Enhancing competition in the postal sector: Can we do away with sector-specific regulation?

Paper prepared for the 14th Conference on Postal and Delivery Economics, Bern, 1-3 June 2006

Damien Geradin
Professor at the Universities of Liège, and the College of Europe, Bruges
Of Counsel, Howrey LLP

I. Introduction

Over the last ten years, the European Commission (hereafter, the "Commission") has been trying to increase competition in the postal sector.[1] In order to achieve this goal, as well as other objectives such as the enhancement of the quality of postal services in the EU and the maintenance of universal service, the Commission adopted a first postal directive in 1997.[2] Directive 97/67 sought to progressively reduce the scope of the postal incumbents' reserved area, but also imposed a range of regulatory obligations on postal operators. This directive was amended by Directive 2002/39, which further reduced the scope of the reserved area and clarified a certain number of regulatory provisions.[3] The Commission is expected to issue its proposal for a third postal directive by the end of this year, initiating the process of full accomplishment of the internal market for postal services by the original target date of 2009 as indicated in the 2002 directive.

While Directives 97/67 and 2002/39 have certainly contributed to open the postal sector to competition, the level of competition achieved in this sector is quite uneven. Some segments of the postal market are now subject to intense competition. Yet, others are still largely controlled by postal incumbents. The level of competition within one market segment can also considerably vary among Member States. While some Member States have completely liberalized their postal sector by going further than the requirements contained in the postal directives, others decided not go further than these requirements.

Experience teaches that creating competition in freshly liberalized industries is not easy.[4] Incumbents will generally retain considerable market power for a number of years after liberalization. Telecommunications incumbents, for instance, still largely hold strong market positions although the sector has been fully liberalized for almost ten years. In addition, the Commission has recently acknowledged that liberalization efforts in the gas and electricity

---

1 See D. Geradin, Ed., *The Liberalization of Postal Services in the European Union*, Kluwer Law International, 2002

2 Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of the quality of the service, (1998) O.J. L 15/14.

3 Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal service, OJ L 176 of 5 July 2002 pp.21-25

4 See D. Geradin, "The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process", in D. Geradin, Ed., *The Liberalization of State Monopolies in the European Union and Beyond*, Kluwer Law International, 2000, at p. 181.

markets had failed to reach their targets.[5] Similar findings can be made in the postal and transport sectors.

Several factors contribute to the difficulty of creating competition in these industries. Incumbents generally hold a number of significant advantages compared to new entrants, such as considerable expertise, an established brand name, the ability to achieve economies of scale (due to size) or scope (due to vertical/horizontal integration), as well as special connections with public authorities, which often remain shareholders of these firms. Another potential barrier to entry in these industries (which are often referred to as "network industries") comes from the fact that incumbents will typically hold elements of network infrastructure, which are needed by new entrants to compete on the market.

Controlling incumbents' market power is thus a central concern in liberalized industries, such as the postal sector. Such control can be achieved through two complementary tools.[6] First, sector-specific regulation can be used to address market failures, such as, for instance, the presence of bottlenecks. Competition rules can also be used to control market power, notably by preventing incumbents to abuse of their dominant position on some markets. Such rules may also deal with a range of other anti-competitive practices, such as restrictive agreements between competitors or the granting of illegal State aids. While competition rules play a fundamental role with respect to the creation, strengthening or maintenance of competitive market structures in the postal sector, the primary focus of this paper will be on ex ante regulation. There is indeed considerable debate regarding the regulatory framework, which should be provided for in the forthcoming postal directive.

While some operators are calling for the strengthening of the existing regulatory framework applicable to the postal industry, others have been arguing in favor of a light-handed approach to regulation. Pursuant to this view, the forthcoming postal directive should only provide for minimal regulatory requirements, market power being essentially controlled through the enforcement of competition rules. Few would disagree with the overall goal of reducing regulation to its strict minimum, but it is subject to question whether the postal sector is competitive enough to roll back sector-specific regulation. This paper defends the view that sector-specific regulation has still a major role to play in the postal sector and that deregulation is premature.

This paper is divided in five parts. Following this introduction, Part II explains that sector-specific regulation and competition law are complementary tools and that both have a critical role to play to allow for the creation of a competitive postal market. Part III offers some principles for the new postal directive. It critically reviews the claim made by some that postal regulation should follow a light-handed approach and, in particular, that no ex ante access to the postal network regime is needed. Part IV argues that even in the presence of ex ante regulation, competition rules should continue to play a significant role. Ex ante regulation and competition law are complements, not substitutes. Finally, Part V contains a short conclusion.

