

## ABUSIVE PRACTICES IN THE POSTAL SERVICES?

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## I. Introduction.

It is somehow striking that, amidst the process of market liberalisation in which the postal services sector is fully introduced, three out of six –that is, fifty per cent!- of the fines imposed by the Commission in 2001 in cases applying Article 82<sup>2</sup> of the EC Treaty were related to this industry.

The well known *Deutsche Post AG (I)* and *(II)* Commission's decisions took place that year, as well as *De Post / La Poste (Belgium)* and also the so-called "hybrid mail case", *Poste Italiane / Commission*. Although those are the more relevant, in terms of significant case law concerning abusive practices in the postal services, they're not the only ones to which we'll refer in this paper. We shall see that cases related to "structural" problems –such as mergers, or regulatory measures adopted by governments that may induce to abusive practices- have also raised antitrust concerns. The adoption of pronouncements such as *Corbeau*, *TNT Traco v. Commission* or *UPS Europe v. Commission*, will also be studied here.

In addition to the review of the more relevant EC case-law, especial mention will be made to the Spanish experience in this sector, abundant in fines imposed by our NCA, the *Tribunal de Defensa de la Competencia*, whose sanctioning activity has been lately devoted to our public-owned former monopolist, *Correos y Telégrafos*, accused by private operators by anticompetitive practices allegedly aimed at obstructing the Spanish postal market opening.

In its *Competition Policy Report* for 2004, published<sup>3</sup> in June 2005, the Commission makes reference to the Decisions taken that year. One concerns the restrictions on mail preparation<sup>4</sup>, 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 sorting centres. Other deals with the rejection<sup>5</sup> of the complaint filed by l'Union Francaise de l'Express and three of its members, DHL, FedEx and Crie, against the French Republic, La Poste and Chronopost, owing to the lack of Community interest in further pursuing the investigation of the anticompetitive practice by La Poste. Such practice was allegedly extending its dominance from the reserved market in ordinary postal services to the market in express mail services in France, in which its affiliate Chronopost is active, thereby infringing Articles 82 and 86.

It is important, therefore, to pay attention to these practices that may jeopardise the efforts of liberalisation. That's why, in this paper, we'll focus on anticompetitive behaviour of companies –or governments, if that's the case- rather than in regulatory aspects of the postal markets.

Concerning this latter issue, it seems (Waterschoot, 2002) that the key points are what is the existing level of competition, and how competition should be regulated and why. Others have pointed (Niels, 2002) that the ultimate goal is finding the right balance between regulation and competition. We agree with this approach. Postal markets are under too many structural constraints –basically, the Universal Service

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<sup>2</sup> In order to avoid confusion, in this paper references to EC Treaty articles will be made according to Amsterdam numbering, even when the cases referred to are lodged before the European Commission or the Court after 1 May 1999.

<sup>3</sup> [http://www.europa.eu.int/comm/competition/annual\\_reports/](http://www.europa.eu.int/comm/competition/annual_reports/)

<sup>4</sup> COMP/38.745, not yet published in the Official Journal.

<sup>5</sup> COMP/38.663 – *UFEX*.

Obligation (hereinafter USO) - to even try considering them as any other normal industry.

Also there is an urgent need to assess the effectiveness of the jurisprudence, that is, up to what extent antitrust decisions and fines imposed to postal operators achieve the abovementioned goals?

It is obvious –we’ll recall this matter constantly throughout this study- that decisions by the Commission and sentences by the European Courts have had, so far, little effect on markets. The analysis of cases done here shows, *prima facie*, that some Postal Operators seem quite insensitive to fines and sanctions, and insist on performing all sort of abusive and anticompetitive practices.

Some<sup>6</sup> have suggested that only competition rules should apply; however, it seems that they alone do not provide sufficient safeguards for development of fair competition, at least certainly not in the absence of a reserved area and a situation whereby full competition only leaves us with article 82 as the basis for a corrective action.

In addition to it, as long as the effects of liberalisation and the regulatory framework envisaged by the Postal Directive –to which we’ll refer *in extenso* later- are not yet clear, it seems that the role of competition law in this field will become more significant in the following years.

Precisely, what it’s at stake in postal markets is precisely that balance between regulation and competition, illustrated paradigmatically with the tension between articles 82 and 86(2) of the EC Treaty.

It is well known that Article 86(1) of the Treaty states that in the case of public undertakings and undertakings to which they grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules of the Treaty, in particular to those provided for in Article 82. In so far as it may affect trade between Member States, the abuse of a dominant position within the common market or in a substantial part of it is prohibited by Article 82 of the Treaty.

However, it must be observed that, although merely creating a dominant position by the grant of special or exclusive rights is not, in itself, incompatible with Article 82 of the Treaty, a Member State breaches the prohibitions laid down by Article 86(1) of the Treaty in conjunction with Article 82 if it adopts any law, regulation or administrative provision that creates a situation in which an undertaking on which it has conferred exclusive rights cannot avoid abusing its dominant position.

Also, since the USO constitutes the sole possible justification for the exclusive rights granted to Postal Public Operators (hereinafter PPOs), any use of profits derived from an exclusive right to other end, may constitute an abuse, or at least should be strictly scrutinized. Regulation is necessary, precisely under the effects of liberalisation, as a tool to facilitate a transition to competition, and avoid such hindrance to the whole scheme so wisely devised.

In addition to this, we should avoid the pitfall of confusing arguments relating to Article 82 EC with arguments relating to Article 86 EC. These are two distinct provisions with different aims: Article 82 EC is aimed only at anti-competitive conduct engaged in by undertakings on their own initiative whereas State measures must be examined from the point of view of Article 86 EC. In any event, there is no absolute rule prohibiting cross-subsidy. This is because, even though a cross-subsidy can be used

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<sup>6</sup> DE BRIL, P., VAN DAMME, E. and LAROUCHE, P., “Light is Right. Conditions for Competition and Regulation in the Postal Market”, paper presented at the *Tilburg Law and Economics Centre*, June 2005.

to be the instrument of an abuse - for example, predatory pricing, excessive pricing or price discrimination - it does not in itself constitute an abuse.

Therefore, -and this is also settled doctrine and case law- the mere fact that an exclusive right is granted to an undertaking in order to guarantee that it provides a service of general economic interest does not preclude that undertaking from earning profits from the activities reserved to it or from extending its activities into non-reserved areas.

In these circumstances, what we'd like to examine here is the question of whether traditional analytical framework of the competition policy applies to such a restrained market. Antitrust authorities have already taken decisions concerning "classical" institutions like predatory pricing, cross-subsidies, discriminatory pricing, collusive agreements, and so forth. We can add -derived from the Spanish experience, which in this point is quite illustrative- a couple of examples: abuse in neighbouring market, and anticompetitive behaviour derived from unfair practices.

It should be stressed that anticompetitive practices being the focus of this analysis, other issues, although extremely interesting, should be left aside. Notably, the case-law concerning directly State Aid will not be examined here. Even though there are quite a number of cases<sup>7</sup> in postal markets -and we may say, quite appalling ones- their analysis fall outside the scope of this work.

Consequently, this paper will be structured as follows. After this introductory section, in section II the process of liberalisation will be briefly examined. It is necessary to do so since everything else derives from here. It also provides an unfortunately accurate view of how the objectives pursued by the Commission with the Postal Directive collide with some of the practices implemented by postal operators in Europe.

After that, in Section III, a review will be made of the developments in EC case law related to abusive practices in the postal markets. Naturally, special attention will be paid to the recurrent features of existing case law, in order to extract some common characteristics that may constitute the behaviour to avoid, if the completion of this internal and liberalised market is to be ensured. The corresponding analysis of the preceding case-law will be done in Section IV.

A complete review of the more relevant case-law, this time in the Spanish market, will be done in Section V. Some lessons that may be drawn from the Spanish experience which may shed some light to other European postal markets will be pointed out, to end with some general conclusions in Section VI.

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<sup>7</sup> It can generally be assumed that the grant of State aid to a PPO will affect trade between the Member States and will also distort or threaten to distort competitive conditions in the non-reserved services. Therefore, the key issues in this area will be, first, whether a particular situation or course of conduct involves elements of State aid, and second, whether that aid is permissible. For example, Case C-39/94, *Syndicat Français de l'Express International ("SFEI") v. La Poste*, [1996] ECR I-3547. A direct action was also brought by SFEI and others in respect of the Commission's decision dated 30 December 1994, rejecting their complaint that alleged the existence of cross-subsidies between La Poste and a subsidiary in violation of Articles 82 and 86 of the EC Treaty. This action was rejected by the Court of First Instance: Case T-77/95, *SFEI v. Commission*, [1997] ECR II-1. However, on appeal the Court overturned the Court of First Instance on the question of an on-going Community interest in establishing a violation of the competition rules which has ended, and in relation to an evidentiary matter; see Case C-119/97 P, *Union française de l'express (Ufex) v. Commission*, [1999] ECR I-1341, paras 86-97, 110-113. The Court of First Instance followed the Court in its judgment in Case T-77/95 RV, [2000] ECR II-2167.

## II. The process of liberalisation.

The postal sector is expanding, owing in particular to further market opening and the changes brought about by the e-economy. In addition to “structural” reforms, the Commission has taken these years several important decisions concerning this sector to avoid re-monopolisation of liberalised markets by incumbent operators. As we’ll see, both structural and behavioural measures are quite connected.

### A. The amending of Directive 97/67/EC.

On 15 October 2001, the Council approved a common position of the Member States on a text aimed at amending the existing postal directive, Directive 97/67/EC. The main changes introduced by the text approved by the Council are:

- A further opening of the market, with a staged reduction in the reserved area as of 1 January 2003 and as of 1 January 2006;
- The possibility, by means of a Commission proposal to be approved by the European Parliament and the Council, of the completion of the internal postal market in 2009;
- The liberalisation of outgoing cross-border mail except for those Member States where it needs to be part of the reserved services in order to ensure the provision of the universal service;
- The prohibition of cross-subsidisation of universal services outside the reserved area out of revenues from services in the reserved area unless it is strictly necessary in order to fulfil specific universal service obligations imposed in the competitive area;
- The application of the principles of transparency and non-discrimination whenever universal service providers apply special tariffs.

The text approved by the Council does not contain any definition of ‘special services’. The revised text, although resulting in an opening of the postal market to a lesser extent than originally envisaged by the Commission, can be considered an important step towards a single postal market.

The Directive’s scheme centres on the maintenance of a monopoly in the core area of letter service and the establishment of a high degree of regulation regarding the attainment of service quality by the universal service providers.

This Directive is accompanied by the *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*<sup>8</sup>, to which we’ll refer as the Postal Notice.

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<sup>8</sup> OJ 1998, C 39, p. 2.

## **B) Transposition of the new postal directive (Directive 2002/39/EC)**

The new postal directive sets a clear path towards completion of the internal market for postal services through, in particular, a progressive reduction of the reserved area and the liberalisation of outgoing cross-border mail. The implementation of these provisions, aimed at widening the scope of the area in which competition is allowed, is likely to affect the application of EU competition rules in the postal sector. The directive should have been transposed by 31 December 2002.

In January 2003, the Commission opened infringement proceedings against those Member States which had not yet transposed (or notified the transposition of) the directive into national law. As of 14 October 2003, all Member States except France had already completed the transposition of the directive.

