

### Postal services and competition law : An overview of EU and national case law

**Anticompetitive practices, Discriminatory practices, Exclusive right, Predatory pricing, Refusal to deal, Access to facilities, Remedies (antitrust), Barriers to entry, Margin squeeze, Agreement (notion), Foreword, Judicial review, Remedies (mergers), Market definition, Postal services**

Note from the Editors : Although the e-Competitions editors are doing their best efforts to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database can not be guaranteed. The present foreword provides readers with a fair view of the existing trends based on cases reported in e-Competitions and alternative sources gathered by the author. Readers are welcome to bring to the attention of the editors any other relevant cases.

Lars Kjølbye, Christos Malamataris, e-Competitions | N° 77572, [www.concurrences.com](http://www.concurrences.com)

#### I. Introduction

Postal services play a key role in a well-functioning and dynamic EU Single Market and they are of crucial importance to businesses and EU citizens alike. In particular, the parcel sector is experiencing significant growth in terms of volume and plays an important role in the development of e-commerce. Despite the prevalence of email in today's communications, letter posts also remain relevant, accounting for 0.34% of the EU's GDP.

After the opening of the postal sector to competition in a gradual and controlled way, the European Commission ("Commission") is seeking to improve further the quality of delivery and access to postal services and achieve a well-functioning Single Market for postal services [1]. The effective application of competition law is a critical ingredient [2]. However, sectors historically dominated by statutory monopolies (such as the postal sector) have often not evolved easily towards effective competition [3]. The conduct of postal services providers have raised competition concerns relevant to the EU Competition rules.

This Foreword provides an overview of recent decisions concerning anti-competitive practices in the postal sector adopted by the EU Courts, the Commission, and Member State competition authorities ("NCAs") and courts. Several of these cases deal with key issues of the application of competition law in the postal sector (and beyond) such as :

- The definition of relevant product markets going forward (*Slovenská pošta*) ;
- The "as efficient competitor test" and the cost benchmarks used to identify abuse of dominance (

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*Post Danmark I and II* ;

- The scope of judicial review in fact-intensive competition cases (*Posten Norge*) ;
- The first merger prohibition under the significant impediment to effective competition test involving entities would not be dominant post-transaction (*UPS/ TNT*).

A common theme emerging from both the EU and the national cases is that a case-by-case assessment is necessary at all levels of the competition analysis (e.g., relevant market definition ; dominance ; abuse ; remedies in merger cases). High-level guidance provided through soft law is valuable but cannot substitute a detailed appraisal of the facts — in particular in the postal sector, where market dynamics were (and still are) substantially affected by the existence of special or exclusive rights.

The remainder of this Foreword is structured as follows. Section II discusses market definition in the postal sector and the role of the Commission's 1998 Postal Notice ("the 1998 Notice"). Section III describes how competition authorities and courts treat unilateral anti-competitive practices in the postal sector. Section IV turns to the decisional practice of the Commission and NCAs regarding mergers in the sector. This Foreword does not cover cases involving anti-competitive agreements in the postal sector. No such cases were reported in E-Competitions in recent years [4].

## **II. Market definition**

The 1998 Commission Notice makes the following points in terms of market definition :

- *markets where special/exclusive rights exist or existed (e.g. universal service obligation reserved area, USO-R) must be separately defined.* Following that view, in a case of abuse of dominance involving *Correos* (Spanish postal incumbent), the Spanish NCA distinguished two markets : the USO-R and all liberalized postal services [5]. Albeit distinct, the two markets were considered as being linked.
- *clearance, sorting, transport and delivery of mail in principle constitute distinct markets.* Indeed, deciding on a case of discriminatory pricing, the Higher Regional Court of Düsseldorf examined the transportation of letters separately from the collection and pre-sorting services of *Deutsche Post* [6].
- *different categories of customers and postal items must be distinguished in terms of market definition.* The Spanish NCA underlined that services to business and services to non-business customers do not belong to the same market, because there is no demand-side substitutability [7].
- *activities combining new telecommunication technologies with elements of postal services are distinct markets.*
- *territories of the Member States constitute separate geographic markets for the delivery of domestic and inward cross-border mail* [8]. In Denmark, the NCA and national courts followed this rule and even extended it to services that are not reserved, such as unaddressed mail [9].

While NCAs and national courts generally follow the basic principles contained in the Notice when dealing with competition cases in the postal sector, there are also exceptions. In 2009, the Dutch

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NCA considered that transport, sorting, distribution and delivery of letters belonged to one over-arching market [10]. In another case, when assessing the partial acquisition of *Leijona Oy* by *Suomen Posti Oyj*, the Finnish NCA viewed the postal distribution market “as a whole” [11].

More recently, in *Slovenská pošta*, the Commission itself was accused of departing from the Postal Notice. In its abuse of dominance decision concerning the Slovakian incumbent postal operator, the Commission defined a separate market for hybrid mail services, which included all levels of the distribution chain, including delivery. According to the Postal Notice, *Slovenská pošta* argued, the Commission should have defined a separate market for the traditional delivery of postal items and then assess whether that market included the physical delivery of postal items generated in the context of hybrid mail. The General Court upheld the Commission’s decision. It found that the Postal Notice does not oblige the Commission to distinguish delivery from the other services, but only gives general guidance as shown by the use of the terms “in principle”. In fact, according to the General Court, “[t]he market can only be defined for each individual service according to the particular circumstances of each case”. [12]

### III. Unilateral anti-competitive practices

The most important competition issues in the postal sector (as in all recently liberalized industries) generally concern allegations that dominant incumbent operators have engaged in abusive conduct to foreclose competitors. Below is a summary of the most relevant EU Court, national court, and NCA cases, looking *first* at dominance and *second*, at abuse.

