

The Portuguese Competition Authority issues guidance on the forthcoming liberalization of the postal sector (Liberalização do Sector Postal)

Portugal, Regulated sectors, Barriers to entry, Universal service, Excessive prices, Price squeeze , Tying, Postal services

The Portuguese Competition Authority (Authority) issued on 16 July 2010 a guidance document on the state of competition in the postal sector (Report), in anticipation of the forthcoming full liberalization of the sector resulting from the implementation of the EU's Third Postal Directive [1], due on 31 December 2010.

The Report analyzes the characteristics and the evolution the postal sector in Portugal, and identifies the main barriers to entry and expansion that new entrants may face further to liberalisation. The Authority also draws on the past practice of the European Commission and of other EU national competition authorities (NCAs) to analyse "the most common" anti-competitive conduct that may take place in the sector. The Report sets forth a number of recommendations in order to ensure a level playing field in the postal markets.

The postal sector in Portugal

Postal services, traditionally provided in Europe and elsewhere by state-owned monopolies, have gone through a gradual market opening process initiated by Directive 97/67/EC (the First Postal Directive) [2]. Under this process, increasing competition in the postal sector has coexisted with certain services reserved to the Universal Service Providers within national boundaries (so-called "reserved areas"), as a compensation for taking on the uneconomic burden of universal service. The implementation of the Third Postal Directive will abolish the reserved areas and the corresponding exclusive or special rights, at the same time providing alternatives for the continued financing of the universal service.

In Portugal, the universal postal service is entrusted to CTT - Correios de Portugal (CTT), a state-owned corporation. The "reserved area" of the incumbent has been progressively reduced, but at present still represents 78% of the total postal traffic. Express mail, the main liberalised segment, accounts for 25% of total postal revenues in Portugal, although it represents only 2% of total traffic.

Demand for postal services has been decreasing in recent years. Nevertheless, with the gradual opening of the market the number of companies active in the postal sector increased dramatically, from ten in 2002 to sixty by the end of 2009, most of which provide express mail services. CTT still maintains a clear leading position in all the postal market segments open to competition (with shares above 90%), except for express mail, where alternative providers hold a combined share of approximately 60%.

Barriers to entry and expansion

As a result of the present state of market opening in Portugal, the Authority identifies a number of legal restrictions to entry and expansion, the impact of which has been partly reduced by recent regulatory reform (for instance by restricting the scope of the reserved area, by ensuring the access to the public postal network and by providing simplified licensing procedures for new entrants). However, like in other Member States, Portuguese law still exempts the universal services

provider from value added tax (VAT), which places alternative providers at a comparative disadvantage. In addition, the uncertainties related to the concrete terms of the market opening process and the regulatory obligations which will be imposed by the regulator (in particular regarding the access to the incumbent's network) increase the risks of entry.

The Report also identifies a number of "natural barriers" to entry and expansion, which, because related to the "intrinsic characteristics" of the postal sector, will not disappear subsequent to the completion of the liberalisation. From the demand-side perspective, reputation and portfolio effects are considered to be the most relevant, as on the one hand CTT benefits from a strong brand and reputation with clients (in several consecutive years it was considered the most trustworthy institution in Portugal), and on the other corporate clients, which originate approximately 90% of postal traffic, prefer to use a single postal services provider. Conversely, search and switching costs were not found to be particularly high, except for large clients with tailor-made services.

From the supply-side perspective, economies of density (resulting from the concentration of the postal traffic in the largest urban areas) were found to be the most relevant obstacles to entry, since they condition the contestability of geographic areas with lower population density. For this reason, the provision of postal services at the national level by an alternative provider faces significant obstacles, although this factor is less critical for express mail. Other potential supply-side factors, such as buyer power, sunk costs, scale and scope economies and network effects, were found to have a limited effect on market entry.

Antitrust concerns in the postal sector

The Authority foresees that the liberalization of the postal market may raise competition concerns, similarly to the case of other network industries fully liberalised in the past, (such as telecoms), in particular by creating incentives for dominant incumbent operators to adopt anti-competitive behaviour in order to retain or increase its market power.

The Report therefore analyses the recent practice of the European Commission and of several NCAs in the postal sector, observing that the most frequently punished behaviours are related to abuse of dominance cases by incumbents [3], in particular through practices such as:

Cross-subsidization of costs between the reserved area and the liberalised area, by compensating losses in the segments open to competition with revenues from the universal service;

Predatory pricing strategies, in order to exclude as efficient competitors;

Margin squeeze by vertically-integrated companies, through the price increase of wholesale inputs to downstream retail competitors;

Price and quality discrimination of competitors, by unduly favouring the incumbent's retail subsidiaries;

Fidelity and other exclusionary discounts;

Refusal to grant downstream retail competitors access to the network;

Tying reserved services to liberalised services;

Excessive pricing.

Conversely, the Authority considers that cartel behaviour is not common in the sector, due to the existence of national markets and largely dominant incumbents, although a case of a non-aggression cartel between two postal operators fined by the Hungarian Competition Authority is reported [4].