In spite of all the enthusiasm and cheerfulness expressed by the Commission, we suggest adopting a quite sceptical approach to the new postal directive. As many experts (Van der Horst, 2002) have pointed out, more than fourteen years after the debate on liberalization of the postal market started, there is an alarming lack of real competition in this field.

Pursuant to Article 7 of Directive 97/67/EC as amended by Article 1 of Directive 2002/39/EC, outgoing cross-border mail is liberalised in all Member States except in those where the revenue there from is deemed necessary to ensuring the provision of the universal service. An important issue as far it concerns the application of the competition rules is therefore whether, in the context of the transposition of the directive, Member States have decided to maintain the market for outgoing crossborder mail within the monopoly area. As of 14 October, six Member States (Greece, Spain, Ireland, Italy, Luxembourg and Portugal) out of the fourteen which had already completed the transposition had decided not to liberalise the market in question.

Recently, in its judgment<sup>9</sup> of 11 March 2004, the ECJ issued a preliminary ruling providing interpretation of Directive 97/67/EC on the common rules for the development of the internal market of Community postal services and the improvement of quality of service. Specifically, the ECJ clarified that Article 7 of the Directive does not permit Member States to extend the services reserved for the universal service provider by making self-provision subject to any of the following conditions:

- That the receiver must be the same person as the sender;
- That the services must not be provided to third parties in the course of commercial or business activity of the service provider;
- That the services must not be provided by the mailbag system or other similar methods; and
- That such operations must not disrupt the services reserved to the universal service provider.

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<sup>9</sup> Case C-240/02, *Asempra* and Others, not yet reported.

### **C) Policy recommendations for the third postal directive<sup>10</sup>.**

Whereas the current directive (2002/39/EC) will expire at the end of 2008, the regulatory timetable used by the European Commission identifies the following next steps: a prospective study in 2006, a proposal for third directive in 2006 and accomplishment of the internal market in 2009 implying full liberalization<sup>11</sup>. The third directive will however need to provide sufficient guarantees to ensure provision of universal service and allow for further development of competition.

The policy discussion is expected to focus on the scope of universal service and financing the universal service. The development of competition is expected to be linked network access, whether this form of access requires additional regulatory intervention will be part of the upcoming policy debate.

In its preliminary study results on the evolution of the regulatory model for European postal service, WIK identifies areas for regulation and the degree for regulation applied. WIK identifies the regulatory challenges related to liberalized markets with dominant operators and proposes a dedicated regulatory regime for Postal operators with significant market power<sup>12</sup> acknowledging their natural market advantage over new entrants requiring additional regulatory attention.

The European Commission's application report identifies access as "an important issue which merits further analysis and discussion with Member States in the coming years"<sup>13</sup>. As we have already contended in this study, application of competition rules and more specifically article 82 will play an important role in maintaining a level playing field and avoiding abuse of dominant position by the incumbents. Further reduction of the ex-ante regulatory involvement – as suggested by van Damme and Larouche<sup>14</sup> is another option to be evaluated. Full reliance on competition rules in a dynamic market requires a very effective legal apparatus to avoid competitive distortion in a developing market before damage is done.

The high number of cases and the time required coming to decisions and rulings indicate that a simple reliance on competition rules only is not effective enough to "regulate" the liberalizing postal market. Additional sector specific remains necessary, as suggested by WIK and identified by the Commission in its application report.

Finally, it has also been noted (Finger, Alyanak and Rossel, 2005) that the dynamics of competition in the communications and postal markets strongly suggest a critical review of today's definition of the USO.

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<sup>10</sup> I owe the inclusion of this paragraph, and most of its content, to the suggestions and advise of Mark van der Horst, to whom I want to express again my gratitude.

<sup>11</sup> Joerg Reinbothe, European Commission, The EU approach to Postal Regulation, May 2005.

<sup>12</sup> WIK, The Evolution of the Regulatory Model for European Postal Services, 2<sup>nd</sup> Public Workshop, Brussels 26 April 2005.

<sup>13</sup> European Commission, Report on the application of the postal directive (Directive 97/67/EC as amended by directive 2002/39/EC) Com 2005 102 Final, Brussels 2005

<sup>14</sup> Van Damme and Larouche, "Light is Right. Conditions for Competition and Regulation in the Postal Market", Tilburg Law and Economics Center, Tilburg 2005.

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### III. Review of allegedly abusive practices in the European postal market.

Having stated all that interesting and ambitious liberalisation plans, however it looks like –and that’s the reason why the reform’s objectives have been quoted *supra*– there are a bunch of anticompetitive practices seemingly aimed against these very goals pursued by Commission, that take place on a regular basis in the European postal markets.

For example, Sweden was the first country in Europe to deregulate its postal market in 1993. However, due to high barriers to entry and the market’s sensitivity to the activities of the former monopolist, the transformation from a monopoly market to a competitive one has been a slow process. As some authors have noted (Wetter and Rislund, 1999) abusive practices by the former PPO quickly aroused and antitrust measures were soon needed.

As we’ve pointed out in the introductory section, competition policy has dealt with these practices using its own methods and tools. In particular, it should be noted that EC competition law has developed a number of “incumbent-unfriendly” (Niels, 2002) principles that are specially suited for this task:

- The “special responsibility”<sup>15</sup> doctrine, a burden laid on dominant firms not to impair competition or weaken it due to their exercise of their market power.

- The “essential facilities” doctrine<sup>16</sup>, which obliges the owner of certain structure deemed necessary to develop an economic activity to grant access to it in objective and fair conditions to any given competitor that may request it.

In addition to these, we’d like to add two other recently settled case-law principles that allow antitrust authorities to deal appropriately with abuses committed in a market different from the one the dominant undertaking yields its market power:

- The “abuse in neighbouring markets”<sup>17</sup> doctrine, which establishes that a dominant position can be abused in other market, separated from the one in which dominance is hold, but closely linked to it. This principle, obviously, often limits freedom of incumbents to compete fiercely in new markets.

- The “monopoly leveraging”<sup>18</sup> doctrine, imported from the United States, which applies when an undertaking with monopoly power in one market unlawfully tries to create or strengthen another monopoly position in another market, distinct but somehow connected with the first.

As we shall see, these principles apply quite accurately to some of the pricing schemes and strategic behaviour adopted by former monopolists in postal markets who have to face now a free competition environment, at least in some of the areas of their activities.

Also, and this is one of the key issues in our thinking, given the peculiar scheme derived from the coexistence of statutory separated-but-connected markets, the

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<sup>15</sup> *NV Nederlandsche Banden Industrie Michelin v Commission*, Judgment of the European Court of Justice, 9 November 1983, Case 322/81, E.C.R. (1983) p. 3461.

<sup>16</sup> *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, Judgment of the ECJ, 6 March 1974, Cases 6 and 7/73, E.C.R. (1974) p. 0223, n° 22.

<sup>17</sup> *Tetra Pak II*, Commission Decision 92/163, 1992, O.J. L 72/1 (1992) 4 CMLR 551.

<sup>18</sup> *Tetra Laval BV c. Commission of the European Communities*, Judgement of the CFI, 25 October 2002, Case T-5/02.

analytical framework provided by the abovementioned doctrines<sup>19</sup> seems to us quite indispensable for economical and legally assessing conducts that usually take place in more than one market, and almost always in market other than the dominated.

For those who are not familiar with recent case law, before the analysis we'll develop in the following sections an outline of the main cases and their relevant features is offered below.

The examples have been grouped in accordance to their nature or the authority who issued the pronouncement: subsection A) covers those Commission's Decisions related to allegedly anticompetitive practices; subsection B) covers those Decisions in which the Commission states some piece of legislation or regulatory framework may induce to the commitment of such practices; subsection C) is devoted to jurisprudence emanated from both the European Court of Justice and the Court of First Instance; finally, subsection D) outlines significant decisions by other authorities.

## **A) Commission's Decisions (related to abusive practices).**

### **1) *Deutsche Post AG I.***

Following a complaint by United Parcel Service in 1994 claiming that Deutsche Post AG (DPAG) was using revenues from the letter mail monopoly to finance below-cost selling in the open market for business parcel services, the Commission decided that any service provided by the beneficiary of a monopoly in open competition had to cover at least the additional or incremental cost incurred in branching out into the competitive sector. Any cost coverage below this level was to be considered predatory pricing. The investigation revealed that DPAG, for a period of five years, did not cover the costs incremental to providing the mail-order delivery service.

On 20 March 2001, the Commission concluded its investigation into DPAG and adopted a decision<sup>20</sup> concluding that this company had abused its dominant position by granting fidelity rebates and engaging in predatory pricing in the market for business parcel services. DPAG was fined EUR 24 million in respect of the foreclosure resulting from its long-standing scheme of fidelity rebates. No fine was imposed in relation to predatory pricing given that the economic cost concepts used to identify predation were not sufficiently developed at the time. This was the first formal Commission abuse decision in the postal sector.

After that, DPAG has undertaken to create a separate company ('Newco') to supply business parcel services which will be free to procure the 'inputs' necessary for its services either from DPAG (at market prices) or from third parties or to produce these inputs itself. In addition, DPAG has undertaken that all inputs it supplies to Newco will be supplied to Newco's competitors at the same price and under the same conditions.

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<sup>19</sup> For a more detailed exposition on these figures, and their interconnection in both EU and US case law, see DIEZ ESTELLA, F., "La doctrina del abuso en mercados conexos: del monopoly leveraging a las essential facilities", *Revista de Derecho Mercantil*, Issue n. 248, April – May 2003.

<sup>20</sup> Commission Decision of 20 March 2001, Case COMP/35.141, (OJ L 125, 5 May 2001).

## **2) *Deutsche Post AG II.***

On 25 July 2001, the Commission, following up a complaint, this time filed by the UK Post Office, decided<sup>21</sup> that Deutsche Post AG –again- had abused its dominant position in the German letter market by intercepting, surcharging and delaying incoming international mail which it erroneously classified as circumvented domestic mail (so-called A-B-A remail).

The Commission found that DPAG had abused its dominant position in the German market for the delivery of international mail –thereby infringing Article 82 EC Treaty- in four ways:

The Commission took the view that DPAG:

- (i) Discriminated between different customers (i.e. senders of “genuine” incoming cross-border mail, on the one hand, and senders of cross-border mail which it considered to be of German origin, on the other hand),
- (ii) Refused to supply its delivery service to the latter user category without any objective justification,
- (iii) Charged excessive prices, i.e. a price exceeding the average processing and delivery cost by at least 25 percent, and
- (iv) Impeded the delivery of mail, thereby damaging the commercial activities of the senders’ and of the “exporting” Member State’s PPO.

During the course of the proceedings, DPAG had given an undertaking to the effect that it would no longer intercept, surcharge or delay international mail of the type to which the case related. The Commission also decided that DPAG’s abusive behaviour justified the imposition of a fine, which, owing to the legal uncertainty that prevailed at the time of the infringement, due to the process of liberalisation and the changing regulatory regime concerning international mail services, was set at the ‘symbolic’ amount of €1.000.