#### 1. Dominance

As set out in the Commission’s 2008 Guidance Paper, three criteria are key for a finding of dominance [13] : the market position of the dominant undertaking ; barriers to entry for actual or potential competitors ; and countervailing buyer power.

The NCAs and national courts that examine unilateral conduct cases in the postal sector generally apply the same criteria to identify dominance. Generally, it is not difficult to establish a strong market position, since the incumbent operator tends to have a significant position in the local postal market. Finding that barriers to entry exist is, however, more controversial. In the postal sector, typical barriers to entry resulted from areas of activity reserved by law for one postal operator. Under the Third Postal Directive [14], reserved areas have been abolished since 1 January 2011. All operators can now, in principle, compete in the market for all types of postal services. Even so, entry barriers continue to subsist in this sector. For example, in its decision of April 2013, the Spanish NCA found that *Correos* was dominant in the wholesale market for access to the public postal network and the retail market for the provision of postal services for administrative notifications as a consequence of the privileges it had been enjoying over the past years. When assessing *Correos*’ dominance, the Spanish NCA also took into account that the company was the designated operator of the universal service, although it did not benefit from a reserved area after 2011 [15].

#### 2. Abuse

##### A. Refusal to Supply

A firm can be found to abuse its dominant position when it refuses to supply an input that is

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objectively necessary to undertakings that compete in a downstream market and, as a result, eliminates effective competition in that market and causes consumer harm [16].

In April 2013, the Spanish NCA found that Correos (the incumbent postal operator) abused its dominant position in the *upstream* market for access services to the public postal network and the *downstream* services market for administrative notifications. Administrative notifications are communications addressed to individuals by public administration and courts in Spain. When those notifications are sent through Correos' public postal network, they benefit from a legal presumption of veracity and authenticity. Correos held a 100% market share in the upstream market but faced competition in the downstream market, as a few private operators had entered offering administrative notification services to the public administration. In 2011, Correos refused to grant access to the public postal network to private operators handling administrative notifications. The NCA found that such access was essential for the operators to compete in the retail market. It was practically impossible for those operators to replicate Correos' postal network and even if they did, their deliveries would still not benefit from the presumption of veracity and authenticity which exists for deliveries through the Correos network. The NCA concluded that i.a., Correos' refusal created an insurmountable barrier to entry in the downstream market, because it prevented other operators from providing administrative notification services to public authorities who require the presumptions described above.

The Federal Cartel Office in Germany also investigated a refusal to supply case in the postal sector. The proceedings were initiated after Compador (a company affiliated with Deutsche Post) refused to continue providing maintenance services for the letter sorting machines of PostCon (a competitor of Deutsche Post). The FCO found that some of the maintenance services could only be provided by Compador. Without those services, it would be impossible for PostCon to sort a portion of its letters and compete effectively against Deutsche Post. The proceedings were abandoned after Compador proposed a new contract to PostCon that was in line with the FCO's requirements [17].

## B. Margin squeeze

In *TeliaSonera*, the Court of Justice of the EU ("CJEU") found that a margin squeeze could, "*in itself, constitute an independent form of abuse distinct from that of refusal to supply* [18]." Put simply, a margin squeeze is an individual category of abusive conduct and can be found to breach Article 102 TFEU even where the dominant company is not obliged to supply its downstream competitor (e.g., because its input is not indispensable).

As far as the postal sector is concerned, a margin squeeze may occur particularly in liberalized markets when the incumbent's competitors rely on its network infrastructure to provide their services. For instance, a postal operator often controls a key input (e.g., "last mile" delivery of letters) supplied to rivals (e.g., providers of delivery-related services like mail preparation). By setting a high price for the input (here, access to delivery) and/or a low price for the retail product (here mail service), a postal operator could foreclose "as efficient" competitors.

In January 2014, the Spanish NCA fined Correos (the incumbent postal operator) more than EUR 8 million for margin squeeze. Correos competes with rivals such as Unipost in the retail market for postal services involving large senders in Spain. To offer those services, Unipost and others needed access to the public postal service network, which is managed by Correos. The NCA found that

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Correos offered discounted prices to large senders while it was charging very high prices to its downstream rivals for access to the network. As a result, Unipost and other rivals could not viably offer their services to large customers [19].

Poste Italiane, the incumbent postal operator in Italy, was active in the upstream market of hybrid mail (through its subsidiary Postel). Postel faced competition by several rivals. Poste Italiane was also active in the downstream market for hybrid mail delivery, in which there was no competition. The operators in the upstream market had to use Poste Italiane's services to deliver hybrid mail. In 2003, an undertaking lodged a complaint with the Italian NCA claiming, among other things, that it was charged the regular postal tariff by Poste Italiane for delivery of hybrid mail, while Postel was proposing to big customers reduced postal delivery tariffs, if they used its own hybrid mail services. The NCA found that this conduct was abusive, because Poste Italiane was margin squeezing its competitors in the hybrid mail market. The NCA imposed a fine of EUR 1.6 million on Poste Italiane in 2006 (for this and other abusive conduct) [20].