---

[5] See "The Commission takes action against Member States which have not opened up their energy markets properly", European Commission, Press Release 4 April 2006, IP 06/430. See also, Communication from the commission to the Council and the European Parliament, Report on the functioning of the Internal Market in electricity and gas Brussels, 15 November 2005, COM(2005) 568 final.

[6] See, in the telecommunications sector, Damien Geradin and Michel Kerf, *Controlling Market Power in Telecommunications: Antitrust vs. Sector-specific Regulation*, Oxford University Press, (2003), at p.11.

II. Controlling market power in postal services: Sector-specific regulation vs. competition law

Sector-specific regulation and competition law are complementary tools to control market power and more generally stimulate competition in the postal sector. These instruments present, however, different characteristics.

Sector-specific regulation applies to one sector of the economy in particular, such as the postal sector. Regulatory requirements apply ex ante, i.e. they seek to prevent a problem rather than cure it once it has occurred. Such requirements are generally enforced by specialized agencies, which typically deal with one or a limited number of sectors. One advantage of regulation is that it tends to provide some degree of certainty to market actors. An access to the network regime, for instance, provides potential investors with the guarantee they will be able to access the incumbent's network if they decide to penetrate the market. On the other hand, regulatory regimes may be excessively rigid and thus impede innovation. Such regimes may also contain gaps, which tend only to appear once legislation has been adopted and is being implemented.

Competition rules typically apply to all industry sectors as they seek to prevent certain types of behavior, which can occur in any sector of the economy. These rules tend to apply ex post in that they will only intervene once an anti-competitive behavior has been committed by one or several market actors. Some of these rules, such as for instance those dealing with merger control or State aids, can also apply ex ante. Competition rules cannot provide the same degree of certainty as sector-specific rules as every competition case is different and highly facts specific. A ruling adopted in one case may not necessarily apply to another case. Outcomes of competition law proceedings tend thus to be uncertain. On the other hand, competition rules are very flexible and can apply to a wide range of situations, which could not necessarily have been anticipated by the legislator. They also allow deterring or challenging various anti-competitive practices, which cannot be addressed by ex ante regulation.

Sector-specific regulation and competition rules thus tend to play a complementary role and it is no accident that both tools have been extensively relied upon in liberalized industries. The postal sector is no exception. While the postal directives have established a basic regulatory framework, a range of postal issues have been dealt with through the application of competition rules.[7] Over the last ten years, the Commission has indeed adopted a number of decisions designed to put an end to a variety of anti-competitive practices, such as cross-subsidization, predatory pricing, rebates or tying.[8]

One central issue relates to the design of regulation, which does not necessarily need to be intrusive to be effective. Regulation should be limited to correct market failures and should correct such failures in a way that does not impose unnecessary costs on regulated firms. Regulation is also called to evolve and various phases can generally be observed in the regulation of liberalized industries. The first few years following liberalization will generally

[7] Such as, *e.g.*, the delivery of hybrid email (see Commission Decision 2001/176 of 21 December 2000, New Postal services with a guaranteed day or rime certain delivery in Italy, (2001) O.J. L 63/59)..

[8] See, *e.g.*, Commission Decision 2001/354, Deutsche Post AG, (2001) O.J. L 125/27. For an analysis of these cases, see Damien Geradin and David Henry, "Regulatory and Competition Law Remedies in the Postal Sector" in D. Geradin (ed.), *Remedies in Network Industries – EC Competition Law versus Sector-specific Regulation*, Intersentia, (2004).

involve intense regulation. During these years, liberalized markets tend not to function correctly for the reasons explained above. Regulatory provisions will thus seek to stimulate competition in the liberalized markets while maintaining an acceptable degree of universal service. This first phase is generally followed by a period of progressive deregulation whereby regulation will be streamlined as competition takes place on the market. As some market failures tend to persist, complete deregulation is generally not an option.

