2004)⁶:

137. The economic rationale for special tariffs for downstream access is to remunerate a sender or a service provider for services (legally) provided in lieu of the universal service provider, at the level of the avoided costs of the latter.

The ERGP report itself notes p.9 that

Commission staff working document [SEC (2008) 3076] accompanying document to the report from the Commission to the European Parliament and the Council on the application of the Postal Directive {Com (2008) 884 final} refers that (page 20) „The special tariffs mentioned in Article 12, fifth indent, may be considered as applicable to downstream access and the principles of transparency and non-discrimination have been specially enshrined in the Postal Directive

Using the definition provided by the ERGP, access refers to the use of a postal operator for the “partial provision” of a postal service, that is, when some part of the network of the operator is avoided. Special tariffs therefore refer to prices that takes into account operational discounts granted in exchange for the costs avoided by the partial provision. Article 12.5 of the Directive therefore refers to operational discounts, not to commercial discounts. This is also apparent from the French case law where the competition authority⁷ considered that:

“La directive précise également que la non-discrimination s’applique dans le cas où des services sont rendus puisque les tarifs doivent tenir compte des coûts évités ».

This is also the position adopted by the Tribunal de Commerce de Paris (27 September 2010):

“Il résulte d’une lecture attentive de la motivation de cet arrêt interprétatif de la Cour de justice des Communautés européennes que celle-ci a été précisément saisie d’une question sur la rémunération versée par les « prestataires du service postal universel » au titre des « coûts évités » par ces derniers et, dès lors, que son dire pour droit ne vise que la rémunération des clients professionnels pour « le dépôt dans les centres postaux de quantités minimales d’envois prétriés. (...) la rémunération des « coûts évités » par La Poste pour le dépôt d’envois prétraités est précisément l’objet des contrats « techniques » qui bénéficient à l’ensemble des « déposants », dont les « intermédiaires », tant pour le secteur réservé que pour le secteur non-réservé. »

The essential facility doctrine

The report of the ERGP explains that the issue of whether the postal infrastructure can be classified as an essential facility has given rise to extensive debates. If this remark is

⁶ Draft COMMISSION DECISION of [...] 2004 on the German postal legislation relating to mail preparation services, in particular to the access of self-provision intermediaries and consolidators to the public postal network and related special tariffs

⁷ Avis n° 07-A-17 du 20 décembre 2007 relatif à une demande d’avis de l’Autorité de régulation des communications électroniques et des postes (ARCEP) sur le dispositif de remises commerciales de La Poste

certainly well founded it is unfortunate that the ERGP does not provide the results of these debates, such an exercise would have demonstrated that the delivery network of postal operators has overwhelmingly been considered not to constitute an essential facility.

Most studies applied to the postal industry agree that the sector does not present significant barriers to entry. Ecorys (2005)⁸ for example shows that reputation effects, portfolio effects or switching costs can exist but are not prohibiting. They also show that sunk costs can exist in collection or sorting but are also limited and cannot prohibit entry. Heitzler (2009)⁹ confirms that sunk costs are necessarily low since labor represents the majority of the costs of postal operators. In conclusion, most analysts have considered that entry barriers in the postal sector are not sufficiently important to constitute an essential facility. Heitzler (2009) considers that *"Mail collection, sorting, transport and delivery access might exhibit economies of scale and represent a natural monopoly in remote areas, but economies of scale alone do not create an essential facility."* Panzar (2009)¹⁰ also notes that *"In the absence of significant sunk costs, and ample direct and indirect evidence that it is possible for entrant's to create duplicate delivery networks, it is difficult to defend a policy of mandated access on the basis of an essential facilities argument"*. Finally, Ecorys (2005) concludes that *"The discussion (...) on natural entry barriers shows that the facilities of the national postal operators probably do not constitute essential facilities. There are no large sunk costs of investments and the natural entry barriers on the demand side as well as network effects do exist to a smaller or larger extent, but do not seem to prohibit entry"*.

The absence of essential facility in the postal sector can also be proven by the existence of end to end competition in several countries. Copenhagen Economics (2010) shows that for the 21 countries considered in their study, 15 of them declared that there was at least one competitor to the incumbent on the correspondence market. We also know that substantial network competition has developed in several countries like Sweden, Germany, The Netherlands, Spain or Italy. These examples show that a competitor can easily develop an alternative delivery network because, contrary to other sectors like rail, energy or telecommunications, all the elements of the postal infrastructure can be easily replicated without technical difficulties. However, it does not mean that it will be easy for competitors to develop profitable delivery networks. Indeed, the experience of some of the countries mentioned above shows that competitors had to face several setbacks. But, those financial difficulties actually mimic the difficulties of incumbent postal operators and are in part explained by the development of electronic substitution. To express this idea differently, the postal delivery network is easy to replicate and there is no technical obstacle to its reproduction, however, the profitability of such a reproduction is in doubt if the competitor cannot attract sufficient volumes. The Bronner¹¹ case law of the European Court of justice makes it very clear that under these circumstances the delivery network of postal operators cannot be considered as an essential facility. Bronner was a small newspaper publisher who wanted an access to the nationwide delivery system of the largest publisher of Austria. The court rejected this claim on two grounds. First, the

⁸ "Development of competition in the European postal sector", Final study, Ecorys

⁹ Heitzler, S. (2009), "Traditional regulatory approaches and the postal service market", *Competition and Regulation in Network Industries*, 10(1), 77-105.

¹⁰ Panzar, John C. (2009). "Interactions between regulatory and antitrust policies in a liberalized postal sector", in: *Handbook of Worldwide Postal Reform*, ed. by Michael A. Crew and Paul R. Kleindorfer, Edward Elgar.

¹¹ Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and Others, 26 November 1998, [1998] ECR I-7791.

network was not an essential facility since it could be replicated, the court indeed considered that:

"in order to demonstrate that the creation of such a system is not a realistic potential alternative and that access to the existing system is therefore indispensable, it is not enough to argue that it is not economically viable by reason of the small circulation of the daily newspaper or newspapers to be distributed. For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish (...) that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme".

Secondly, the network could not be considered to be an essential facility since there were other possible methods to deliver newspapers (posts, kiosks...). The same exact points apply to the postal delivery network. First, there exist alternative media to postal delivery. It is also technically possible to set up an alternative delivery network and with volumes comparable to the volume of postal incumbents this network could be viable.

Contact :

Denis Joram

Direction de la Régulation Européenne et Nationale

CP V412 ; 44 Boulevard de Vaugirard; 75757 PARIS CEDEX 15

Tel.: +33 (0)1 55 44 02 01 - Fax : +33 (0)1 55 44 01 94

denis.joram@laposte.fr