### C. Exclusive Dealing And Related Practices

A dominant undertaking may also abuse its dominant position if it forecloses competitors through the use of exclusive purchasing obligations or rebates.

In April 2012, the EFTA Court handed down a judgment in a case on exclusive dealing in the postal sector (*Posten Norge*) [21].

The Court upheld the decision of the EFTA Surveillance Authority, which looked into the establishment of Posten Norge's Post-in-Shop network. With this initiative, Posten Norge sought to provide parcel delivery and other services through retail outlets owned by third parties, such as supermarkets and petrol stations. In the framework contracts with the Post-in-Shop partners, Posten Norge included exclusivity clauses preventing them from granting access to their outlets to Posten Norge's competitors. The exclusivity obligations foreclosed Posten Norge's parcel delivery competitors from approximately 50% of all outlets in grocery stores, kiosks, and petrol station chains in Norway. The exclusivity clauses had been in place for 5-6 years and Posten Norge was considering extending them further. The EFTA Surveillance Authority found that Posten Norge had abused its dominant position in the market for business-to-consumer over-the-counter parcel delivery by pursuing an exclusivity strategy with preferential treatment when establishing its Post-in-Shop network. The EFTA Court upheld the decision of the EFTA Surveillance Authority [22].

In 2012, the Irish NCA launched an investigation into exclusivity rebates granted by An Post (the Irish incumbent postal operator) to its customers. More specifically, the rebates concerned An Post's zonal pricing scheme for the delivery of newspapers and periodicals. In 2014, the NCA found that An Post charged lower prices to publishers that used its services exclusively and attempted to charge higher prices to publishers that also used a competitor. The NCA held that An Post's conduct constituted an abuse of dominance under the "formalistic per se" approach but added that it also had likely anticompetitive exclusionary effects. In its assessment, the NCA also took into account (i) the lack of transparency in the application of the zonal pricing scheme and (ii) An Post's internal documents directly referring to the company's exclusionary strategy. An Post amended its procedures for the application of the zonal pricing scheme and addressed the competition concerns raised during the proceedings. As a result, the NCA closed the investigation [23].

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## D. Predatory Pricing

Under the seminal *AKZO* judgment [24], a dominant firm's pricing is presumed predatory (and thus abusive) when prices are set below its average variable costs ("AVC"). If the dominant firm's prices are above AVC but below average total costs ("ATC"), unlawful predation can only be established on the basis of additional evidence. The 2008 Guidance Paper retained the logic of this test but changed the relevant cost benchmarks. Instead of AVC and ATC, prices have to be compared to the average avoidable cost ("AAC") and the long term average incremental cost ("LRAIC"), respectively [25].

In the postal sector, the Commission proposed a specific approach to predatory pricing : in the *Deutsche Post* decision, the Commission stipulated that a multi-service undertaking "*must earn revenue on [a particular] service which at least covers the costs attributable to or incremental to producing the specific service*", or the average incremental cost ("AIC") [26]. In that case, the AIC was defined as including variable and fixed costs arising solely from the provision of the service in question.

When dealing with predatory pricing cases in the postal sector, NCAs are inspired by the logic of the *AKZO* test, but are inconsistent in the use of relevant cost benchmarks.

For example, the Danish NCA investigated the pricing of Post Danmark (the Danish incumbent postal operator) in unaddressed mail services and in 2004, fined Post Danmark for abuse of dominance. The NCA found that Post Danmark had been charging below-cost prices to three customers of its main rival (Forbruger-Kontakt or "FK"). Post Danmark appealed the decision to the Eastern High Court, which upheld the NCA's decision. Post Danmark appealed to the Supreme Court, which requested a preliminary ruling from the CJEU. In March 2012, the CJEU handed down its ruling, which focused on two types of pricing conduct :

- To one of FK's customers, Post Danmark offered prices that were above AIC but below ATC. The Danish NCA had calculated the AIC by taking into account : (i) the fixed and variable cost attributable to the distribution of unaddressed mail ; (ii) common variable costs ; (iii) 75% of attributable common costs of logistical capacity ; and (iv) 25% of non-attributable common costs. This method of calculation went much further than the definition of AIC that the Commission gave in *Deutsche Post*, where AIC should only cover element (i) above [27].
- The CJEU considered the AIC benchmark used by the Danish NCA but did not confirm nor criticize its application. The Court limited itself to stating that "*[i]n the specific circumstances of the case... it must be considered that such a method of attribution would seem to seek to identify the great bulk of the costs attributable to the activity of distributing unaddressed mail*" [28].

The CJEU went on to note that prices above AIC and below ATC constitute an abuse of dominance only if the national court can establish that they produce an actual or likely exclusionary effect to the detriment of competition. In the case of Post Danmark, this was unlikely as FK eventually won back the customer [29]. Nor did the CJEU consider Post Danmark's pricing as part of a plan for eliminating competitors [30].

- As regards the other two customers, Post Danmark offered prices above ATC but below what it was offering to its pre-existing customers. The CJEU stated that "*in those circumstances, it cannot be concluded that such prices have anticompetitive effects*" [31]. The CJEU thus confirmed the views

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of AG Mengozzi who opined that only in exceptional circumstances can above-cost pricing (albeit selective) qualify as an abuse of dominant position [32].

Based on the CJEU's responses, the Danish Supreme Court overturned the decision of the NCA in February 2013 [33].