An interesting illustration of these different regulatory phases is provided by EU telecommunications regulation, now more exactly referred to as the regulation of electronic communications.[9] After an intensive phase of regulation which lasted for about fifteen years, the EU opted in 2003 for an entirely new regulatory framework replacing the large number of existing directives, some of which were outdated, by a smaller number of pieces of legislation.[10] This new framework is based on the idea that regulation should apply to operators holding significant market power (SMP operators). It also provides for a decentralized approach entrusting national regulatory authorities (hereafter "NRAs") with the responsibility of tailoring the content of regulation to local circumstances. This new regulatory schemes is also intended to follow the principles and methodologies of EC competition law.

Pursuant to this regime, regulatory obligations can be imposed on operators holding SMP in one given market after a four-step analysis, which requires coordinated efforts of the European Commission and the NRAs:

- First, the Commission periodically adopts a Recommendation,[11] which identifies, in accordance with the principles of competition law, the products and services markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in specific directives.[12]

- Second, taking "utmost" account of this Recommendation and the Commission guidelines on market analysis,[13] the NRAs define relevant markets appropriate to

[9] See D. Geradin and J.G. Sidak, "European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications", in M. Cave, S. Majumdar, and I. Vogelsang, Eds. Handbook of Telecommunications Economics, Vol. 2, Oxford University Press, 2005; Alexandre de Streel, "The Integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications", (2003) 26 *World Competition*, 489.

[10] Directive 2002/21 on a common regulatory framework for electronic communications networks and services, 2002 O.J. L 108/33; Directive 2002/20 on the authorization of electronic communications networks and services, 2002 O.J. L 108/21; Directive 2002/22 on universal service and users' rights to electronic communications networks and services, 2002 O.J. L 108/51; Directive 2002/19 on access to, and interconnection of, electronic communications networks and associated facilities, 2002 O.J. L 108/7; Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector, 2002 O.J. L 201/37.

[11] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, O.J. 8.5.2003 L 114/45.

[12] See Article 15(1) of Directive 2002/21, supra note 10..

[13] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, O.J. 2002, C 165/6.

national circumstances, in particular, relevant geographic markets within their territory, in accordance with the principles of competition law.[14]

- Third, the NRAs analyze relevant markets, where appropriate in cooperation with the national competition authorities, to determine whether they are competitive or not.[15] This amounts to determining whether one or several operators hold SMP in a given market.

- Fourth, when the NRA concludes that the market is effectively competitive, it cannot impose or maintain any specific obligations on the operators active in this market, and in cases where sector-specific obligations already exist the NRA must withdraw them.[16] Conversely, when the NRA determines that a relevant market is not effectively competitive, it must first identify operators with SMP on that market and impose specific obligations on them from the menu of remedies proposed by the directives.[17] The remedies include obligations of transparency, non-discrimination, accounting separation, access to network infrastructures, or price control. When a NRA imposes one or several remedies, it must ensure they are proportionate to the policy objectives identified.[18]

While this new regulatory framework for electronic communications has many attractive features, it is subject to question whether it provides an ideal model for the regulation of the postal sector. There are indeed significant differences between these two sectors.

First, unlike the electronic communications sector, postal services have never been subject to a heavy regulatory burden. Directives 97/67 and 2002/39 already follow a light-handed regulatory approach, leaving a significant amount of freedom to national authorities to tailor regulation to national circumstances. There does not seem any urgent need to reduce the level of regulation in the sector and, as discussed, there could even be benefits in strengthening the current postal regulatory framework.

Second, the level of competition achieved in electronic communications services is arguably much higher than the one reached on most postal markets. In most Member States, telecommunications incumbents are now subject to fierce competition on their traditional areas of strength, such as residential voice telephony. Incumbents tend to retain strong market positions, but new entrants have made significant inroads in such areas and competition seems to increase on a continuing basis. The same cannot be said of the basic letter mail market, which is still largely monopolistic.[19] There are probably several reasons

---

14 See Patrick Rey, "Collective dominance in the Telecommunications Industry", September 2002, mimeo.

15 See Article 16(1) of Directive 2002/21, supra note 10..

16 Id. at Article 16(3)..

17 Id. at Article 16(4).

18 See Commission guidelines on market analysis and the assessment of significant market power, supra note 13, at §118.

19 See Study on the evolution of the regulatory model for European postal services, Wik-Consult - July 2005, (hereafter, "WIK Report"), at 101 ("Thus, development of competition in the letter post market has been extremely gradual even in the most liberalized markets. Sweden repealed the postal monopoly a decade ago, but Sweden Post retains about 93 per cent of the letter post market. In the United Kingdom, Postcomm (the NRA) has made substantial efforts to introduce competition in the last two years, but Royal Mail retains more than 99.5 per cent of the mail volume within the licensed area. In Germany about one-third of the licensed area has been open for competition since 2003. Deutsche Post still has a market share of about 95 per cent within the licensed

for this, one being that the telecommunications market has been fully open to competition since 1998, whereas the postal market has not been fully liberalized yet.

