

Newsletter

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EDITORIAL



Philippe Bodson

Competition, not just on paper

It is with much regret that I read some of the findings of the most recent study on the EU postal market. The Ecorys study on the main developments in the postal sector (2006-2008) highlights that liberalisation in some member States has taken a slower pace and that a substantial number of barriers to competition still exist or have emerged, which provide formidable obstacles to real competition.

Fixing a final date for liberalisation at EU level was indeed a big achievement, but as I suspected, it was not enough to change the postal landscape. Competition hasn't really kicked in and it will not do so until when regulatory certainty will be provided with the third Directive being fully implemented and Regulators ensuring that all provisions are respected by all players.

Both the Commission and Ecorys stressed the need for a more correct application of article 7, stating that the reserved area can only be used to the extent necessary to fund the burden of the USO, advocating that member States can already today reduce or eliminate the reserved area to encourage development of competition based on a good understanding of the cost of USO.

Barriers to competition are not only natural or legal. Postal users are deeply concerned about strategic obstacles such as the anti-competitive practices reported by Ecorys, including cross-subsidisation, predatory pricing, bundling and tying, price discrimination, refusal to deal, access conditions, etc. And that's not all.

Continues on page 4

VIEWPOINT

Postal Liberalisation in Belgium

By Antoine Baeke, Chairman of the postal group on liberalisation, the Belgian Direct Marketing Association, BDMA

Unlike what is happening in many other countries in Europe, the liberalisation of postal services is going at a slow pace in Belgium. The incumbent postal operator, La Poste/De Post does not have to face any competition for the distribution of addressed mail. It still has a virtual monopolistic position, although in Belgium such as in other countries in the EU, the market is liberalised for the distribution of letters over 50 grams. Why are things moving so slowly?

The regulatory framework is controlled by the Belgian Institute for Post and Telecommunication BIPT/IBPT. While this body, under pressure of competitors, has taken different initiatives over the last years to force the incumbent telecom operator to open its network for competition, the regulator has so far not taken up an active role to open the postal market to competition. A licensing/declaration system has been set up for companies active in the postal environment. The regulators position is that all companies active in the postal/parcel handling chain are subject to the licensing/declaration system.

- Anyone who is involved in one of the 4 activities – collection; transport; sorting and distribution of postal items up to 20 kilos within the universal service/non-reserved area is subject to the licensing system.
- Companies providing postal services outside the universal service are subject to a declaration of the type of services they provide.

Both types of licensees must declare the revenue they generate in the postal area and should contribute to the financing of the public grievance service on postal services.

The licensing system is subject to a lot of discussion as all express/parcel companies and lettershop companies have to apply for a licence/declaration while they are merely providing services outside the universal postal service. The system is seen as a burden to open the market.

This, combined with the fact that employment laws in Belgium are quite restrictive to employ people for short-term work, means that no companies have yet taken the initiative to start a distribution service for letters outside the reserved area and that competition is non-existing. Some competition exists for the delivery service of parcels.

The new directive on the full liberalisation of the postal sector as of 2011 has not yet been transposed into the national law. It is expected that this will only be done late in 2010.

The Belgian Direct Marketing Association hopes competition will get a foot on the ground as this would benefit the cost for the distribution of direct mail and sustain the growth of the medium. It is urging the regulator to take a more active position to help competition to get started.

COMPETITION IN THE POSTAL SECTOR

Overview of recent rulings and pending cases

A number of developments took place in the past weeks in relation to competition cases and decisions in the postal sector. Below is a non-exhaustive overview:

At the beginning of the month of August, the Commission decided that recent amendments to Slovakia's postal legislation infringe EC Treaty rules on dominant market positions. These amendments extended the monopoly of Slovenska Posta, the Slovak postal operator, to hybrid mail while this activity had until then been open to competition. The EC therefore requested Slovakia to re-open competition in the hybrid mail sector.

Slovakia is not the only country that is under the scrutiny of the Commission. There are currently several pending cases at EU level especially concerning state aid. The Commission for instance initiated in October 2007 a procedure against Germany to determine whether there is any overcompensation for Deutsche Post's universal service obligation beyond the aid already found to be incompatible in a 2002 Commission decision.

It appears that a final decision on this case will be taken before the summer and should be complementary to the Decision adopted by the Commission in 2002, which established that Deutsche Post priced door-to-door parcels below incremental costs and that this aggressive rebate policy did not fall within the universal service obligation. The Commission therefore ordered Germany to recover the incompatible state aid of € 572 million from Deutsche Post.