In December 2009, the Dutch NCA examined a complaint against TNT (the Dutch incumbent postal operator) for abuse of dominance in the market for addressed print, by engaging, among other practices, in predatory pricing [34]. The Dutch NCA assessed separately the sacrifice and the foreclosure elements of TNT's behaviour. As to sacrifice, the Dutch NCA used the LRAIC benchmark. The NCA's investigation demonstrated that average prices had been consistently above LRAIC and hence, TNT's pricing entailed no sacrifice. As regards foreclosure, the NCA took into account the development of the complainant's competitive position over the years. Given that the complainant increased its returns almost every year and won tenders against TNT, the NCA decided that the complainant was not foreclosed by TNT's pricing. When comparing the pricing of the addressed print service to the LRAIC benchmark, the Dutch NCA explicitly mentioned that it followed the incremental cost test of the Deutsche Post decision. This means that it only took into account the incremental costs of addressed print services (liberalized service), without considering any costs related to the universal service obligation.

## E. Discriminatory Pricing

According to Article 102(c) TFEU, a dominant firm commits an abuse when it applies "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". Price differentiation is common in the postal sector. An example is the practice of postal operators to grant preferential tariffs for large mail senders, without extending them to mail intermediaries. The latter are competitors of the postal operator who offer mail preparation services (i.e., collection of mail, sorting, delivering to access points) to customers of the postal operator. The issue was examined by NCAs and national courts in France and Germany. Interestingly, the outcomes differed.

In 2007, *La Poste* notified to the French NCA its rebate scheme for 2008. Among other mechanisms, *La Poste* offered rebates to its large customers through a system of so-called "commercial contracts" (*contrats commerciaux*). These rebates were calculated on the basis of the turnover realized by *La Poste* with the client in question. However, they only concerned direct senders, while excluding, among others, mail intermediaries. The French NCA [35] and French courts [36] found that *La Poste* was within its rights to not extend its rebates regime to mail intermediaries. This approach can be justified on the grounds that postal rebates were granted to stimulate demand, which is only achieved when rebates are directed at mail originators [37].

By contrast, in Germany, the Federal Cartel Office (FCO) examined a rebate scheme of Deutsche Post, whereby a price reduction was given to large customers who perform mail preparation services themselves, as long as they exceeded a specific volume threshold. This price reduction was not given to mail intermediaries. This was found to constitute unlawful discriminatory pricing. In other words, the FCO suggested that when the rebate is given for the provision of a mail preparation service, large customers and mail intermediaries are in comparable situations. Hence, they should be treated identically, as regards pricing, and receive the same price reductions [38].

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## F. Rebates

On 6 October 2015, the CJEU issued its preliminary ruling in the *Post Danmark II* case [39]. The case provides further guidance on the circumstances under which certain types of rebates by dominant companies can be found to breach competition rules.

*Post Danmark* held a share of approximately 95% in the delivery of bulk mail in Denmark. 70% of the bulk mail market was covered by *Post Danmark*'s statutory monopoly on delivery of mail under 50g. *Post Danmark* offered most of its customers a standardised retroactive rebate of 6-16% applicable to purchases made during a reference period of one year. The rebates applied without distinction to mail falling within and outside the scope of *Post Danmark*'s monopoly rights. The rebate scheme covered the majority of customers on the market.

The CJEU made clear that the rebate in question was neither an exclusivity rebate nor a quantity rebate. The rebate was not conditional on exclusivity or quasi-exclusivity ; nor was it solely linked to the volumes purchased. Rather, a retroactive rebate scheme based on purchases during a reference period falls within a different category and must be assessed in light of all relevant circumstances to gauge its likely effects on competition. For instance, the fact that the rebate scheme covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect. However, the Court held that it was not justified to establish an appreciability ( *de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position since there may be cases where any further weakening of competition will be abusive. It follows that market coverage is a relevant factor, but there is no absolute threshold below which abuse cannot be found.

The CJEU held further that there is no legal obligation to always apply the “as efficient competitor” test before finding abuse. That said, recourse to the “as efficient competitor” test in cases involving rebate schemes is by no means excluded. The test is one tool amongst others for the purposes of assessing whether a rebate scheme is abusive. Specifically as regards the 2008 Guidance, which sets out a version of the as-efficient-competitor test to assess the competitive effects of rebates [40], the Court held that in accordance with its nature, the Guidance merely sets out the Commission's priorities ; accordingly, the administrative practice followed by the Commission is not binding on NCAs and courts.

In the specific circumstances of the case, the Court rejected the application of the “as efficient competitor” test. *Post Danmark* held a very high market share and benefitted from structural advantages conferred, *inter alia*, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, making the emergence of an as-efficient competitor practically impossible. In those circumstances, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking [41].

In their decisions concerning rebates in the postal sector, NCAs have also taken into account some of the conditions of competition and/ or the characteristics of the rebate scheme. For instance :

- In April 2014, the Cypriot NCA adopted a decision rejecting a complaint that the DPS (the Cypriot



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postal incumbent) abused its dominant position in the market for delivery of unaddressed mail. The criteria that the Cypriot NCA took into account broadly follow the Commission's 2008 Guidance Paper. It first compared post-discount pricing of DPS services with the AVC and the ATC linked to the delivery of unaddressed mail. The Cypriot NCA found that under all possible methodologies, the effective price was above the AVC (and in some cases, also above ATC) [42]. The NCA then assessed other elements of DPS' conduct to determine whether this produced an (actual or likely) exclusionary effect to the detriment of competition. Eventually, the NCA found that this was not the case because : (i) the rebates were based on quantity and not only on loyalty ; (ii) they were granted in a transparent way ; (iii) the customers were not locked-in because their contracts with DPS were not long-term ; and (iv) DPS' pricing did not lead to any significant increase in the turnover or the share of DPS in the market.