Third, the new electronic communications regulatory framework requires NRAs to make complex assessments and shape the content of regulation. It is not clear that such an approach could be replicated in the postal sector. While Member States have generally devoted significant resources to their telecommunications regulator, the same cannot necessarily be said about their postal agencies. Strong postal regulators, such as Postcomm, tend to be the exception rather than the rule. Another difference between the two sectors comes from the fact that the postal directives impose only minimal requirements with respect to the institutional guarantees which should be offered by the postal regulators. Article 22 of Directive 97/67 provides:

> "Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. Member States shall inform the Commission which national regulatory authorities they have designated to carry out the tasks arising from this Directive …"

This directive does not state that postal regulators should also be independent from the government, a requirement that seems desirable considering that several governments still have a participation in the postal incumbent. As pointed out in the WIK Report, unlike in the electronic communications framework directive, the postal directive also fails to address central issues, such as "specific requirements to ensure independence, impartiality, and transparent administration of the NRA; treatment of affected parties in a non-discriminatory manner; appeal from decisions of the NRA to an appellate body, such as a court, that is independent of the parties involved; authority of the NRA to collect information necessary to regulation; and NRA consultation with interested parties".[20] Should a new postal directive be adopted, these issues should be addressed as a matter of priority.

III. Principles for a new postal directive

Regulation is designed to correct market failures. Commission officials and other legislators/regulators should thus first identify the various failures affecting the postal market. Three such failures can be easily identified.

First, the postal market is still distorted by the maintenance of a reserved area in the majority of the Member States. The traditional justification for the maintenance of a reserved area, which is the need to fund universal service, fails to convince. Funding universal service through cross-subsidization between profitable and non-profitable services is a most imprecise mechanism, which is likely to lead to over- or under-compensating the operator in charge of providing this service. It also deprives the users of services maintained in the reserved area from the benefits of liberalization.

---

area. In the segment opened to competition its market share is still about 85 per cent. In the Netherlands, direct mail has been liberalized since years. The market share of TNT in the letter post segment (including direct mail) is still above 95 per cent. All in all, the success of the different market opening strategies has still been very limited.")

[20] See WIK Report, supra note 19, at §2.5, p.71.

Second, the market is unlikely to provide for some aspects of universal service, such as the provision of a range of pre-determined postal services at a uniform cost throughout the territory. As there is a consensus among stakeholders that universal service is at the core of the European model of society, regulation should thus intervene to define the scope of universal service and the way to fund it. As noted in the prior paragraph, funding universal service has traditionally achieved through the maintenance of a reserved area. One should, however, move away from this inefficient model and opt for alternative funding strategies, which do not distort competition in the market.

Third, it is not clear that, even in the absence of a reserved area, all market segments are contestable. For very many years, there has been a debate among economists as to whether or not the delivery segment of the postal network is a natural monopoly. The delivery segment, which is sometimes referred to as the "last mile" of the postal network, is subject to large economies of scale and it is thus not clear that new entrants are in a position to duplicate this segment. If the delivery network is not duplicable and new entrants need access to it to be able to compete on some markets, regulation might thus be justified.

The new postal directive could eliminate the first of these market failures by suppressing the reserved area. This would have two major benefits. First, this would allow competition to develop on all market segments. Second, it would reduce the risk of cross-subsidization, as well as other forms of leveraging, from the monopolistic area to the competitive market segments. As several abuse of dominance cases have shown, there is always a strong incentive for postal incumbents to extend the monopoly they hold over basic letter mail to strengthen their position in the markets where they face competition, such as express services. The new postal directive should thus completely liberalize the postal market by 1 January 2009.