## **3) *De Post/La Poste (Belgium).***

On 5 December 2001, the Commission decided<sup>22</sup> that the Belgian postal operator De Post/La Poste had abused its dominant position by making a preferential fee schedule in the general letter mail service subject to acceptance of a supplementary contract covering a new business-to-business (‘B2B’) mail service. This new service competes with the ‘document exchange’ B2B service provided in Belgium by Hays plc, a private operator in postal services based in the United Kingdom.

As La Poste exploited the financial resources of the monopoly it enjoys in general letter mail in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission imposed a fine of EUR 2.5 million.

In April 2000, Hays had lodged a complaint with the Commission alleging that La Poste was trying to eliminate the Hays document exchange network, which it had been operating in Belgium since 1982. Hays could not compete with the schedule

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<sup>21</sup> Commission Decision of 25 July 2001, Case COMP/36.915, (OJ L 331, 15 December 2001).

<sup>22</sup> Commission Decision of 5 December 2001, Case COMP/37.859 (OJ L 61, 2 March 2002).

reduction offered by La Poste in the monopoly area and as a result was losing most of its traditional clients in Belgium, namely the insurance companies.

#### 4) *La Poste Italiana v. Commission.*

By letter of formal notice dated 16 May 2000, the Commission announced its intention to adopt certain measures by means of a decision under Article 86(3) EC addressed to Italy. The Commission took the view that Italy infringed Articles 86(1) and 82 EC by extending the scope of the national postal monopoly to include the following value-added distribution services: hybrid electronic mail, express-dispatch of administrative correspondence, and local commercial correspondence. Therefore, it announced its intention to oblige Italy to eliminate the exclusive rights granted to Poste Italiane S.p.A. in the three relevant sectors. In July 2000, Italy brought an action pursuant to Article 230 EC requesting the Court to annul the above-mentioned Commission letter<sup>23</sup>.

According to Italy, the challenged act was vitiated by a clear infringement of essential procedural requirements and by a misuse of powers. Italy alleged essentially that the Commission's initiative was based on a wrong legal basis. First, the compatibility of the national provisions at issue should have been assessed exclusively in relation to the Postal Directive. Secondly, any criticism regarding the allegedly incorrect transposition thereof should have been the object of infringement proceedings pursuant to Article 226 EC.

Italy's application raised obvious problems of admissibility, which prompted the Commission to raise a formal objection in this respect. At any rate, after the closure of the written procedure the Italian government informed the Court of its intention to discontinue the proceedings. Case C-286/00 was accordingly removed from the Register by Order of the President of 2 May 2001.

In the meantime, on 21 December 2000, the Commission adopted a formal Article 86(3) decision<sup>24</sup> establishing that the reservation for the incumbent PPO of the delivery of hybrid mail at a predetermined date or time in Italy, which was found to be a separate "niche" product market from the traditional delivery service, violated Articles 86(1) and 82 EC. The Italian authorities were thus ordered to eliminate the exclusive rights granted to Poste Italiane S.p.A. with respect to the day- or time-certain delivery phase of hybrid electronic mail services.

The Commission took the view that there were no grounds for reserving the provision of the relevant service for a universal service provider which did not offer it at the time when the State measure was adopted. Not only would the incumbent PPO not suffer any losses if this service were to be allocated to a competing operator, but also, in order to offer remittance at a predetermined date or time, the incumbent PPO would have to set up a completely new sorting and distribution infrastructure.

Therefore, in the Commission's view, the necessary investment would far outweigh any income likely to be generated by that niche market with a minimal return.

Finally, it is noteworthy that the attendant press release issued by the Commission on the same date as the decision (IP/00/1522) expressly rejected the argument, which had been put forward by Italy in Case C-286/00, according to which

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<sup>23</sup> See OJ 2000, C 302, p. 15.

<sup>24</sup> 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 2001, L 63, p. 59.

the Commission's initiative should have been based on the Postal Directive, noting that the decision refers to the application of the Treaty competition rules only.

## **B) Other Commission's Decisions.**

### **1) *La Poste* (France) and French Postal regulation.**

Pursuant to Article 86(1), in conjunction with Article 82 of the EC Treaty, the Commission adopted on 23 October 2001, a decision on the monitoring of relations between the French company La Poste and firms specialising in the making-up and preparation of mail.

In this decision, the Commission found that the French regulatory framework concerning the supervision of La Poste's contractual arrangements with mail-preparation firms was insufficient to ensure that La Poste did not abuse its monopoly position in the downstream market for mail delivery. The activities of mail-preparation firms range from a variety of services for the benefit of mail originators (making up items, bundling and collecting them) and preparatory work on behalf of La Poste (pre-sorting). La Poste is both active on the mail-preparation market through a number of subsidiaries and at the same time the unavoidable partner for competing independent mail-preparation firms.

Indeed, for the performance of their activities, mail-preparation firms have no other choice than to resort to La Poste's network, as soon as the mail items fall within the scope of the postal monopoly, which is the case for the bulk of their activity. La Poste's activities and some of its tariffs may well be subject to supervision by the Ministry of Finance, but the scope of the competences of the latter is not complete and there is a risk that the controls exercised by its lack of neutrality owing to the fact that the responsibility for managing the State's shareholding in La Poste falls within the powers of the same ministry.

In these circumstances, La Poste had the power to impose on its mail-preparation partners unfair or discriminatory technical and financial conditions. Both La Poste and the French ministry were deemed by the Commission to be affected by a conflict of interest. Beyond the assessment of the shortcomings of the existing regulatory framework, the Commission's decision included comments on a draft decree instituting a postal ombudsman, which the French authorities had submitted in the proceeding. The decision insists, in particular, on the right for the ombudsman to publish his statements.

### **2) *Deutsche Post AG* and the German Postal Law.**

On 20 October 2004, the Commission announced<sup>25</sup> details of its decision (following a complaint by a German association of postal service providers) finding that

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<sup>25</sup> See *SJ Berwin Community Week*, Issue n. 197, 26 October 2004.

the German Postal Law was contrary to European competition law, as it induced Deutsche Post to abuse its dominant position in breach of Article 82 of the EC Treaty, by discriminating against commercial mail preparation service providers.

The Commission's decision was adopted pursuant to Article 86(3), which, as we have seen, prohibits Member States from enacting or maintaining in force any measures which allow or encourage public undertakings to violate the competition rules set out in the EC Treaty.

Pursuant to the EU regulatory framework for the provision of postal services set out in the Postal Directive, Member States are entitled to grant certain exclusive rights to national postal operators. However, Article 86(2) provides that such undertakings which are entrusted with services of general economic interest are still subject to EC competition rules, but only to the extent that these rules do not obstruct the performance of the particular tasks assigned to that undertaking.

In Germany, Deutsche Post has been granted the exclusive right to distribute letters below 100g (the so-called "reserved" area under the Postal Directive). However, having undertaken its investigation, the Commission determined that the provision of mail preparation services (such as the pre-sorting of mail and its transport from the sender's premises to a particular part of Deutsche Post's network) did not fall within the reserved area. The provision of mail preparation services is therefore subject to the EU competition rules.

The Commission determined that the German Postal Law induces Deutsche Post to grant discounts to bulk mailers who feed prepared mail directly into sorting centres, but prohibits Deutsche Post from granting discounts to firms that handle mail preparation services for third parties. Accordingly, the German Postal Law induces Deutsche Post to discriminate against mail preparation firms, contrary to Article 82. The Commission noted that the German government had failed to demonstrate that the discrimination was justified on the basis of Article 86(2). The Commission has therefore given the German Government two months to inform the Commission of the measures taken to ensure compliance with EU law.

Both Germany and Deutsche Post have brought actions<sup>26</sup> before the Court of First Instance on 21 and 22 December 2004 respectively against this decision.

### **C) Jurisprudence of the European Justice Court.**

#### **1) *TNT Traco SpA v Poste Italiane SpA and Others.***

On 27 February 1997, TNT Traco was inspected by three employees of Poste Italiane. Having ascertained that mail entrusted to TNT Traco for express delivery had been collected, carried and delivered in breach of Article 1 of the Postal Code, those employees imposed a fine of ITL 46.331.000 on TNT Traco pursuant to Article 39 of the Postal Code.

Afterwards, TNT Traco brought an action before the Geneva's Civil District Court against both Poste Italiane and the three employees who had carried out the inspection. TNT Traco relied on the fact that both the exclusive rights enjoyed by Poste

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<sup>26</sup> See OJ of 5 February 2005.

Italiane and the conduct of Poste Italiane and its employees were incompatible with Articles 82 EC and Article 86 EC.

By order of 21 June 1999, the abovementioned *Tribunale civile di Genova* referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 82 EC and 86 of the EC Treaty.

By its judgment<sup>27</sup> of 17 May 2001, the European Court of Justice established (paragraph n. 63) that in so far as trade between Member States may be affected, Article 82 of the EC Treaty, read in conjunction with Article 86 thereof, precludes legislation of a Member State which grants a private-law undertaking the exclusive right to operate the universal postal service from making the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, unless it can be shown that the proceeds of such payment are necessary to enable the undertaking to operate the universal postal service in economically acceptable conditions and that the undertaking is required to pay the same dues when itself providing an express mail service not forming part of the universal service.

That may be proved in accordance with the rules of the domestic legal system of the Member State concerned, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Finally, we think trustworthy recalling that by its question, the national court was essentially asking whether Articles 82 and 86 of the EC Treaty, when read together, preclude legislation of a Member State which grants a private-law undertaking an exclusive right to operate the universal postal service from making all the dues expressed above, but –and this is the important caveat- where the legislation contains no compensatory and regulatory mechanism designed to prevent that undertaking from allocating cross-subsidies to its own non-universal activities.

## **2) *UPS Europe SA v Commission of the European Communities.***

On 11 May 1998 the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) by which Deutsche Post AG sought to acquire, within the meaning of Article 3(1)(b) of that regulation, joint control of DHL International Ltd (DHL) by purchasing 22'498% of its shares. Deutsche Post would thus control DHL jointly with Deutsche Lufthansa AG (Lufthansa) and Japanese Airlines Company Ltd (JAL).

On 19 May 1998 prior notice of the proposed concentration was published (Case No IV/M.1168 - DHL/Deutsche Post, OJ 1998 C 154, p. 6) inviting third parties to submit their observations to the Commission.

The United Parcel Service group of companies (which distributes parcels throughout the world, with offices in all the Member States of the European Community, including Germany) by letter of 8 June 1998 lodged with the Commission a formal complaint against the Federal Republic of Germany, Deutsche Post and DHL. The complaint alleged infringements of Articles 81 EC, 82 EC and 87 EC. The applicant requested the Commission to initiate, in particular, a procedure against

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<sup>27</sup> Judgment of the Court (Sixth Chamber) of 17 May 2001, Case C-340/99, ECR (2001) p. I-04109.

Deutsche Post for abuse of a dominant position, arguing that Deutsche Post could only muster sufficient resources for the acquisition of its shares in DHL through its profits on the reserved postal market. The applicant also stated that Deutsche Post was not entitled to use its exclusive rights for purposes other than complying with its obligation to provide the service of general economic interest with which it was entrusted.