- In May 2012, the Swedish NCA closed an investigation into a rebate scheme of Posten (the Swedish incumbent postal operator) which offered 20% discounts to customers of Posten's main competitor, Bring Citymail Sweden AB. The Swedish NCA decided that the scheme did not raise competition concerns because it only applied to a few isolated customers. The scheme's effect on the market was found to be very limited as only a small number of customer contracts had been concluded and no actual shipments had been made [43].

## G. Other Types of Abuse

Under Article 102 TFEU, the list of types of conduct that amount to an abuse of dominance is non-exhaustive [44]. Sometimes the specific circumstances of a case are not adequately captured by existing categories of abuse because the tools and mechanisms used to exclude competition differ from those expressly mentioned in Article 102 TFEU or established in the case law [45].

The Italian NCA identified such types of abusive conduct by Poste Italiane on two occasions in recent years :

- *Application of VAT exemption to individually negotiated universal services (2013)*. The universal service provider enjoys a VAT exemption regime for the services it offers to its customers. Under EU rules, this exemption should not apply to customer contracts that have been individually negotiated [46]. However, Poste Italiane (the universal service provider in Italy) extended the VAT exemption regime to such individually negotiated contracts (e.g., contracts involving discounts or departing from its General Conditions). In so doing, Poste Italiane unlawfully gained a competitive advantage vis-à-vis its competitors, who had to include VAT in their prices. Poste Italiane countered that it was required by (Italian) law to exempt the individually negotiated contracts from VAT. The NCA held that such national law was contrary to EU law and disapplied it. However, citing the CIF case law, [47] the NCA did not impose any fine on Poste Italiane, acknowledging that its conduct had been dictated by national legislation [48]. The Regional Administrative Court of Lazio upheld the decision of the Italian NCA in February 2014 [49].

- *Abuse of the control on the postal network (2011)*. In 2011, the Italian NCA found that Poste Italiane used its control over the postal network in Italy in ways that disadvantaged its rival TNT and which did not constitute competition on the merits [50]. TNT had launched the "Formula Certa" service, which guaranteed mail delivery at a specific time and date. When a letter was sent through the Formula Certa service but mistakenly addressed through the Poste Italiane network, Poste

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Italiane would not return the mail to TNT. Instead, the mail was forwarded back to the actual sender. This came at unreasonably high costs for the senders. Moreover, Poste Italiane would destroy mail, if the sender did not want to pay the fee for the return. The NCA found that this did not constitute competition on the merits. The Regional Administrative Court of Lazio overturned the decision of the Italian NCA in 2013. The Regional Court found that even if Poste Italiane did not have a collaborative approach to TNT, this did not amount to anti-competitive foreclosure beyond competition on the merits. The Regional Court added that sporadic evidence of Poste Italiane's conduct was not sufficient – an overall abusive plan would have to be uncovered [51]. The Council of State confirmed the judgment of the Regional Court of Lazio in January 2014 (full text judgment issued in May 2014) [52].

#### IV. Mergers

The most important recent development in mergers in the postal sector is the prohibition of the *UPS/TNT* deal by the Commission in January 2013. In this case, the Commission's investigation focused on the market for international express deliveries of small packages in the EEA. There were only four main players in this market in Europe, also known as "integrators" : UPS, TNT, DHL, and FedEx. Integrators control international seamless air and ground small package delivery networks. Other market players, such as national postal operators, can only compete to a limited extent in this market segment because they do not reach comparable efficiency or reliability, given their heavy reliance on road rather than air transport.

The Commission found that the transaction would significantly lessen competition in 15 Member States, bringing the number of integrators from four to three and in many cases, from three to two. It added that the merger would likely lead to price increases (as corroborated by the price concentration analysis conducted by UPS itself). The combined entity would also face only limited restrictions by new entry or customer bargaining power. Post-transaction, the merged entity would not be dominant. Notwithstanding this, the Commission found that a deal created a significant impediment to effective competition even without the creation or strengthening of a dominant position. Finally, while the Commission accepted that the deal gave rise to certain efficiencies, in particular regarding savings in air network costs, it concluded that such savings would not outweigh the predicted price increases.

While the parties proposed commitments to address the Commission's competition concerns, the Commission did not consider these to be sufficient. The small package delivery sector is a network industry. Being a viable and credible competitor requires having a seamless comprehensive network both at pick-up and delivery points, including development of aircraft fleet. The Commission found that the carve-out remedy the parties proposed would not lead to the emergence of a credible competitor to the merging parties [53]. When Fedex notified its own plan to acquire TNT in 2015, the Commission raised similar concerns on the international express delivery services market. The Commission opened a Phase II investigation in July 2015 focusing again on the international express services market and finding that it is very concentrated (only four players to be reduced to three post-transaction). However, after conducting a price analysis on the markets affected by the deal, the Commission now seems set to approve the merger [54].