The new directive could also do a lot to reduce the distortions generated by the need to fund universal service. The reserved area should be eliminated and other mechanisms should be developed to fund universal service.[21] As suggested in the WIK report, it would also be desirable to give greater leeway to the Member States with respect to the definition of the scope of universal service. Universal service as currently defined in the postal directive may be unnecessarily costly.[22] In a modern world where a range of communications means co-exist (telephone, fax, email, instant messaging, etc.), it is not clear that the demanding requirements imposed in the directive, e.g. in terms of frequency of delivery, are still justified. This does not mean that the level of universal service should necessarily be reduced, but Member States should be given greater freedom to define the level of universal service they deem appropriate on their territory.

The rest of this section will focus on the third potential source of market failure, which is due to the presence of large economies of scale at the delivery level. This issue is not uncommon in liberalized industries. In the electronic communications and energy fields, for instance, the liberalization directives have established access to the network regimes. In the postal sector, the issue of access to the network is not new. For several decades in the United States, private

[21] WIK Report, supra note 19, p. 63: ("Authorizing Member States to establish national reserved areas is not necessary or proportionate to ensuring affordable, reliable, and efficient universal postal service").

[22] Id., p. 42 ("Requiring five-day-per-week delivery to every address in the national territory may impose substantial financial burdens on some Member States, especially in the future if the nature of universal services. It is not necessary or proportionate to *prohibit* Member States and USPs from adjusting delivery frequency in selected areas as one means of ensuring a quality of service that reflects the needs of society.")

postal operators have engaged in work-sharing with the US Postal Service whereby these postal operators accomplish some of the segments of the postal transaction (e.g., collection, sorting, transport, etc.) and then contract with US Postal for the delivery of their mail.[23] In such work-sharing scenarios, US Postal does not charge the full price of the stamp to the private operators, but offers them discounts, the amount of which depends of the scope of the work already performed by these operators. This has allowed the introduction some degree of competition, and thus efficiency, on the otherwise monopolistic US postal market.

Work-sharing is also a common practice in Europe and some Member States, such as Germany and the United Kingdom, have developed access regimes guaranteeing private postal operators to get access to the postal incumbent network at a regulated price.[24] Under Condition 9 of its licence, Royal Mail is required to negotiate access to its postal facilities with licensed operators or users. If Royal Mail and the access seeker are unable to agree terms, then either party can request that Postcomm makes a determination. Thus, after UK Mail, a new entrant, and Royal Mail failed to agree on the terms of access, Postcomm made a determination in May 2003 mandating the latter to give access to its network to the former against the payment of fees depending on the weight of the mail. This determination was, however, never formally applied as the parties eventually concluded an agreement setting the various parameters of access.[25]

The question, however, arises as to whether the new postal directive should include a mandatory access regime allowing new entrants to have access to the postal incumbent network at a regulated price. Directives 97/67 and 2002/39 are quite ambiguous on the issue of access to the postal network.

Article 11 of Directive 97/67 provides that:

> "The European Parliament and the Council (…) shall adopt such harmonisation measures as are necessary to ensure that users and the universal service provider(s) have access to the public postal network under conditions which are transparent and non-discriminatory".

This provision appears to defer to subsequent legislation the controversial question of access to the postal network.

Directive 2002/39 added the following indent to Article 12 of Directive 97/67:

> "- whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items and, together with the associated conditions, shall apply equally both as between

[23] See D. Geradin and J.G. Sidak, "The Future of the Postal Monopoly : American and European Perspectives after the Presidential Commission and Flamingo Industries", 28 (2005) *World Competition*,, p. 161.

[24] In other Member States, such as the Netherlands and Sweden, public authorities did not formally adopt a mandatory access regime and local operators have competed with incumbents by developing their own networks.

[25] Postcomm news release**, "**Postcomm welcomes access agreement", available at http://www.postcomm.gov.uk/news-and-events/news-releases/2004/postcomm-welcomes-access-agreement.html

different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to private customers who post under similar conditions."

This provision does not create an access regime, but provides that whenever universal service providers apply special tariffs they cannot discriminate between third parties both with respect to tariffs and associated special conditions. Such tariffs should also take account of the avoided costs as compared to the standard service they offer to customers. In other words, if a universal service provider gives access to its delivery network to a private postal operator at a special tariff, this tariff should take into account avoided costs, and should be extended to the other private postal operators requesting a similar access. This means that as long as the postal incumbent does not voluntarily conclude an access agreement with a third party, no postal operator can force it to give access to its delivery network.