On 26 June 1998 the Commission adopted a decision, of which notice was published in the Official Journal of the European Communities (OJ 1998 C 307, p. 3), declaring a concentration compatible with the common market (Case IV/M.1168 - DHL/Deutsche Post) on the basis of Regulation No 4064/89. UPS's complaint was rejected by decision of 10 June 1999, arguing it was unfounded; UPS's brought action<sup>28</sup> before the Court of First Instance challenging this decision (only that part of it which concerned Article 82 EC and relates to the concentration) on 2 August 1999.

In its judgment<sup>29</sup> of 20 March 2002, the Court of First Instance dismissed UPS's claim, declaring (Paragraph 55) that the acquisition by an undertaking with a statutory monopoly in the postal sector of a holding in the capital of a company which is active in the non-reserved market of parcel distribution could raise problems in the light of the Community competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market. In such a situation, where there are grounds for suspecting an infringement of Article 82 EC, it is necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stems from an abuse of a dominant position.

The CFI also stated (Paragraph 61) that in the absence of any evidence to show that the funds used by the undertaking holding a monopoly for the acquisition in question derived from abusive practices on its part in the reserved letter market, the mere fact that it used those funds to acquire joint control of an undertaking active in a neighbouring market open to competition does not in itself, even if the source of those funds was the reserved market, raise any problem from the standpoint of the competition rules and cannot therefore constitute an infringement of Article 82 EC or give rise to an obligation on the Commission to examine the source of those funds in the light of that article.

### **3) *Courbeau*.**

In *Corbeau* the Court was asked by the Criminal Court (*Tribunal correctionnel*) Liège whether Articles 7, 81, 82 and 86 of the EC Treaty precluded national legislation conferring exclusive rights to the Régie des Postes in relation to basic postal service, resulting in criminal penalties for other undertakings which offered specific distinct services<sup>30</sup>. The Court established that a body which has been granted a monopoly as regards the collection, carriage and delivery of mail must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of Article 86(1) of the EC Treaty (paragraph 8).

In *Corbeau* the Court established a connection between the first two paragraphs of Article 86 of the EC Treaty (paragraphs 13 and 14): a national measure contrary to

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<sup>28</sup> Action brought on 2 August 1999 by UPS Europe NV/SA against the Commission of the European Communities, OJ C 281/27, 2 October 1999, p. 51.

<sup>29</sup> Judgment of the Court of First Instance (Fourth Chamber), of 20 March 2002, Case T-175/99, ECR (2002) p. II-01915.

<sup>30</sup> Judgment of the European Court of Justice, Case C-320/91, (1993) ECR I - 2533.



Community law pursuant to Article 86(1) may nonetheless be deemed compatible with the EC Treaty if it satisfies the conditions laid down in Article 86(2), in particular, if it is necessary to ensure the performance of the task of general economic interest assigned to the undertaking in question.

In this respect, the Court observed that a USO imposed by a Member State on its postal monopoly allows it to cross-subsidise between users and destinations. In a liberalised market, however, the new entrants would tend to engage in “cream-skimming”, i.e. to concentrate on the economically profitable businesses included within the universal service. In these sub-markets they would be able to offer lower fees than the PPO, even if they were less efficient, as long as their costs of providing the service were less than the uniform *equalised* fee schedule charged by the PPO.

In *Corbeau* the Court added that, however, the exclusion of competition is not justified as regards specific services dissociable from the *Services of General Economic Interest* and which the traditional postal service does not offer, which meet special needs of economic operator; however, the Court left it to the Belgian judge to establish whether the services in question in the main proceedings met these criteria.

In a situation such as the one considered in *Corbeau*, the threat to the economic and financial equilibrium of the PPO subject to the USO derives from the fact that the third party’s conduct—to which the PPO reacts by exercising its exclusive rights, allegedly in violation of Articles 82 and 86(1) (unless the requirements for application of Article 86(2) are met)—relates precisely to the profitable sectors, that is, those submarkets in which, according to the internal logic of the USO, the postal monopoly must achieve the profits needed to fund its operations in the loss-making sub-markets.

#### **4) *Deutsche Post*.**

In Joined Cases C-147/97 and C-148/97 *Deutsche Post*, the German PPO, subject to a USO within the national territory, invoked the right –based on the national legislation implementing Article 25 of the Convention of the Universal Postal Union (the “UPU Convention”)- to refuse to supply one of the services reserved to it (delivery of incoming cross-border mail from another Member State), or to make provision of that service conditional on payment of the fee schedule applicable to another reserved service (domestic mail) in addition to the postage already paid in the country of origin

It submitted that, first, the financial losses caused by the obligation to deliver “fraudulent” inbound international mail would, ultimately, have to be financed by the other users of the postal service, in the form of increases or forgone reductions in postage rates. Secondly, the indications were that in future a growing number of the operators concerned (banks and credit card management companies in particular) would resort to non-physical remail techniques. Therefore, DP argued, the only means by which it could maintain its financial equilibrium was by applying Article 25 of the Convention.

The Court found it useful to reformulate the preliminary questions raised by the Frankfurt Higher Regional Court, which concerned in essence the compatibility of the German law transposing the UPU Convention in the internal legal system, constituting a “State measure granting exclusive rights”, within Articles 86(1) and 82 of the EC Treaty, subject to the possible application of the Article 86(2) derogation. The Court’s reasoning, and accordingly the operative part of the judgment, had as their object the following, slightly different, question: is it contrary to Articles 86 and 82 for a body

such as DP to exercise the right provided for by Article 25(3) of the UPU Convention? (Paragraph 36).

In its judgement<sup>31</sup>, which will be analysed *in extenso* in the following section, the Court concluded that, in the context of large-scale “ABA remailing”, the need for the PPO to operate, in economically balanced conditions, its SGEI, as defined in an extremely narrow manner, meant that its right to treat incoming cross-border mail as domestic mail was justified (paragraphs 49–52).

The judgment also emphasised the absence of any legal provisions allowing the PPO to receive a full financial compensation for the costs determined by its obligation pursuant to the UPU Convention. The terminal dues are indeed fixed amounts, determined without taking into account the costs actually borne by the PPO of the country of destination (Paragraphs 50 and 54).

#### **D) Other significant pronouncements.**

##### **1) German Supreme Court: *Deutsche Post AG / trans-o-flex*.**

On 21 December 2004, the Bundesgerichtshof (German Supreme Court, hereinafter BGH) rendered judgment<sup>32</sup> in the Deutsche Post/trans-o-flex case objecting to the acquisition of shares pursuant to German merger control law.

In 1997, Deutsche Post AG acquired 24.8% of the shares in trans-o-flex Schnell-Lieferdienst GmbH (“trans-o-flex”). This acquisition was retrospectively notified to the Bundeskartellamt (German Federal Cartel Office, hereinafter BKartA) in 1999. In 2001, Deutsche Post notified the BKartA of its intention to increase its shareholding in trans-o-flex to 100%. The BKartA prohibited both acquisitions. The parties appealed the BKartA’s decision to the Oberlandesgericht Düsseldorf (Higher Regional Court Düsseldorf) without success. The BGH has now affirmed both the BKartA and the OLG Düsseldorf’s decisions.

Deutsche Post was found to have enjoyed a market share of 65% on the German market for the delivery of business packages to private end consumers (“business-to-consumer”) and was therefore considered dominant in this market. Trans-o-flex was active only on the German market for the delivery of business packages to business customers (“business-to-business”).

The BGH confirmed that the acquisition of 24.8% of the shares in trans-o-flex constituted a concentration within the meaning of German merger control law. According to Section 37 (1) No. 4 GWB (German Act against Restraints of Competition), the possibility to exercise a competitively significant influence on another undertaking, regardless of the percentage of shares acquired, constitutes a concentration. Combined with its superior knowledge with regard to the market and the industry concerned as well as its strong market position, the BGH confirmed that Deutsche Post would have had the possibility to exercise a competitively significant influence on trans-o-flex. Furthermore, the other shareholders in trans-o-flex were investors with purely financial interests in the company. The BGH in particular took into account that Deutsche Post had concluded a consortium agreement with these

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<sup>31</sup> Judgment of the ECJ of 10 February 2000, Joined Cases C-147 and C-148/97.

<sup>32</sup> See *SJ Berwin Community Week*, Issue 209, 31 January 2005.

shareholders, which enabled Deutsche Post to hinder any capital increase or expansion of the business activities of trans-o-flex to other business areas<sup>33</sup>.

The BGH concluded that both concentrations would have led to Deutsche Post strengthening its dominant position on the German "business-to-consumer" market for packages. By looking at the activities of competitors of trans-o-flex, the BGH expected that trans-o-flex would have expanded its business activities to the "business-to-consumer" package market in the future. The proposed concentration would have hindered this market expansion. The minority interest in trans-o-flex by itself would have enabled Deutsche Post to block any expansion of the business activities of trans-o-flex and would thereby have assured its own dominant position.

## **2) Autorità Garante della Concorrenza: Poste Italiana (I)**

In a decision quite similar to both *Deutsche Post AG I* and *II*, L'Autorità Garante della Concorrenza e del Mercato (the Italian antitrust authority) found the Italian PPO, Le Poste Italiane, guilty<sup>34</sup> of an abusive conduct against Article 82 of the EC Treaty consisting in the following practices:

First, the interception of incoming international mail, and second, requiring to the Italian customer or delivery undertaking for remailing of the abovementioned mail of high prices and tariffs, equivalent to the tariffs charged by Poste Italiane for mail coming from the country of origin.

In its decision, the Italian antitrust authority clearly states that Postal Operators in any country are entitled to receive some compensatory payments for large amounts of international mail which they receive from third countries and they have to deliver locally. However, these payments should be done according to international agreements –specifically the Universal Postal Convention- and following objective and transparent criteria. In no case is a postal operator entitled neither to block or intercept incoming mail nor to exercise its exclusive rights in order to require directly from customers the corresponding payments.

## **3) Autorità Garante della Concorrenza: Poste Italiana (II)**

More recently, on 23 February 2005, the AGCM opened another investigation<sup>35</sup> into the conditions under which Poste Italiane S.p.A. offers access to the so-called "hybrid electronic mail"<sup>36</sup> to its competitors.

Operators of hybrid mailing services compete in all the other upstream services, but necessarily have to use Poste Italiane's delivery service. The charge such service is set by the Italian PPO on the basis of the ordinary postal tariff or, if a number of cumulative conditions are met, it is charged at a substantially lower tariff.

The conditions previously set by Poste Italiane and then incorporated into the national regulation are set at such a high level that only nationwide operators, with

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<sup>33</sup> Note: Not only a shareholding slightly below 25% may constitute a concentration under German law on the basis of the ability to exercise a competitively significant influence on another undertaking. The Bkarta has in the past considered a shareholding as low as 9% to constitute a concentration on the basis of the ability to exercise a competitively significant influence on another undertaking.

<sup>34</sup> *Internacional Mail Express Italy / Poste Italiane*, Provvedimento A299, n. 11, 19 April 2001.

<sup>35</sup> *Case A365*, Bolletino AGCM 8/2005.

<sup>36</sup> We have already explained the precise meaning of the concept, when dealing with EJC's decision *La Poste Italiane v. Commission*.

substantial activities at local level in each postal district, can have access to this more favourable price regime.

Such scheme provides the typical scenario for developing the sort of conducts that we're examining here and that may fall under the category of abusive practices, such as discriminatory pricing, refusal to supply, excessive prices or negative to grant access to an essential facility –if the delivery network is as such considered-.