Mergers in domestic package delivery are typically dealt with by the NCAs. In 2014, the Polish NCA unconditionally cleared DPD's acquisition of shares in Siodemka. Unlike the Commission's

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assessment in international small package delivery, the Polish NCA found that there are numerous competitors in domestic small package delivery and new entry is easy, fuelled by the practice of ad hoc orders and by customers' strategy to multi-source [55]. In the same vein, in 2012, the French NCA unconditionally cleared the acquisition of Sernam by Calberson, highlighting that there is overcapacity among competitors' domestic package delivery and that buyers have significant countervailing power which could constrain the combined entity despite its relatively high share [56].

NCA's have also looked at mergers involving vertical overlaps in the postal sector. For example, the merger of *Posten AB* (Swedish incumbent postal operator) with a company offering printing and enveloping of business/ marketing mail raised input foreclosure concerns, namely, that post-merger, *Posten AB* could discriminate in favour of customers that purchase mail distribution combined with printing/enveloping services and against customers that are only interested in mail distribution services. The Swedish NCA cleared the transaction but subject to remedies i.e., providing for non-discriminatory open access to all the services of the combined entity [57].

The joint venture ("JV") between Post Danmark (Danish postal incumbent) and a newspaper publisher for the distribution of unaddressed mail raised similar issues, i.e., that Post Danmark might provide cheaper solutions for postal delivery to the joint venture compared to other distributors of unaddressed mail, which also needed to make use of this input. The Danish NCA approved the JV but subject to remedies ensuring that Post Danmark and the JV will continue to act as independent players in the market and that other competitors will not be foreclosed [58].

Although the Parties mainly offer behavioural remedies to address competition concerns in mergers in the postal sector, divestiture remedies are also not uncommon. For instance, in *La Poste/ Swiss Post*, the Commission cleared the creation of a JV in international mail services subject to conditions. The Parties offered to divest Swiss Post International France SAS, namely the subsidiary through which Swiss Post was active in France. The Parties also undertook to transfer to the purchaser the customer relationships of Swiss Post International France SAS [59].

[1] See <http://ec.europa.eu/growth/sectors/...>

[2] See Report from the Commission to the European Parliament and the Council on the application of the Postal Services Directive, SWD (2015) 207, 17 November 2015, pp. 41ff., 52ff., 64ff.

[3] See D. Gérardin, *The Opening of State Monopolies to Competition : Main Issues of the Liberalization Process*, in D. Gérardin (ed.), *The Liberalization of State Monopolies in the European Union and Beyond*, Alphen aan den Rijn : Kluwer Law International, 2000, at p. 181.

[4] For a summary of such cases before 2012, see [Damien Geradin, Christos Malamataris, Postal services and competition law : An overview of EU and national case law, 6 March 2012, e-Competitions Bulletin Postal services, Art. N° 43769](#). This Foreword was finalized before 15 December 2015, when the French NCA issued a decision fining companies for a cartel in parcel delivery (Case 15-D-19). The full text of that decision is available at <http://www.autoritedelaconurrence.....>

[5] See [Sarūnas Keserauskas, The Lithuanian NCA fines the State postal company for discriminatory practices \(Lietuvos Patas\), 5 January 2006, e-Competitions Bulletin January 2006, Art.](#)

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[6] See [Bettina Beer](#), [A German Court confirms a decision of the Bundeskartellamt and adds an additional milestone in the EC recent decisions concerning consolidators in the postal sector \(Deutsche Post\)](#), 13 April 2005, [e-Competitions Bulletin April 2005, Art. N° 15](#)

[7] See [Javier Tapia](#), [The Spanish National Competition Commission rules that neither inter- nor intra-brand competition is affected by restrictive practices in the postal sector \(Logimail/Unipost\)](#), 23 October 2007, [e-Competitions, n° 15162](#)

[8] See Commission Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services ; OJ C 39, 6.2.1998, p. 2-18, paras 2.1.

[9] See [Morten Kofmann](#), [The Danish Competition Council approves the creation of a JV for the distribution of unaddressed mail, including newspapers, subject to nine behavioural commitments, including distribution obligation \(Post Danmark/365 Media Scandinavia\)](#), 30 August 2006, [e-Competitions, n° 21225](#) and [Gaucho Rasmussen](#), [The Danish Competition Appeal Tribunal upholds findings by the Danish NCA that the postal incumbent has abused its dominant position in the market for distribution of unaddressed mail on the basis of Art. 82 EC \(Post Danmark\)](#), 1 July 2005, [e-Competitions, n° 337](#)

[10] See [Margot Aelen, Loes Brekhof](#), [The Dutch Competition Authority finds no abuse of dominance in the postal sector \(TNT\)](#), 15 December 2009, [e-Competitions, n° 34057](#) and [Douwe Groenevelt](#), [The Dutch Competition Authority dismisses alleged predatory pricing, tying and bundling, discriminatory pricing and foreclosure through exclusive and/or multi-year contracts in the postal market \(Sandd/TNT\)](#), 15 December 2009, [e-Competitions, n° 32024](#)

[11] See [Kari Niemenoja](#), [The Finnish Competition Authority cleared a merger in the postal services market with remedies \(Posti/Leijonajakelu\)](#), 22 August 2003, [e-Competitions, n° 20797](#)

[12] Case T-556/08 *Slovenská pošta a.s.*, ECLI:EU:T:2015:189, para. 120.

[13] *Id.*, paras 9-18.

[14] See Directive 2008/6/EC of the European Parliament and of 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..