The issue of access remains thus unsettled at EU level. In an interesting study commissioned by Deutsche Post and TNT, de Bijl et al. conclude that:

> "specific access regulation, on top of generic non-discrimination principles, is not needed and may be counterproductive as it may force entrants into a specific entry mode, thereby possibly limiting innovation".[26]

This conclusion is based on a variety of arguments, which will be reviewed hereafter.[27]

Mandated access would drastically restrict the entrant's strategic choices or, at the very least, drastically curb the incentives to innovate

The authors do not take position on the issue of whether the delivery segment is a natural monopoly. They argue that "[t]he relevant question is not whether the industry is a natural monopoly, but rather whether there is a monopolistic bottleneck".[28] Such bottleneck would not, however, be observable in the postal market since

> "it is possible to enter certain (product or geographical) segments of the market while incurring only low sunk costs and still attain a stable market position. … In short, there is room for various entry and growth strategies, and as a consequence, one does not have to bring a detailed set of regulations to help entrants get over a high entry barrier and, at the same time, *drastically restrict the entrant's strategic choices or, at the very least, drastically curb the incentives to innovate.*"[29]

This statement fails to convince for the following reasons.

First, it is not because investors can enter some segments of the postal market that they should not benefit from an access regime. The fact that new entrants on the telecommunications market could penetrate some market segments (e.g., data transmission markets) without

---

[26] See Paul de Bijl, Eric van Damme, and Pierre Larouche, 'Light is Right': Competition and Access Regulation in an Open Postal Sector, June 2005, Tilburg Law and Economics Center, at p.5.

[27] Some have, however, taken a more favourable attitude towards ex ante regulation of access. See, e.g., NERA, The Economics of postal services, 2004, p. 157; T. Walsh, Downstream access to European postal networks, lessons from the UK experience, *CERP Plenary*, Vilnius, Lithuania, 24-25 November 2004.

[28] See de Bijl et al., supra note 27, at p.12.

[29] Id. Emphasis added.

access to the local loop did not refrain the Commission from mandating telecommunications incumbents to give access to the last mile of their network, this even in case where imperfect substitutes (e.g., cable networks) existed. In the absence of such an access regime, new entrants would only have been able to access a small number of market segments and this would have limited the benefits of liberalization to a limited number of clients. While mandating access was not necessary to create competition on *some* markets, it was necessary to allow competition on *all* markets.

Second, the adoption of an access regime would not restrict the entrants' strategic choices, but on the contrary enhance them as they would have the ability to either rely on the delivery infrastructure of the postal incumbent or to develop their own delivery infrastructure. In fact, new entrants could initially rely on the incumbent's delivery network and then, once they have reached a sufficient scale, develop their own delivery infrastructure. Some entrants might also simply decide not to rely at all on the network of the incumbent and develop their own delivery system. The adoption of an access regime in some Member States did not prevent some operators to continue to rely on alternative delivery facilities when they thought this was a better option. It is thus hard to see why giving new entrants the ability to rely on the incumbent's delivery network would constrain their strategic choices and necessarily lead to an access-based mode of entry.

Third, the development of an access regime would not necessarily curb the new entrants' incentives to innovate as facilitating their entry in the market would certainly allow the development of new products and services and thus contribute to innovation. One could, of course, argue that mandating postal incumbents to give access to their delivery infrastructure could negatively impact their own incentives to maintain and enhance this infrastructure, but this is not necessarily true as it essentially depends on the access charges that would be paid by the new entrants. One cannot also compare the issue of access to the postal infrastructure with access issues arising in dynamically competitive industries where the facility/product/service/intellectual property to which access is requested is the subject of large and risky investments.[30] From this viewpoint, mandating access to the postal network would not kill the incentives of the postal incumbent to invest in its network, except if access was mandated at a price too low to provide a fair return on investment. This problem can, however, be avoided through a proper assessment of the costs of providing entry or alternatively of the costs saved by the incumbent when some segments of the postal transaction are carried out by the new entrant. As will be discussed below, an access price regime based on avoided costs should be quite favourable to the incumbent as it would be compensated for its opportunity costs of not carrying out the whole postal transaction.