Therefore, AGCM's aim is assessing whether such conduct amounts to an infringement of Article 82 EC. This investigation is expected to be completed by 31 March 2006, and seemingly (Capobianco and Fratta, 2005) will focus on the following issues:

1) Whether the conditions set by Poste Italiane of obtaining the lower tariff represent the correct methodology for measuring lower costs or increased efficiencies derived from the delivery of the hybrid mail.

2) Whether the same conditions and the prices charged according to whether the conditions are met or not, are discriminatory rather than purely linear.

3) Whether the fact that Poste Italiane charges the ordinary postal tariff to some operators who do not meet the conditions for the lower tariff may be an exploitative abuse because the ordinary tariff does not reflect the services offered to operators of hybrid mailing services.

#### **IV. Antitrust Analysis of the EC Case-Law.**

From the above review of the EC Case-Law there are some lessons that can be drawn in order to properly understand the role competition law is called to assume ensuring the accomplishment of the postal market objectives pursued by both the Treaty (as regard European market, as a whole) and the Postal Directive (concerning this specific industry).

This analysis will be made around the three potential anticompetitive practices that may take place in these markets. Firstly, we shall deal with the issue of PPO's reliance on exclusive rights granted by State measure (as means of protecting the USO's financial equilibrium) to act against competition law. Secondly, we'll see how PPO's may also rely on such rights to achieve the extension of PPO's statutory monopoly to separate (and usually liberalised) product markets. Finally, also connected with the previous practice, we'll examine the plainly abusive conduct, either in the same market where the dominance is yielded or in another separate –but somehow connected-market.

It may be argued that the unlawful practice of cross subsidisation should not be left aside in this section. It is not an unnoticed forget. Consequent with the approach adopted previously, we are only dealing here with anticompetitive practices. Cross subsidisation, when unlawfully practiced, may constitute a practice that facilitate other abusive behaviours, such as predatory pricing (because it allows to offset losses incurred in the market where services are below-cost priced with earnings in other profitable areas of activities), price discrimination (establishing a dual tariff scheme, giving access to some operator at different prices, applying therefore dissimilar conditions to equivalent transaction, without incurring in losses due to the earnings in other areas), refusals to deal (to new entrants in markets were competition is more

aggressive, enduring such loss of business with profits in other separate markets) or others. In itself, we do not characterise cross subsidies as a competition issue –in the sense of abusive practices-, but rather a regulatory concern.

Moreover, cross subsidisation between profitable and non-profitable activities within the reserved area in order to achieve a global financial equilibrium by the PPO under the USO is explicitly allowed –as we shall see in the following section- in decisions such as *Corbeau* and others.

#### **A) Unlawful exercise of exclusive rights.**

It has already been said that in order to protect de USO's financial equilibrium, exclusive rights are usually granted by State measures to PPOs. As established in the *Corbeau* doctrine, in the present phase of gradual and controlled liberalisation of the market, it is exactly the need to enable the universal service provider to operate under financially balanced conditions which justifies the maintenance in almost all Member States of a range of services, defined by weight and/or price limits, which are reserved to the national PPO.

That's precisely why the Postal Directive expressly provides that the reservation of some services to the operator subject to the USO must be limited to the minimum compatible with the requirement of protecting the long-term economic viability of the provision of the universal service. It has been pointed out as noteworthy (Flynn and Rizza, 2001) that in *Corbeau* the Court failed to make clear the exact nature of the Régie des Postes' abusive conduct and to indicate whether such abuse had actually occurred or was likely to occur.

Similarly, in the *Deutsche Post* case, as we have shown, the German PPO invoked the right to refuse to supply one of the services reserved to it (delivery of incoming cross-border mail from another Member State), or to make provision of that service conditional on payment of the tariff applicable to another reserved service (domestic mail) in addition to the postage already paid in the country of origin.

DP sought to justify its claim by asserting that the delivery costs of cross-border mail posted in another Member State are greater than the corresponding revenues (terminal dues) and that, because of the use of non-physical remail, it would receive only terminal dues on substantial volumes of business for which it was entitled to the uniform national tariff. According to DP, the flow of internal resources on which it could draw to fulfil the USO would be irremediably depleted.

In this latter case, while Advocate General La Pergola suggested in his opinion<sup>37</sup> that there had been a violation of the EC Treaty rules on freedom to provide postal services, as well as an abuse of DP's dominant position, the Court concluded that, in the context of large-scale ABA remailing, the need for the PPO to operate, in economically balanced conditions, its SGEI, as defined in an extremely narrow manner, meant that its right to treat incoming cross-border mail as domestic mail was justified (See paragraphs 49–52).

Therefore, the Court seems to have taken the view that, pursuant to Article 86(2) EC, a PPO subject to a USO may legitimately claim that *each* of the services within the reserved sector, such as distribution of the incoming cross-border mail, has to be provided under conditions of financial equilibrium. Under such an approach it becomes

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<sup>37</sup> (2000) ECR I-825.

unnecessary to analyse whether DP's anticipated loss of revenues in the sub-market at issue could be compensated by the level of profits earned through the application of the uniform equalised tariff in the profitable sectors within the universal service.

The Court, with this line of reasoning, seems to ignore the proposition laid down in clear terms in paragraph 17 of *Corbeau*, that it is inherent in the performance of the obligation to provide a universal postal service under conditions of financial equilibrium that, within the reserved services, non-profitable operations can be cross-subsidised by profitable ones.

It is therefore compressible that Member States are required by Article 14 of the Postal Directive to adopt the measures necessary to ensure that the universal service providers implement cost accounting systems which can be independently verified and by which costs can be allocated to services as accurately as possible on the basis of transparent procedures. The requirement to keep separate accounts for each of the services in the reserved sector and the non-reserved services, thus introduced by the Postal Directive, is dictated by the need to prevent cross-subsidies from the reserved sector to the non-reserved sector, which could adversely affect competitive conditions in the latter (see paragraph 28).

Some commentators contend (Flynn and Rizza, 2001) that the Court in *Deutsche Post* shifted the focus of its analysis, from the State measure to the monopolist's conduct. We've already alerted that the mixing-up (See recital 58 of the ECJ's judgement) of those two distinct types of analysis (the one under Article 86 EC and the abuse of dominance analysis under Article 82 EC) should be avoided. That's why these authors claim that the need for legal certainty dictates that the Court should abstain from applying Article 86(2) to a monopolist's conduct when it is required to assess a State measure granting exclusive rights. We disagree.

It is true, as Advocate La Pergola pointed out, that once the "shield" of national legislation had fallen, the issue of the lawfulness, under the competition rules, of a monopoly's conduct consisting of making the delivery of mail posted in another Member State conditional on the payment of separate and additional tariffs to those already paid by the sender in the Member State of posting, should be examined on the basis of Article 82 EC alone.

Yet, we think that both conducts should be examined together since, as we are trying to show in this work, one is the "fertile soil" where the other grows and bears its anticompetitive fruits.

## **B) Extension of statutory monopoly to liberalised markets.**

As a natural consequence of the abovementioned regulatory framework and actual degree of partial-liberalisation of postal markets, to which we can add the coexistence of different areas (reserved and non-reserved), services (profitable and non-profitable), operators (PPOs and private undertakings), the practices of monopoly leveraging and abuse in neighbouring markets dwell freely in postal markets.

Whether by national legislation in itself (as in *TNT Traco*), by means of merger (as in *UPS Europe*) or by PPO's own practices (as in *Italian Hybrid Mail*), it seems that postal markets allow for a wide range of possibilities in terms of extending the PPO's statutory monopoly to another –and usually liberalised- separate product market, or using the market power it yields in one market –e.g. reserved area- to commit some sort of abusive practice in another distinct, but related market –e.g. non reserved area-.

As some authors (Van der Horst, 2005) have pointed out, the exclusive right PPOs enjoy to a significant portion of the letter mail market, as a compensation of the burden of USO, cannot be driven too far. The abuse of this privilege can only be avoided by further separation between public service activities –there were the market fails to provide solutions- and commercial and competitive services.

In his opinion in *TNT Traco*, Advocate General Alber considered (paragraph 48) that the markets in courier services and in basic postal services were separate markets, Ente Poste Italiane being dominant in the latter but not in the former.

The real issue was, however, that of whether the obligation of courier firms to make a payment to the Italian PPO equivalent to the basic fee for carriage constituted an abuse of dominance in the former market. A.G. Alber looked at the potential abuse arising from a distortion of competition in the express courier services market in EPI's favour as a result of the obligation to make these payments. Applying the ruling in *Tetra Pak*, to the effect that only in particular situations could a firm which is dominant on one market be considered to be in violation of Article 82 EC by reason of its behaviour on a market in which it does not enjoy dominance, he considered that such special circumstances did exist here, by reason of the interconnected nature of the relevant markets, resulting in the basic postal service and the express courier service being at least partially substitutable for each other. Imposing payment of postal charges upon express courier service providers could, therefore, be considered as an abuse, by extending dominance into a separate market or by strengthening the Italian PPO's market power within the same one.

The judgment of the Court largely follows the reasoning proposed by the Advocate General Alber on the substantive issue of a violation of the competition rules. The Court examined whether Articles 82 and 86 EC, when read together, preclude legislation of a Member State which grants a private-law undertaking an exclusive right to operate the universal postal service from making the right of other economic operators to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, where the legislation contains no compensatory and regulatory mechanism designed to prevent that undertaking from allocating cross-subsidies to its own non-universal activities.

The same sort of extension of PPO's statutory monopoly to separate markets, this time by means of legislative measures, is offered in the Commission's decision *La Poste Italiana*, whereas the same extension is found in ECJ's pronouncement *UPS v Commission* achieved by merger. In the former, the Commission decided that the reservation for the incumbent PPO of the delivery of hybrid mail at a predetermined date or time in Italy, which was found to be a separate "niche" product market from the traditional delivery service, violated Articles 86(1) and 82 EC. In the latter, however, the Court found that in the absence of any evidence to show that the funds used by the undertaking holding a monopoly for the acquisition in question derived from abusive practices on its part in the reserved letter market, the mere fact that it used those funds to acquire joint control of an undertaking active in a neighbouring market open to competition does not in itself, even if the source of those funds was the reserved market, raise any problem from the standpoint of the competition rules and cannot therefore constitute an infringement of Article 82 EC or give rise to an obligation on the Commission to examine the source of those funds in the light of that article.

As said before, it is important to point out that, while stating that does not infringe competition law nor postal regulation to extend the range of activities from reserved area to non-reserved one, the Commission also pointed out in its decision that

the profits used for these acquisition cannot result from excessive pricing in the reserved area.

In relation to this issue, the current directives actually call for pricing oriented to cost and affordability. It is possible to challenge the assertion that certain profit margins and return on capital more than 50% are “geared to cost”<sup>38</sup>. To some, those margins go beyond the original rationale for having a monopoly in the first place, which is no other than funding the burden of the USO. As we’ll point out in the conclusions of this study, this brings us back to the real effectiveness of the jurisprudence and the course of action followed up to now by European antitrust authorities: little has changed in the market as a result of the various decisions –cited here– related to Deutsche Post and other postal operators.