[15] See [Article from European Competition Network Brief](#), [The Spanish Competition Authority fines incumbent operator for abuse of dominant position in postal sector \(Correos\)](#), 22 April 2013, [e-Competitions, n° 53278](#), and [Luis Blaquez Palasí](#), [The Spanish Competition Authority fines postal operator for abuse of dominant position in the wholesale market for access services to the public postal network and the retail services market for administrative notifications \(Correos\)](#), 22 April 2013, [e-Competitions, n° 52524](#)

[16] 2008 Guidance Paper on Article 102, para. 81.

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[17] See [Article from European Competition Network Brief, The German Competition Authority ceases the investigation concerning an alleged abuse of dominance in the market for alternative postal services \(Compador Technologies / DPAG\), 23 October 2013, e-Competitions, n° 59576](#)

[18] Case C-52/09 *TeliaSonera* EU:C:2011:83, paras. 55 and 56. See [Alexandre G. Verheyden, Serge Clerckx, The EU Court of Justice issues a preliminary ruling in a case concerning price squeeze abuses providing clear guidance on this issue \(TeliaSonera\), 17 February 2011, e-Competitions Bulletin February 2011, Art. N° 50200](#)

[19] See [Article from European Competition Network Brief, The Spanish Competition Authority fines a postal service provider in margin squeeze case \(Correos\), 21 January 2014, e-Competitions, n° 64348](#)

[20] See Italian NCA, Case No. 365, *Posta Ibrida*, Provvedimento No. 15310, 29 March 2006.

[21] See EFTA Court, 18 April 2012, Case E-15/10, *Posten Norge AS v. EFTA Surveillance Authority*, available at <http://www.concurrences.com/Bulleti...>

[22] The Court reduced the fine imposed on Norway Post from EUR 12.89 million to EUR 11.112 million on account of the excessive length of the administrative procedure.

[23] See [Article from European Competition Network Brief, The Irish Competition Authority publishes an enforcement decision concerning state postal services provider \(An post\), 30 October 2014, e-Competitions, n° 72080](#)

[24] Case 62/86, *em>AKZO Chemie v. Commission*, ECLI:EU:C:1991:286.

[25] 2008 Guidance Paper on Article 102, paras 63-69

[26] European Commission, 20 March 2001, Case 35.141, *Deutsche Post AG*, [2001] OJ L125/27, para 10.

[27] Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172.

[28] *Id.*, para. 34.

[29] *Id.*, para. 39.

[30] *Id.*, para. 29.

[31] *Id.*, para. 36.

[32] Case C-209/10 *Post Danmark I* ECLI:EU:C:2011:342 (AG), para. 95. Such exceptional circumstances include : (i) super-dominance ; (ii) intention to drive out competitors evidenced by internal documents ; (iii) broader strategies involving abuses of dominance. See [Wessel Geursen, The EU Court of Justice endorses an effects-based approach on the assessment of low pricing policy under Article 102 TFEU \(Post Danmark\), 27 March 2012, e-Competitions Bulletin March 2012, Art. N° 57395](#)

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[33] See Case No. 2/2008. Summary is available in English at <http://www.supremecourt.dk/supremec...>

[34] See [Douwe Groenevelt, The Dutch Competition Authority dismisses alleged predatory pricing, tying and bundling, discriminatory pricing and foreclosure through exclusive and/or multi-year contracts in the postal market \(Sandd/TNT\), 15 December 2009, e-Competitions, n° 32024](#)

[35] French Competition Authority (Conseil de la concurrence), 20 December 2007, Opinion 07-A-17, *relatif à une demande d'avis de l'Autorité de régulation des communications électroniques et des postes (ARCEP) sur le dispositif de remises commerciales de La Poste*.

[36] French Supreme Court (Cour de Cassation), 5 May 2009, Case No. 08-15290 upholding the decision of the Paris Court of Appeal, (Cour d'Appel de Paris), 26 March 2008.

[37] D. Gérardin, Price discrimination in the postal sector and competition law, in M. Crew and P. Kleindorfer (eds), *Reinventing the postal sector in an electronic age*, Cheltenham/Northampton : Edward Elgar, 2010, p. 231.

[38] See [Helmut Bergmann, Frank Rohling, The German Federal Cartel Office imposes further liberalisation of the postal market by prohibiting the incumbent to grant rebates for mail preparation services \(Deutsche Post\), 11 February 2005, e-Competitions, n° 191](#) and [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 \(Deutsche Post\), 11 February 2005, e-Competitions, n° 32](#). For the decision of the High Regional Court of Düsseldorf on this case, see [Bettina Beer, A German Court confirms a decision of the Bundeskartellamt and adds an additional milestone in the EC recent decisions concerning consolidators in the postal sector \(Deutsche Post\), 13 April 2005, e-Competitions, n° 15](#)

[39] Case C-23/14 Post Danmark II EU:C:2015:651. See [Daniel Muheme, Maria Tsoukala, The EU Court of Justice rules on issues concerning retroactive rebates and the procedures through which these rebates can be characterized as abusive \(Post Danmark II\), 6 October 2015, e-Competitions Bulletin October 2015, Art. N° 76553](#) ; [Frederic Depoortere, Ingrid Vandendorpe, Simon Baxter, The EU Court of Justice rules on retroactive loyalty rebates \(Post Danmark II\), 6 October 2015, e-Competitions Bulletin October 2015, Art. N° 76217](#) ; [Peter Alexiadis, David Wood, The EU Court of Justice confirms "safe harbour" for volume rebates but creates new challenges \(Post Danmark II\), 6 October 2015, e-Competitions Bulletin October 2015, Art. N° 76174](#)

[40] European Commission Communication – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7, paras. 39-44.