An access regime would lead to regulatory uncertainty

The Deutsche Post/TNT-sponsored study points to the uncertainty which would result from the adoption of an access regime. Access-based entry would create "a mutual dependency among firms" and in the case of unforeseen events would involve renegotiation costs for the parties as the initial access agreement would have to be amended to take the new circumstances into account.[31] This argument about uncertainty could be turned back on its head as one of the advantages of adopting an access regime is that it provides a degree of

[30] See C. Ahlborn , V. Denicolò , D. Geradin and J. Padilla, "DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries", available at www.ssrn.com.

[31] See de Bijl et al., supra note 27, pp. 13-14.

certainty to new entrants.[32] Because of the asymmetry of interests between new entrants willing to gain access and the incumbent unwilling to give access (as giving access would facilitate entry and thus enhance competition), access negotiations may last for years and impose high costs on new entrants, which may then turn to litigation to obtain access. The advantage of an access regime is that it also typically provides for the modalities of access (locations where the mail can be handed over to the incumbent, access prices, etc.). This once again reduces uncertainty and stimulates entry.

The need for an ex ante access regime is further supported by the fact that reliance on ex post competition rules to obtain access is extremely uncertain and, even if competition rules could be used to obtain access, competition authorities are poorly placed to define the modalities of access. According to the report

> "[o]n the basis of Bronner and IMS Health, there would be no case for using competition law (Article 82 EC) to force an incumbent postal operator to open access to its delivery facilities to its competitors".[33]

This radical conclusion is not necessarily accurate for the following reasons. First, the *Bronner* case did not deal with the distribution of mail, but with the distribution of newspapers and magazines. Unlike in the mail sector, there are different ways of delivering newspapers and magazines. While some publishers rely on their own distribution network, others send their publications through the mail. Most newspapers and magazines are also sold in news shops or even in supermarkets. There are several distribution means and this is therefore purely logical that the European Court of Justice decided that Mediaprint's refusal to give access to its distribution network to *Bronner* could not amount to an abuse of a dominant position. The situation in the postal sector is radically different as, unlike in the publishing sector, it is hard to identify alternative distribution means. Moreover, the problem with relying on competition rules to force an incumbent to give access to its delivery network is that competition proceedings can last for several years and their outcome is often uncertain. This is a timeframe that clearly plays at the disadvantage of new entrants. When they consider that access is essential to their business case, this may thus discourage them to enter the market. Finally, competition authorities are poorly equipped for setting the modalities of access, such as access prices.[34] This requires the type of resources that competition authorities do not have.

In sum, to the extent that allowing new entrants to gain access to the postal network is considered as desirable, it is much better to establish it through ex ante regulation.

There is no need for an access regime as obligations of non-discrimination and transparency are sufficient

Although it does not say it explicitly, the report seems to be satisfied with the non-discrimination and transparency regime that prevails under Article 12 of the postal directive as amended by Directive 2002/39. The report states that:

---

[32] Some commentators have criticized Article 12 of the postal directive as creating uncertainty because of its vagueness over the issue of access. See T. Walsh, Downstream access to European postal networks, lessons from the UK experience, *CERP Plenary*, Vilnius, Lithuania, 24-25 November 2004.

[33] de Bijl et al., supra note 27, p. 23.

[34] See, for a formulation of this idea, Jean Tirole, "Telecommunications and Competition", in Pierre A. Buigues and P. Rey, *The Economics of Antitrust and Regulation in Telecommunications*, Edward Elgar, 2004 at p.104.

> “if any regulation were to be envisaged, it appears likely that the non-discrimination obligation already imposed under competition law – coupled if necessary with a transparency obligation in order to render that non-discrimination obligation more easily enforceable – would suffice to ensure a proper functioning of the market”.[35]

Although the principle of non-discrimination is one of the central pillars of competition law and regulation, it should be made clear that it does in no way guarantee that new entrants will have access to the postal network. Indeed, non-discrimination only means that, when the postal incumbent provides special tariffs to postal operators engaged in work-sharing, it cannot discriminate between these operators by offering one or several of them better conditions than the ones proposed to the other postal operators.[36] It does not provide, however, that a postal incumbent should grant access to its network to the new entrants requesting it.[37]

Experiences in some countries show that access regimes are not needed to allow competition in postal services

The report bases its findings that effective competition can take place without the introduction of an access regime on the experiences of two Member States only, i.e. Sweden and the Netherlands.[38] Evidence does not, however, indicate, a high degree of competition in these countries. Moreover, there may Member States where, for economic (relatively low volumes of mail) and/or geographic (low population density) reasons, no competition can take place without the introduction of an access regime.[39] It seems thus that far more data is needed before concluding that access to the postal network is, as a general matter, unnecessary.