In July this year, the European Court of First instance's ruling annulled the 2002 decision alleging that the EU's antitrust authority had not proved its case that Deutsche Post misused public funds to unfairly undercut private sector rivals on door-to-door parcel delivery services. The Commission did not agree with this decision and launched an appeal against this decision in September.

The Commission has also opened similar investigations against France, UK, Italy and Poland concerning the financing of their postal operators.

As regards France and the UK, the Commission is still investigating into the unlimited state guarantee provided for La Poste in France and into some aspects of the UK's funding of Royal Mail.

Concerning Italy, the Commission also launched two enquiries concerning Italy. The first one focused on the interest rates applied since 2005 to the funds collected

from Poste Italiane's customers' current accounts and deposited with the Treasury. The Commission issued its final decision in July concluding that these higher interest rates, which do not conform to market conditions, provided an economic advantage in favour of Poste Italiane and distorted competition and trade within the Single Market. Therefore, it ordered Italy to recover this "unlawful" state aid. The second case dealt with the remuneration paid by the Cassa Depositi e Prestiti to Poste Italiana for the distribution of postal bonds. On that case, the Commission estimated that it did not constitute a state aid.

Finally, the Commission welcomed the action taken by Poland to put an end by 30 June 2008 to the unlimited state guarantee previously enjoyed by the Polish Post Office.

The Commission is currently analysing several legislative initiatives, which are now discussed in some member States to better regulate the postal sector, in order to be sure that they do not distort competition. In addition to state aid, the introduction of a minimum wage or VAT exemption in some member States could also be at some point considered as barriers to enter these markets and obstacles to the development of fair competition. According to ECORYS, the most important main barriers to competition requiring attention at EC and/or national level of are:

- the VAT exemption of many of the National Postal Operators;
- access to letterboxes, most notably in Austria and Poland;
- strategic barriers, in particular arising from (alleged) exclusivity contracts, price discrimination, loyalty bonuses, and bundling and tying;
- barriers that may arise from collective arrangements of labour conditions;
- barriers arising from how the universal service obligation will be defined, its net cost established and the cost of financing of the universal service obligation shared between market participants.

At a time when member States must open their market in order to comply with the new postal Directive, which foresees the full opening by 1 January 2011, barriers to competition have to be dismantled as they could be considered as a wrong signal for the EU member States ■

EU STUDY CALLS FOR BRINGING DOWN BARRIERS IN THE POSTAL SECTOR

Final results of ECORYS study presented at stakeholders' workshop on 17 October

The Commission published in mid-October the final results of the study commissioned by DG Internal Market as regards the main developments of the postal sector in relation to the application of the Postal Directive. Customers are concerned that, despite the gradual liberalisation, Postal Operators are still acting as monopolists and are not customer oriented.

On 17 October, DG Internal Market organized in Brussels a stakeholder workshop to present the final results of the study undertaken by Ecorys. The meeting had a high turn out due to the fact that stakeholders were interested in learning more about the final conclusions of the Ecorys' consultants and providing their feedback.

The Ecorys report provides for a realistic overview of the regulatory, economic, consumer and employment dimensions of the European postal sector and includes country-specific analysis.

With no surprise, the study finds that barriers to competition in the postal sector still exist across EU countries and that member States' liberalisation processes have been very slow with the postponement of postal liberalisation in several countries. Little has been done to date to bring down the obstacles that new entrants have to face in a number of EU countries, such as the VAT exemption for the incumbent, restricted access to letterboxes, licensing requirements, special labour agreements, etc.

It could explain that in most countries there is no competition of any significance in the addressed mail market. The Netherlands, Germany, Sweden and Spain are the only countries where end-to-end competition has further developed. In each of these countries competitors to the national postal operators share around 10% of the national market.

The study identifies several main barriers to competition such as VAT exemption, access to the letter boxes, collective arrangement of the labour conditions, strategic barriers and the barriers arising from how the universal service obligation is financed.

It is interesting to note that this report also outlines the customers views showing that customers are in favour of full market opening and fair access to the delivery network of the incumbent. They recognise the benefits of liberalisation in terms of more choice, better quality and lower prices of postal services. Most of the customer respondents indicated that sustained pressure on prices is expected to be the main benefit of competition in the medium to long term.

Despite the gradual liberalisation, customers feel that Postal Operators are still acting as monopolists and are not customer oriented. They stressed that continued market supervision is required in order to create a level playing field environment between postal operators and to improve the dynamism of the postal market.

According to the study, in order to allow competition to develop and therefore to meet the customers' expectations, the powers and resources of national regulators need to be strengthened with a view to increase the transparency of the regulators as well as their ability to assess whether prices are actually geared to cost. Regulators should also regulate tariffs in a way that stimulates Operators to improve efficiency.