Recommendations

In order to promote the entry of new operators into the Portuguese postal sector, the Authority puts forward a number of recommendations, essentially regarding the regulatory framework:

Whenever possible, postal service should be assured by market mechanisms, including public tenders, in the regions where it is viable;

The selection process of the universal service provider should be transparent and designed in a such a way as to include the largest possible number of qualified candidates;

The access to the postal infrastructure network by alternative operators should be guaranteed in transparent and non-discriminatory conditions, as provided in the Third Postal Directive and in the national legislation; the same applies to the case of network interoperability;

National tax rules should be revised in order to guarantee the application of VAT rules without market distortions.

Comment

The recommendations contained in the Report are in principle directed at the Portuguese Government and at regulator ANACOM, the entities responsible for drafting and enforcing the national legislation and regulations that will implement the Third Postal Directive into Portuguese law.

However, the Report should also be read as a serious warning to present and future postal sector operators in Portugal (and especially to incumbent CTT). The Authority clearly states that further to the completion of liberalisation it anticipates that the enforcement of competition law will be intensified, in order to ensure effective competition. On the other hand, the references in the Report to the precedents of other jurisdictions, as well as the Authority's past practice in the other recently liberalised sectors (such as in telecoms) [5], suggest that exclusionary conduct by dominant companies will be one of the main priorities in the enforcement of competition law in the postal sector.

At the same time, although the Authority sees its intervention as complementary to sector regulation, market operators will have to be particularly careful on the interaction between competition law and sectoral regulation (enforced by ANACOM), especially considering the Deutsche Telekom and Telefonica case law, under which the existence and the application of sector regulation to a given behaviour does not preclude the application of competition law.

Finally, the Authority will have to take care in ensuring that the application of competition law will not obstruct the provision of the universal postal service, which constitutes a service of general economic interest under EU law.

[1] See Directive 2008/6/EC of the European Parliament and the Council of 20 February 2008 amending Directive

97/67/EC with regard to the full accomplishment of the internal market of Community postal services ; OJ L 52, 27.2.2008, p. 3-20.

[2] See Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ; OJ L 15, 21.1.1998, p. 14-25 subsequently amended by Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ; OJ L 108, 24.4.2002, p. 7-20 and by Directive 2008/6/EC.

[3] Commission decisions COMP/38.170 REIMS II Renewal (2003); Commission Decision 2001/354/EC, of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/35.141, Deutsche Post AG) ; OJ L 125 , 05/05/2001, p. 27-44; Commission Decision 2001/892/EC, of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/36.915, Deutsche Post AG - Interception of cross-border mail) ; OJ L 331 , 15/12/2001, p. 40-78; Commission Decision 2002/180/EC, of 5 December 2001 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/37.859, De Post-La Poste) ; OJ L 61, 02/03/2002, p. 32-53. Decisions of the Danish Competition Authority against Post Danmark of 29 November 2004-> (regarding this case, see David Henry, Cédric Cheneviere, The Danish national postal operator finds guilty of abuse of dominant position on the market for the distribution of non-addressed items and local weekly papers (Post Danmark/Forbruger-Kontakt), e-Competitions, n° 174), 30 August 2007 and 24 June 2009; of the German Competition Authority of 11 February 2005, B-9/55/03 (regarding this case, see Thees Willemer, The German competition authority paves way for pre-postal services and rejects the State action defence raised against the application of Art. 82 EC (Deutsche Post), e-Competitions, n° 32 and Helmut Bergmann, Frank Röhling, The German Federal Cartel Office imposes further liberalisation of the postal market by prohibiting the incumbent to grant rebates for mail preparation services (Deutsche Post), e-Competitions, n° 191); of the Spanish Competition Authorities in cases 584/074 - Prensa/Correos, 542/02 - Suresa/Correos of 20.06.2003, and 568/03 Asempre/Correos, of 15 September 2004; of the Italian Competition Authority of 29 March 2006, Posta Ellettronica Ibrida, N.A365 (regarding this case, see Pablo Ibàñez Colomo, The Italian NCA fines € 1.6 M the incumbent postal operator for exclusionary tariffs based on a national decree on the basis of Art. 10, 82 and 86 EC (Posta Ibrida), e-Competitions, n° 559) and of 28 February 2008, Poste Italiane Concessionari Servizi Postali, N.A388 (regarding this case, see Elena Gilardi, Giorgio Candeloro, The Italian Antitrust Authority closes the investigation for abuse of dominance in the Italian postal sector following commitments (Poste Italiane), e-Competitions, n° 18716 and Michele Giannino, The Italian Competition Authority closes investigations for abusive conducts committed by the incumbent post operator with a commitments decision (Servizi postali), e-Competitions, n° 17657); of the Hungarian Competition Authority in case Vj-174/2005 Magyar Posta Zrt; of the Austrian Competition Authority N 26KT 29, of 2005; and of the French Competition Authority in case 4-D-65, of 30 November 2004.

[4] Case Vj-140/2006, Magyar Lapterjeszto/Magyar Posta.

[5] The only abuse of dominance decisions adopted by the Competition Authority since its creation in 2003 were three decisions against telecoms incumbent Portugal Telecom (PT) (see press releases 13/2007, of 2 August 2007, 15/2008, of 01st 2008 and 16/2009, of 2.09.2009).

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