[41] See L. Kjøbye/ C. Malamataris/ J. Wileur, Main developments in Abuse of Dominance enforcement (September 2014 – October 2015), 1 *Competition Law and Policy Debate* 2015 (4) 4-13.

[42] See Cypriot NCA Decision 22/2014, Andreas Alexandrou Accessories Ltd v. DPS, 24 April 2014. On an interim decision in the same case, see [Cypriot Competition Authority, The Cypriot Commission for Protection of Competition imposes fines for not providing the information requested during the investigation of a complaint in the postal sector \(DPS\)", 3 October 2012, e-Competitions,](#)

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[43] See [Article from European Competition Network Brief, The Swedish Competition Authority closes investigation on alleged abuse of dominant position by the incumbent postal operator \(Posten\), 3 May 2012, e-Competitions, n° 48361](#)

[44] See e.g., Case C-95/04 *British Airways* EU:C:2007:166, para. 57, See also Case 6/72 *Europemballage Corporation and Continental Can Company Inc.* EU:C:1975:50, para. 26, which reads : “[Article 102] states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty...”.

[45] This is confirmed in the EU Courts’ case law. In *Tetra Pak II*, the dominant firm argued that the tied sales of cartons and filling machines were not caught by the wording of Article 102(d) since there was a natural link between the two and tied sales were in accordance with commercial usage. The CJEU ruled, however, that the list of abusive practices set out in Article 102 is not exhaustive and even where tied sales of two products are not covered by the exact wording of the Article “such sales may still constitute abuse within the meaning of Article [102] unless they are objectively justified” (Case C-333/94 *Tetra Pak II* ECLI:EU:C:1996:436, para. 37. On the basis of this case law, the Commission ruled in *BdKEP/ Deutsche Post* that “D[eu]tsche P[ost]’s arguments based on a tight reading of the wording of Article [102](c) are not relevant” (Case COMP/38.745, *BdKEP/ Deutsche Post AG and Bundesrepublik Deutschland*, para. 97). See [Manuel Martinez Lopez, Silke Obst, The European Commission adopts a decision based on Article 86 regarding certain provisions of Germany’s postal regulatory framework which bar commercial mail preparation firms from earning discounts for handing over presorted letter at incumbent’s sorting centers \(Deutsche Post. BdKEP\), 20 October 2004, e-Competitions Bulletin October 2004, Art. N° 36869](#)

[46] Case C-357/07 *TNT Post UK Ltd v. The Commissioners for Her Majesty’s revenue and Customs* ECLI:EU:C:2009:248.

[47] Case C-198/01 *CIF v. Autorità Garante della Concorrenza e del Mercato* ECLI:EU:C:2003:430, para. 58.

[48] See [Sara Lembo, The Italian Competition Authority opens an investigation against postal incumbent in order to assess if it had applied the VAT exemption regime on universal services in breach of Art. 102 \(VAT regime on postal services\), 6 March 2012, e-Competitions, n° 49700](#)

[49] *id.*

[50] See Italian NCA decision A413—*TNT Post Italia/Poste Italiane*, 21 February 2012.

[51] Regional Administrative Court of Lazio, Judgment no. 5769, 25 June 2012.

[52] Italian Council of State, Judgment no. 2302, 6 May 2014.

[53] See [Porter Elliott, The European Commission prohibits a merger considering that efficiencies arguments were not enough verifiable \(UPS/TNT Express\), 30 January 2013, e-Competitions, n° 66954](#) and [Nicolas Petit, The EU Commission blocks a proposed acquisition in the express mail](#)

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[service \(UPS / TNT\), 30 January 2013, e-Competitions, n° 54691](#)

[54] See <http://investors.fedex.com/news-and...>

[55] See [Bartosz Turno, Katarzyna Bojarojć, The Polish competition authority clears an acquisition in the small package delivery sector\(DPD / seven\), 1 October 2014, e-Competitions, Art. n° 71302](#)

[56] See [Article from European Competition Network Brief, The French Competition Authority clears a merger in the parcel delivery sector \(Calberson / Sernam\), 12 November 2012, e-Competitions, n° 58517](#)

[57] See [Sara Bergdahl, The Swedish Competition Authority clears an acquisition in the market for postal services, subject to a behavioural remedy \(Posten/Stralfors\), 12 May 2006, e-Competitions, n° 22235](#)

[58] See [Morten Kofmann, The Danish Competition Council approves the creation of a JV for the distribution of unaddressed mail, including newspapers, subject to nine behavioural commitments, including distribution obligation \(Post Danmark/365 Media Scandinavia\), 30 August 2006, e-Competitions, n° 21225](#)

[59] European Commission, Case COMP/M.6503, *La Poste/ Swiss Post/ JV*, 4 July 2012, paras. 65ff.

Lars Kjølbje | Latham & Watkins (Brussels) | [lars.kjolbye@lw.com](mailto:lars.kjolbye@lw.com)

Christos Malamataris | Latham & Watkins (Brussels) | [christos.malamataris@lw.com](mailto:christos.malamataris@lw.com)