### **C) Abuse of dominant position.**

Finally, we can find a quite wide range of “simple” abusive practices in the Postal Sector, most of which are –in our opinion– encouraged by the separate-but-connected-markets structure derived from the scheme implemented by the Postal Directive, and the privileges and exclusive rights granted to PPO’s.

The first of the EC’s Decisions cited, *Deutsche Post I*, the first time when the Commission applied article 82 EC to a Postal Operator, deals basically with predatory prices and fidelity discounts in the market for package delivery. Others (Lüder 2002) have analysed largely the issues raised by this decision, especially the incremental-cost-test as means to establish a predatory pricing infringement, so we won’t go through it again.

As regards the second *Deutsche Post* decision, the Commission understood that DP’s conduct was abusive of its dominant position, including –notably– four different anticompetitive practices:

1) Price discrimination; since DP applied different conditions to similar transactions, when it charged with different tariffs the same incoming post.

2) Refusal to deal; not in absolute terms, but by means of imposing to the undertaking who is asking for services unfair or prohibitive requisites that, as pursued by the dominant operator, finally render impossible for the soliciting firm to accept.

3) Excessive prices; such were considered the ones demanded by DP to *Post Office*’s customers, since the internal tariff that the German operator applied to incoming mail was well above its real delivery costs in Germany.

4) Finally, hindering market development; the Commission found that DP’s course of action contributed to curbing the development of the German market for the delivery of international mail and of the UK market for international mail bound for Germany.

Similarly, the decision *De Post (Belgium)* referred to the abuse of dominant position consisting in making a preferential fee in the general letter mail service subject to acceptance of a supplementary contract covering a new business mail service. This conduct seems a perfectly envisaged practice under Article 82(d) EC, that declares unlawful to making the conclusion of contracts subject to acceptance by the other

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<sup>38</sup> See NERA report, “The profitability of the Mail Division of Deutsche Post”, 25 July 2003.



parties to supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 82(c) EC –which prohibits applying dissimilar conditions to equivalent transactions, thereby placing other parties at a competitive disadvantage- has also literally been applied in a quite appalling decision<sup>39</sup>, in which the Bundeskartellamt (the German Cartel Office, BKartA) has recently prohibited *Deutsche Post AG* from hindering or discriminating against competitors in the mail preparation services market.

The mail preparation services in question include the pre-sorting and delivery of letters that weigh less than 100 grams to DP's sorting centres. Since DP offered large customers a rebate of between 3% and 21% if they pre-sort and deliver their mail to Deutsche Post themselves, but refused to grant such rebates to other competing companies –known as “consolidators”-, not only hindered the market entry of competing mail service providers, but also discriminates against small and medium-sized companies which are unable to reduce their postage costs in the same way that large customers can.

The German PPO justified its pricing policy with the exclusive licence granted to it under the German Postal Act for mail preparation services concerning letters that weigh less than 100 grams. However, as we have noted in previous sections, the European Commission decided on 20 October 2004 that this German law infringes Article 86(1) in conjunction with Article 82 of the EC Treaty. For this reason, both the European Commission and the BKartA agreed that the discriminatory conduct of Deutsche Post should be put to an end.

Deutsche Post has appealed<sup>40</sup> the BKartA's decision to the Higher Regional Court in Düsseldorf to request a suspension of the immediate enforcement of the BKartA's decision. DP argues that its exclusive licence granted under the German Postal Act for letters weighing less than 100 grams should not be restricted.

## **V. The Spanish Postal Services market.**

As it has been said in the introductory section, Spanish National Competition Authority has lately devoted special attention to allegedly anticompetitive practices in the Spanish postal market undertaken –not only, but mainly- by the public owned former monopoly, *Correos*.

The cases to which we'll refer here are those especially significant, not because their relevance from Spanish law point of view –it wouldn't provide any guidance to the European case law- but rather because they can shed light to community analysis. In particular we think the Spanish antitrust authority accurately applies principles settled by previous community case-law as well as the abovementioned doctrines of abuse in neighbouring markets.

### **A) Overview of current legal situation in Spain.**

The march towards full liberalisation in Spain has so far yielded mixed results. Out of philosophical conviction and concern over high inflation in the service sector, the Popular Party's government privatised postal services, electricity generation and

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<sup>39</sup> See *SJ Berwin Community Week*, Issue 212, 21 February 2005.

<sup>40</sup> See *SJ Berwin Community Week*, Issue 214, 1 March 2005.

distribution, telecommunications, air transport, land use and petrol distribution, usually well ahead of European Union deadlines. Spain was one of only six countries in 2005 that had completely opened its gas and electricity markets to wholesale competition, according to a European Commission study.

But these initiatives were offset by the emergence of private de facto monopolies to replace the formerly public ones in key areas. That is the case, as we shall soon see, of the market under scrutiny in this paper, the market of postal services.

Spain still has significant restrictions on domestic market freedom. Consumers complain that competition in the airline, telecoms and energy markets might exist on paper but monopolistic practices persist. For instance, *Telefónica* still has more than 66% of the fixed-telephone market, *Iberia* airlines still controls most domestic traffic, and local monopolies of natural gas and electricity still have pricing power and have found ways to restrict consumer choice. The same can be said about *Tabacalera* (now called *Altadis*), the former monopolist in the tobacco industry. In the field we're studying, *Correos* remains as a public-owned de facto monopoly, and there seems to be no room for private operators that may compete with it in the non-reserved areas.

The OECD ranks Spanish markets as much more restrictive –in terms of inward limits to competition- than the United States, the United Kingdom, Ireland, the Netherlands, Germany and Austria, but less restrictive than France, Belgium, Italy and Greece. The new government has shown no signs so far of a commitment to continuing the liberalisation process.

The framework for competition policy in Spain has been set out and strengthened by a series of initiatives in recent years, including Royal Decree Laws 2/2001, 6/2000 and 6/1999, Law 52/1999 and Royal Decree 295/1998. This legislation follows Law 16/1989, for the Defence of Competition, which prohibits practices intended to limit competition and the use of a dominant position to the detriment of the economy, consumers or competitors. It specifically forbids price-fixing, production limits, market division, unfair tactics to eliminate or injure competitors, and forced tied sales.

Spain has specialised agencies overseeing antitrust policy. The Service for the Defence of Competition (*Servicio de Defensa de la Competencia*), part of the Ministry of Economy and Finance, drafts reports and issues opinions on proposed legislation. It supports the Tribunal for the Defence of Competition (*Tribunal de Defensa de la Competencia*), which oversees competition legislation and business practices. Several regional governments are creating their own competition courts, following a Supreme Court decision in 1999 declaring that regions had the authority to decide in all cases except those involving mergers and concentration.

Finally, it should be noted that with the public presentation, last 20 January 2005 of the “*White Paper for the Reform of the Law for the Defence of the Competition*” has opened a period of debate which would hopefully culminate in a profound reform of this legislation, including SDC and TDC’s integration in a single competition authority.

## **B) Postal services regulatory framework.**

Directive 97/67/EC was transposed in Spain by Law 24/1998, of 13 July, regulating Universal Postal Service and aiming at Liberalisation of Postal Services (known as the “Postal Law”, as amended by Law 53/2002 in order to incorporate the new Postal Directive). Later Royal Decree 1829/1999 was passed to further developing of the Postal Law.

This law establishes the Universal Postal Service in Spain, clearly differentiating those reserved areas (under the monopoly of our PPO) and those liberalised ones (open to free competition). In particular, the Postal Law settles:

a) The regulatory framework for both operators and consumers rights and obligations (Title I);

b) A wide liberalised area of postal services, in which private postal operators are free to act in accordance to our free market economy envisaged by Article 38 of Spanish Constitution (Title II);

c) The Universal Postal Service (hereinafter UPO) regulation, establishing the right to an economic and financial equilibrium for the PPO and the reservation of a certain area of postal activity, with the corresponding fee system (Title III).

UPO is defined in Article 15.1 of Law 24/1998 as “the bundle of law-established quality services foreseen in the Law, as well as their corresponding development by Regulations, rendered permanently and in affordable terms to every consumer all over national geography”.

In its Article 4 postal services are classified in:

a) Services included in UPO (envisaged in Article 18 of the Postal Law, and subject to public prices or tariffs);

b) Services not included in the previous category (envisaged in Article 31.1 of the Law, and subject to price cap by public authorities and free fluctuation according to supply and demand). In order to render these sorts of services, private operators should obtain administrative singular authorisation (Articles 7, 8, 11, 12 and 13 of the Postal Law). Operators are entitled to discounts and beneficinations.

Among the former category the Royal Decree distinguishes between those services reserved to the operator who is going to assume the UPO (normally, our Public Postal Operator, Correos) and those not reserved.

### **C) Anticompetitive practices in postal services in Spain.**

As we have already noted, *Sociedad Estatal Correos y Telégrafos, S.A.*, known simply as *Correos*, is the former public owned monopoly in performing postal activities in Spain. Since the referred enactment of the Postal Law is no longer the only one entitled to render such services, although it remains as the main industry operator.

In the *Letter Mail* market segment approximately around 2.000 competitors of Correos have an 8% market share. The former faces a strong de facto competition for outgoing cross-border mail, while there seems not be any potential competitors in the 60% of the internal market, which is open to competition since decades.

However, in the *Parcel Services* market segment Correos, which has a 6% market share, aims at becoming a market leader by more than doubling its market share in the next years. This market is yet largely in hands of private operators (such as MRW, DHL, Seur or UPS).

From the abovementioned regime, and following Directive 97/67/EC, as amended by Directive 2002/39/EC, it seems clear that Spanish Postal Law states that, in order to ensure Universal Postal Service, certain areas of activities are reserved to Correos; however, it also allows other operators to freely exercise postal activities in the non-reserved areas. The existence of these separated but closely related markets allows

a series of anticompetitive practices quite similar to the ones studied above when recalling European case law and the *Deutsche Post* and *La Poste* decisions.

Our Competition Tribunal, the *Tribunal de Defensa de la Competencia* (hereinafter TDC) has ruled a set of resolutions<sup>41</sup> on this issue, which we will now consider. After a simple review of the factual grounds a comparative analysis with EC case-law will be done, to draw some normative conclusions.

It is important, while reviewing all this case-law, to bear in mind what we may call the “mediatic predisposition” against our former monopolist, which sometimes bias public opinion<sup>42</sup> without consistent economic or legal grounds.

As we have already noted, as the European one, Spanish Postal Market has only recently been liberalized, and therefore the former monopolist is facing a process both internal and market-oriented of modernisation, that will enable it to compete in a free market with private operators. To achieve this goal, a strategic business plan was launched in 2001 to diversify its offer and make its more than 4.000 offices profitable.

It has been shown, regarding European Postal Market, that the USO it's not a privilege but rather a financial and commercial burden, and as such should be considered when judging –not merely misjudging- Correos' market conducts.

### 1) Resolution *Caja Postal-Argentaria-Correos*.

On 3 June 1996, the “*Confederación Española de Cajas de Ahorro*” lodged a complaint before the Spanish antitrust authorities, against two banking entities (one of them, “Caja Postal”, historically linked with Correos itself; the other, “Argentaria”, former public owned financial institution) and the former monopolist in the Spanish postal market, “Organismo Autónomo de Correos y Telégrafos” (Correos), whose allegedly collusive –and anticompetitive- behaviour consisted in having signed a contract by which the banking entities were allowed to use Correos' material and human resources to promote and sell their financial products.