However, this report also points out the low level of transparency of cost data and accounting of national postal operators that exists for postal services within the Universal Service Obligation (USO). Ecorys therefore recommends that the European Commission strengthens the obligations with regards to the financial accounts of universal service providers in order that the minimum level of details are provided in published accounts with regards to postal services within the universal service obligation.

In conclusion, it seems that many things still need to be improved in order to develop a level playing field and improve competition in the postal sector. The European Commission has an important role to play in this area as well as the member States and the national regulators ■

To read the report, please visit:

http://ec.europa.eu/internal_market/post/studies_en.htm

Continued from page 1 - Editorial

The recent decisions by the European Commission are a clear demonstration that scrutiny is needed to tackle not only operators' behaviours but also the continued attempts by some member States to keep protecting their national champions. This is done, for instance, by expanding (rather than reducing) the reserved area by including new services in the scope of the universal service or granting state aid.

Despite the efforts of the European regulator, there are still a number of pending cases where postal users and market players would like to see clear. Positive signals come from the commitment of the European Commissioner for Competition, Neelie Kroes, and her services, in tackling and sanctioning anticompetitive behaviours.

We are encouraged by the close collaboration of the Internal Market and the Competition services of the Commission. As Commissioner Kroes commented in relation to its recent request to Slovakia to re-open competition in the hybrid mail sector: "To re-monopolise a business activity that had already been successfully liberalised is a step in the wrong direction. Such attempts to benefit incumbent operators by re-monopolising liberalised services harm consumers and businesses". I couldn't agree more. The Commission should continue and increase its efforts in combating market distortions, deciding on existing complaints and ensuring implementation of legal decisions.

Philippe Bodson

VAT EXEMPTION : A BARRIER TO COMPETITION?

One of the most debated issues lately in postal policy is undoubtedly the one concerning the VAT exemption granted to some national Postal Operators. In most EU member States, the historical postal provider is still exempted from VAT on all or part of the services it offers. The VAT exemption for the incumbent could constitute an obstacle to fair competition.

To seek solve this issue, the Commission issued in 2003, a proposal for a Directive to amend the current VAT regime. The proposed Directive, which would amend the Sixth VAT Directive, aimed at making postal services subject to VAT while redressing a tax exemption that is no longer justified. This proposal has been blocked in the Council and no agreement has been found on this issue, which remains very controversial.

Because of the lack of regulation at EU level, VAT regimes vary between member States. The only countries where there are no VAT exemption are Finland, Sweden and Slovenia. In Spain, the VAT exemption is limited to the reserved area. In Cyprus, Greece, Ireland, Lithuania, Latvia, Poland, Portugal and the UK all the services provided by the universal service provider are exempted of VAT. In the other member States, the exemption just concerned the universal services.

The Commission launched in April 2007 infringement procedures against three member States – UK, Germany and Sweden – as regards their VAT regime. As regards the UK and Germany, the Commission is analysing if VAT exemption could hinder competition as regarding Sweden, the infringement procedure is linked to the fact that it has failed to apply an exemption which remains in Community legislation.

Complaints were also filed by private operators at national and European level. For instance, TNT filed a lawsuit against the UK tax department. Further to this complaints, the UK High Court referred to the EC Court of Justice asking a series of questions on the interpretation of the Article 13A(1)a of the 6th VAT Directive dealing with the exemption of the postal services. The answers to these questions have not been issued yet, but they could have an important impact on this issue and re-launch the debate on VAT exemption in the Council.

In Germany, a bill is currently being discussed that will limit the long-standing VAT exemption of Deutsche Post and extend the VAT exemption to other postal providers. Under a draft law proposed by the German Finance Ministry, Deutsche Post would have to charge VAT at the full rate of 19% for products sold to corporate customers and public bodies. However, it will keep its VAT exemption for private consumers sending letters and over-the-counter parcels. Other operators, which could demonstrate that they offered a nationwide distribution service, would also enjoy this exemption.

If this law was adopted it cannot be excluded that the Commission would consider stopping its investigation into Deutsche Post's VAT exemption.

With no clear EU legislative solution, the debate on VAT exemption remains open with different solutions offered by each member States. VAT harmonisation seems not to be a likely scenario in the short term, however, Regulators should be careful that the current differences in VAT regime do not constitute barriers to competition. ■

- **6 November 2008**, Postal Users Group Workshop
- **17-18 November 2008**, PosTech 2008
- **24-25 February 2009**, World Mail & Express Americas
- **23 March 2009**, European Postal Conference