Since Law 25/1991 obliges public owned banks to compete in equal terms with private ones, and this provision was supposedly infringed with such agreement, another anticompetitive practice was also alleged, namely violating antitrust law by means of unfair practices<sup>43</sup>.

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<sup>41</sup> It should be noted that, although named Court, Spanish TDC does not belong to the judiciary order, but rather it is an administrative body. Therefore, its judgments technically are not called *Judgements* but *Resolutions*. We'll refer to them here by either that name, or simply decisions.

<sup>42</sup> See, for instance, just the following headlines of Spanish most prominent economic journal (*Diario Expansion*) in only a few months of 2003: “Diversification and Competition, main Correos' challenges”, 24 January 2003, p. 7; “War in Spanish Postal Sector”, 10 March 2003, p. 7; “Historic fine on Correos”, 25 June 2003, p. 14; “The Ministry of Economy consider opening new proceedings against Correos”, 26 June 2003, p. 3; “The Ministry of Economy accuses Correos of continuously hindering competition”, 5 November 2003, p. 3.

<sup>43</sup> A unique feature of Spanish antitrust law (Law 16/1989, as amended by Law 52/1999) if compared with other European legislation is the existence of a third –apart from collusive practices or abuse of dominant position- antitrust violation, envisaged in article 7, and named “Infringement of antitrust rules by means of unfair practices”. Therefore, any violation of the provisions contained in our Unfair Practices Act (Law 3/1991, *Ley de Competencia Desleal*), which because of its entity may cause serious distort of the market conditions and consequently harm public interest, is considered also an antitrust offence. One of Law 3/1991 provisions, article 15.2, deems an unfair practice the violation of any concurrencial law if such violation may give the offender a competitive advantage. This would be the case in relation to the abovementioned Law 25/1991.

On 3 February 1999 the TDC decided to dismiss the claim<sup>44</sup>, having found that none of the allegedly anticompetitive practices caused any harm to competition.

## **2) Resolution IFCC / Correos.**

On 5 August 1999, International First Class Courier (hereinafter IFCC), entitled by administrative authorisation to develop some postal activities, lodged a complaint against Correos, alleging the following anticompetitive practices by the latter:

- i) Having unlawfully retained mail belonging to IFCC, deposited by mistake in Correos postal network;
- ii) The launching of a denigratory campaign against IFCC, in which its postal service was named illegal;
- iii) Threatening diverse undertakings and foreign postal services in order to obtain a cease of their activities with IFCC.

Although initially there was a decision adopted by Competition Policy Directorate General in which the record of the proceedings was shelved, this was reversed by a formal Resolution<sup>45</sup> of the TDC, invoking (paragraph 6) *inter alia* the especial responsibility which concerns Correos as the dominant operator in the postal market not to reduce the existing level of competition.

On 7 February 2003 the TDC adopted its final Resolution<sup>46</sup>, fining Correos with €900.000 for unlawfully retaining IFCC's mail, and spreading denigratory information about its activities. The third claim –threatening undertakings- was overseen by the Court. Notably, Correos' claim that such conduct damaged Spanish public image among other countries, since it took place mainly in resorts and other typically touristic facilities, failing the letters sent by IFCC's delivery service to reach their destiny, was not taken into account by the TDC.

This Resolution has been challenged before the *Audiencia Nacional*, whose pronouncement is waited.

## **3) Resolution Couriers / Correos.**

On 16 February 2001, the *Asociación Española de Couriers Internacionales* (hereinafter AECI) lodged a complaint against Correos, asserting the Spanish public owned entity had infringed antitrust law by means of launching a new service into the market (called "Urgent International Mail") with a VAT exemption that placed its competitors in the same market segment at a competitive disadvantage<sup>47</sup>. Correos consulted with the Tributes Directorate General, who approved the exemption.

The key issue to decide was whether such activity belonged to the reserved services rendered by Correos, being therefore entitled to grant the exemption; or

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<sup>44</sup> Resolution of TDC, 3 February 1999, Expte. 417/97.

<sup>45</sup> Resolution of TDC, 2 April 2001, Expte. R 417/00, *Correos*.

<sup>46</sup> Resolution of TDC, 7 February 2003, Expte. 536/02.

<sup>47</sup> Here, as in the first Resolution analysed in this Section, *Caja Postal-Argentaria-Correos*, the antitrust violation is the one envisaged in article 7 of Spanish Antitrust Law, since Correos would obtain a competitive advantage by unfair practices (infringing VAT Law) in violation of article 15.2 of Unfair Practices Law.

whether the activity belonged to the liberalised area, infringing then both VAT Law and Directive 77/388/CE (whose provisions state that exemption is only applicable to reserved activities).

The Competition Policy Directorate General decided to shelve the record of the proceedings, and his pronouncement was confirmed –after it was contested by AECEI, as applicant- by Resolution<sup>48</sup> of the TDC of 1 February 2002, stating that, although the activity at stake should be considered as not belonging to the reserved area (and therefore, the VAT exemption was discriminatory against its competitors, who were placed at a competitive disadvantage), Correos acted based on a public entity acquiescence, therefore following principle of “legitimate confidence”. Notably, a dissenting opinion by three magistrates was issued with the final decision.

#### **4) Resolution Suresa / Correos.**

On 14 June 2000, Suresa Cit S.A. (hereinafter Suresa), entitled by administrative authorisation to develop some postal activities belonging to the area under Universal Postal Service but not reserved to the public entity by law, lodged a complaint concerning the discounts and rebates Correos granted to some entities who bought those services to Correos. The claim was that Correos had abused its dominant position by imposing a certain form for the contract to be signed between them, in which an unfair remuneration was established, since only achieving a certain volume of mail traffic was Suresa entitled to a substantial *rappel* in the fees paid to Correos.

These entities also claimed that Correos was refusing to grant them access to the public delivery network. As we have said, before 2003 Spanish market of long-distance and international mail of letters and postcards below 350 gr. –in that year the threshold was lowered to 100 gr.- was under Correos’ monopoly. The rest of the market was liberalized, so the private operators were obliged to deliver to Correos all the mailing which fell under the reserved area.

But until December 1999 some of the collecting and distribution work was made by the private operators, who received in turn, from Correos, some discounts depending on the postage costs. In the proceedings Correos put forward that it was a loss-making activity, and that in order to equilibrate its budget and at least cover the attributable costs, more mail volume should be handled. Consequently, it notified them that, in order to keep the discounts, they should hand over to Correos 10% of the urban mail, which fell under the liberalized –and therefore, not reserved- area.

On 20 June 2003 the TDC issued a Decision<sup>49</sup> in which imposed to Correos a fine of €5.400.109 for abusing his dominant position by requiring this minimum of 10% to Suresa of local deliveries rendered to Correos to qualify for the discounts and rebates.

This Decision was challenged before the *Audiencia Nacional*, who a few months ago has issued its Sentence<sup>50</sup> affirming the validity of TDC’s finding of an abuse of dominant position by Correos, but substantially lessening the fine.

The main contentions argued by Correos (formerly defendant, now recurrent) for challenging the TDC’s decision related to the market definition, the finding of

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<sup>48</sup> Resolution of TDC, 1 February 2002, Expte. R 495/01.

<sup>49</sup> Resolution of TDC, 20 June 2003, Expte. 542/02.

<sup>50</sup> Sentence of 26 September 2005, Rec. 0471/2003, Audiencia Nacional (Sala de lo Contencioso Administrativo, Sección 6ª).

dominance, and the allegedly lack of abusiveness in Correos' conduct. These two latter were dismissed, while the former was accepted.

Concerning market definition, the *Audiencia Nacional* agreed (see recital n. 5) with the recurrent that the TDC's appreciation of market boundaries was too broad and lacked of consistency, since the decision first establishes the market of "collection, classification, transport and delivery of mail" as the reference one in the finding of dominance, while latter refers to the "postal market" –generally speaking- and "the liberalised area" regarding the finding of the abusive conduct.

Concerning Correos' dominance, the claim is strongly rejected (recital n. 6). As regards the abusive conduct, Correos' "objective justification" defence –the regulatory constraints imposed by the liberalisation process, the viability of Correos' economic performance under the USO, the need to achieve costs-saving strategies- is considered by the Court but finally also turned down (recital n. 6, *in fine*).

Therefore, Correos' appeal is partially accepted, the fine is considered disproportionate (recital n. 8) and accordingly reduced to € 2.700.054.

### **5) Resolution ASEMPRE / Correos.**

Significantly, at least in terms of the volume of the fine imposed, a recent decision in the postal sector has supposed one of the biggest sanctions imposed ever by Spanish TDC to a single undertaking.

On 21 January 2002 a complaint was lodged by the *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia*<sup>51</sup> (hereinafter ASEMPRE), accusing Correos of abusing its dominant position by signing contracts with big customers in order to ensure exclusivity and the joint rendering of both reserved and liberalised postal services.

On 15 September 2004, and considering the special gravity of such a conduct, the TDC issued a Decision<sup>52</sup> fining Correos with €15M, one of the biggest fines imposed ever on a single company. Again, this Resolution has been challenged before the *Audiencia Nacional*, whose pronouncement is waited

Interestingly, a new outcome of this case turned up by the end of 2005. As we have shown, the *Servicio de Defensa de la Competencia* ended the investigation into Correos initiated by the claim filed by Asempre. Claim that was triggered by Correos' entry into exclusivity agreements with important clients in reserved and liberalised activities through rebates supported by cross-subsidisation.

The Spanish SDC found evidence of predatory pricing in the liberalised postal activities markets. However, since the information available was insufficient, it divided the file into two "sub-files".

The first focused on the entry by Correos into exclusivity agreements with important clients in the reserved and liberalised activities sector, and was terminated with the fine already mentioned.

The second sub-file, however, focused on Correos' allegedly predatory pricing policy, which was supposedly based on the well-known technique of cross-subsidisation. This second piece of the legal proceedings was open a number of months so that the SDC could gather all the necessary evidence to conduct the investigation.

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<sup>51</sup> Professional Association of Mail Handling and Delivery.

<sup>52</sup> Resolution of TDC, of 15 September 2004, Expte. 568/03.

But, as reported<sup>53</sup> in September 2005, SDC, Correos and *Asempre* had negotiated the settlement of this file on the assumption of commitments by Correos.

Specifically, Correos has undertaken commitments on the basis that the postal services provided in the liberalised activities should be at least equal to the costs incurred in rendering such services. These commitments have been gathered in an agreement subject to a transitory period and the supervision by the SDC. Such a settlement is not at all frequent –in fact, as far as we know, its just the second one- in Spanish antitrust proceedings, and even more worth mentioning if we consider the previous fine of €15M imposed on Correos regarding the first sub-file.

Finally, one concluding remark is that the settlement, dated on 15 September 2005, is publicly available in the SDC's webpage<sup>54</sup>, and hopefully it may provide guidance both to Spanish and European antitrust authorities and undertakings in finding such profitable other-than-judicial ways to end litigations.

### **6) Resolution *Prensa/Correos*.**

Last, as of 16 June 2005, a fine<sup>55</sup> of €900.000 has again been imposed on our PPO, *Correos*, for allegedly abusive practices consisting in discriminating members of the Association of Press Editors (AEDE) in favour of the members of another similar professional association.

This sort of conduct, applying dissimilar conditions to equivalent services, prohibited both by Art. 82 EC Treaty and Spanish Art. 6.2 of Competition Law, resulted in a discount scheme which was enjoyed by the big press editors who used Correos' network for their mailing of periodical publications, whilst the members of Professional Press Association (APP) couldn't qualify for getting the same discounts.

However, the Spanish TDC in its decision considered that the other allegedly anticompetitive practice –a sorpresive and unilateral increase of 100% in the fees charged to periodical publications- was not an infringement of Competition Law.

### **D) Antitrust analysis of Spanish Case Law.**

What lessons can be drawn from the preceding case law? In essence and this conclusion should not be any news; the Spanish market does not –in the Postal services sector- differ essentially from the European one. Therefore, the experience and accumulated knowledge of both community antitrust authorities and national regulators should be fully assumed by Spanish authorities.

However, on one feature at least Spanish experience is unique; as regards our Competition Law, the ability attributed to antitrust authorities by article 7 to prosecute and sanction those unfair practices that, because of their relevance and potential capacity of hindering the market are to be considered as antitrust violations.

As we have already noted, in Resolution *Caja Postal-Argentaria-Correos* the claim was dismissed, having found the TDC that none of the allegedly anticompetitive practices caused any harm to competition. On the contrary, the contract signed between the Spanish PPO and the banking entities is considered procompetitive, since it opens a

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<sup>53</sup> See *SJ Berwin Community Week*, Issue n. 242, 19 September 2005.

<sup>54</sup> <http://www.dgdc.meh.es/>

<sup>55</sup> Resolution of TDC, of 17 June 2005, Expte. 584/04.



new distribution channel for both postal and banking services that contributes to the development of rural areas.

Also, we can find in Resolution *IFCC-Correos* the wide sort of anticompetitive practices exhibited by Deutsche Post in the second of the sanctioning decisions issued by the European Commission, to which we've previously referred. Notably, *Correos* is found guilty of two abusive conducts consisting in unlawfully retaining mail belonging to the applicant –IFCC- and erroneously deposited in Correos' postal network, and the launching of a denigratory campaign against the former.

The first practice is declared a violation of article 6 of Spanish Competition Law (equivalent to Article 82 of the EC Treaty), in the same way as in *Deutsche Post AG II* the German PPO unlawfully intercepted and retained the international mail delivered by the UK operator Post Office.

The defendant contended that it did not yield a dominant position, since it didn't own the public postal network, but merely controlled it; that the statutory reserved area in order to fulfil its USO didn't mean market power; and, finally, that it was economically hindered by the fact that its competitors were obliged to impose higher tariffs for the same services in the reserved areas. All were dismissed by the TDC (Paragraph 8).

The second practice may be characterised as an offence against article 7 of Spanish Competition Law, since the content of the conduct –a denigratory campaign- clearly falls outside antitrust boundaries, and rather constitutes an unfair practice. However, recent –but settled- Spanish case law<sup>56</sup> establishes that any unfair conduct, if done by an undertaking in a dominant position, constitutes an abuse of dominant position regardless of its unfair nature. Consequently, the second practice is also (Paragraph 2) considered as an abuse of dominant position.

The issues raised by the Resolution *Couriers – Correos* concern internal interpretation of Spanish VAT law, and therefore do not offer any lesson in the antitrust analysis. In addition, it confirmed the Competition Policy Directorate General decision of shelving the record of the proceedings, so no unlawful practice was to be found. We should note, however, that the factual and legal grounds relied on by the majority were contested in a dissenting opinion by two magistrates, who understood that Correos' behaviour was actually an infringement of Spanish Competition Law, and indeed a serious hindrance of competitive patterns in Spanish recently-liberalised Postal market.

More interestingly, the two last Resolutions of Spanish TDC, *Suresa - Correos* and *ASEMPRE – Correos* offer a substantial compilation of sound antitrust principles to be applied to abusive practices in postal services.

Quite similar to the last case studied in the previous section –the one in which the German BKartA prohibits *Deutsche Post* to discriminate against small and medium-sized companies, known as “consolidators”, which are unable to reduce their postage costs in the same way large customers can- in the first of these Resolutions Spanish PPO is found guilty of abusing its dominant position by requiring a minimum of local deliveries rendered to it to qualify for certain discounts and rebates. The applicant, *Suresa*, found it couldn't achieve the required 10% of mail traffic volume, and claimed it had been unlawfully discriminated. This illegal scheme was adopted by Correos by means of a new “Model of Consolidator Undertaking”, allegedly adopted and implemented as an instrument to an exclusionary conduct against its competitors.

The adoption of this new plan is described in recital 5 of TDC's Resolution, and while the dominant position is ascertained in recital 7, the abusive behaviour is

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<sup>56</sup> See TDC's Resolution of 8 March 2000, *Retevision – Telefónica*, Expte. 456/99.

described in recital 8, where the doctrine of the abuse in neighbouring markets is explicitly endorsed by the Spanish antitrust Authority when it states that in countries such as Spain, where only transport and inter-provincial delivery still constitutes a statutory reserved area, whereas local mail delivery is fully liberalised, the use of Correos' monopoly in the former to leverage or extend its market power to the latter would be against Competition Law and principles.

The last Resolution cited, *Prensa – Correos*, also provides with some insights of the nature and legal assessment of the typical discriminatory conduct: favouring one customer with discounts that other similar customer can't enjoy, without any objective justification for such different commercial treatment.

Similarly, in Resolution *ASEMPRE – Correos* one of the biggest ever sanctions on a single entity is imposed to the Spanish PPO, found guilty of an abusive conduct consisting on signing contracts with certain customers in order to ensure exclusivity and the joint rendering of both reserved and non-reserved postal services.

As in the preceding Resolution, Correos is unlawfully tying the rendering of services in its reserved area with those liberalised ones, by means of granting substantial rebates and discounts only to those entities that exclusively deal with it in the latter market, in addition to the statutory obligation they endure to deal only with Correos in the former.

Again, two separate product markets are defined (recital 8), one comprised by the reserved activities and services rendered by Correos and the other by the liberalised ones. And again, those two markets are characterised as neighbour markets, being the incumbent dominant operator capable of abusing in the non-dominated market.

Due to the especial circumstances (recital 17) involved in this case, such as the dimension of the market affected, the gravity of the distortion of competition, the especial responsibility that lies on Correos as dominant operator and the duration of the anticompetitive practice, the enormous sanction of € 15 million is imposed on the Spanish PPO.

As some commentators (Gonzalez and Engra, 2001) have wisely noted, both in Spain and the European Union as a whole, competition rules are going to play a crucial role in the postal liberalisation process. The need to ensure the free entry of new operators as well as avoiding the hindering of competition by the incumbents appears as essential conditions to achieve the proposed goals.

Accordingly, conduct by former monopolists –such as Correos, Spanish Public Postal Operator- should be examined carefully, but not judged too harshly. Although Correos' claims in the proceedings we have examined has been so far quite useless, antitrust authorities should understand this is a very peculiar industry, and the transition to a full liberalised market poses quite a number of queries to all the operators in the market, Correos as well.

We think that the cost-saving strategies implemented by the former monopolist deserve at least a cautious scrutiny; not all its pricing policies are *per se* abusive. Markets should be rigorously defined. It is true that the special responsibility doctrine of the dominant firm has to be taken into account, but also the “incursion” of some private operators into reserved areas cannot largely remain overlooked.

There's still lack of rigorous analysis in evaluating some conducts that on a day-to-day basis take place in this markets. Before rapidly considering the delivery network as an essential facility or magnifying the entry barriers to some postal services, a sound economic assessment is due.

## VI. Conclusions.

After all that has been said, and all the cases reviewed, some concluding remarks are offered in this final section. These deal basically with the interface between regulation and competition, the role of the abuse of dominant provision to tackle anticompetitive behaviour, the effectiveness of jurisprudence to guarantee a fair market, and, finally, some suggestions for the future regulatory framework.

In the first place, it seems that the key points in this debate are what is the existing level of competition, and how competition should be regulated and why. We think that the core issue in this field is establishing the right balance between regulation and competition,

However, it must be recalled that, although merely creating a dominant position by the grant of special or exclusive rights is not, in itself, incompatible with Article 82 of the Treaty, a Member State breaches the prohibitions laid down by Article 86(1) of the Treaty in conjunction with Article 82 if it adopts any law, regulation or administrative provision that creates a situation in which an undertaking on which it has conferred exclusive rights cannot avoid abusing its dominant position. We have seen that in most of the decisions and cases in this industry, postal operators act under the coverage of some national legislation.

In addition to it, and this is one of the key issues in our study, given the peculiar scheme derived from the coexistence of statutory separated-but-connected markets, which provides, as has been shown, a particularly apt scenario for implementing specific forms of abuse.

In the second place, since the USO constitutes the usual justification for the exclusive rights granted to Postal Public Operators, any use of profits derived from an exclusive right to other end, may be the only way to safeguard their financial viability. Sound economic analysis is therefore necessary as a tool to differentiate when there's such a necessity or the conduct –e.g. cross subsidisation- is not objectively justified.

Thirdly, we have examined whether traditional analytical framework of the competition policy applies to such a restrained market. We have shown that antitrust authorities have taken decisions concerning both “classical” institutions like predatory pricing, cross-subsidies, discriminatory pricing, collusive agreements, and also some recent ones such as the “essential facilities” doctrine, the “abuse in neighbouring markets”, and the “monopoly leveraging” doctrine.

Our conclusion is that these principles apply accurately to some of the pricing schemes and strategic behaviour adopted by former monopolists in postal markets who have to face now a free competition environment, at least in some of the areas of their activities.

The next conclusion is that there is an urgent need to assess the effectiveness of the jurisprudence, that is, evaluate up to what extent antitrust decisions and fines imposed to postal operators achieve the abovementioned goals.

So far, it seems to us that fines and sanctions to Postal operators still do not achieve their deterrence role, since they insistently engage in the same anticompetitive practices regardless of previous condemnatory decisions and sentences.

Finally, as we have already contended in previous sections, application of competition rules and more specifically article 82 will play an important role in maintaining a level playing field and avoiding abuse of dominant position by the incumbents. Further reduction of the ex-ante regulatory involvement is another option to be evaluated. Full reliance on competition rules in a dynamic market requires a very effective legal apparatus to avoid competitive distortion in a developing market before damage is done.

If the goal is to fittingly address the main current postal issues –liberalisation, access/worksharing and universal service- in a somehow consistent approach, the role of both regulatory and competition laws have to be precisely defined. We have suggested some ideas as to how achieve this goal. Other issues remain largely unanswered, and the scope for further debate is widely opened. For example, in a competitive market, how can we justify the use of pricing schemes which are not demand oriented? Furthermore, USP requirements and restrictions may need some flexibility to have a commercial response to entry.

With this paper we do not pretend to give an answer to all the questions posed, but rather draw the attention of lawyers and economists, undertakings and regulators, to quite a bundle of unresolved issues. Consequently, we hope all this considerations are, to any extent, contemplated in the Third Postal Directive.

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