Ex ante regulation should be limited to narrow circumstances

Finally, the report seems to suggest that regulatory intervention should be limited to a narrow set of circumstances. Specifically, it argues that:

---

35 de Bijl et al., supra note 27, p. 26.

36 Moreover, some authors pointed to the fact that the application of the non-discrimination principle may be extremely hard in practice in part due to the lack of proper information about the costs of the incumbent. See Montero, “Regulating Special Access to the Postal Networks in the European Union”, 11th Conference on Postal and Delivery Economics , at 8.

37 Id. at p. 15 (« The principle of non-discrimination leaves in the hands of the national monopolies the ability to draw the line at which access can take place and the conditions at which access has to be provided. As long as the monopolies do not allow any entity (competitor, client or its own divisions) to have access to the network at a special point, or at certain conditions, no competitor can impose such an access. »)

38 de Bijl et al., supra note 27, pp. 27 et seq.

39 Development of Competition in the European Postal Sector, Ecorys, 2005, at p. 71 (“The key issue that is worth further analysis is the impact of economies of scale, scope and density on the market. In particular for offering (daily) delivery services in (the largest part) of the country, economies of density are large and may be difficult to achieve. It is not unlikely that the (daily) delivery in mountainous or in any other sense remote areas has strong natural monopoly characteristics. The duplication of a delivery network in these areas then may prove unfeasible from an economic point of view: a competitor postal operator cannot develop a profitable business case and will not enter this market segment. What should be analysed in this case is to what extend this situation deprives these customers of the benefits of competition in the upstream market and what should be the most appropriate remedy for this.”)

> "There must be a strong justification for any regulatory framework to go beyond EC competition law. In particular, the 'perfect competition trap' must be avoided: the shared objective of competition law and regulation is not to have a certain number of competitors on the market, but rather to have effective competition with a view to increase consumer welfare."[40]

There is a lot of truth in this statement as competition law and regulation should not seek to create a perfectly competitive market. Yet, the report does not provide evidence that effective competition in some postal markets can be achieved without an access regime. The report points indeed to the example of the Dutch and Swedish markets where a limited degree of competition has been achieved without the need of an access regime. Yet, in the vast majority of the Member States there is no competition whatsoever on some postal markets. This is of course due to the fact that in some of these Member States the markets in question still belong to the reserved area, but there is no evidence that when the reserved area will disappear, these markets will be subject to effective competition without the development of an access regime. It is not suggested here that regulation should be adopted until it is proven unnecessary, as it should be the other way round, but that the limited experiences of the Dutch and Swedish markets do not provide sufficient evidence that new entrants will generally be able to successfully develop alternative networks and that we can just do away with ex ante access regimes.

Besides pointing to all the shortcomings of the setting up of ex ante access regimes, the above analysed report does not refer to any possible advantages, which could be brought by the development of such regimes. To offer a more balance picture than this report, some of these advantages are mentioned hereafter:

- As already noted above, ex ante regulation offers certainty to market players as both the incumbent and the new entrants know in advance the regulatory regime applying to them. This can avoid protracted litigation provided, of course, that the provisions contained in this regime are drafted in a sufficiently precise manner and are implemented in a rigorous fashion. In contrast, the uncertainty over access issues, which currently prevails under EC law, is likely to lead to unnecessary court litigation between incumbents and new entrants to determine what are their respective rights and obligations.

- Sector-specific regulators applying ex ante regimes are much better at addressing access issues that competition authorities relying on competition law.[41] Access issues are indeed not only limited to decide whether access should be granted, but they also require a decision as to the conditions on which access should be granted. This requires the gathering of substantial data, a mission for which competition authorities are poorly equipped. Moreover, access regimes require constant monitoring as the costs of providing access or, in the case of avoided costs pricing scheme, the costs saved by the incumbent as a result of the work carried out by the access seeker, may evolve.

[40] de Bijl et al., supra note 27, p. 3.

[41] See Montero, supra note 37, at 16 ("[A]ntitrust rules cannot effectively prescribe the conditions at which access should take place. Antitrust authorities could even declare a price as excessive, or a technical condition as abusive, but they cannot define the whole access regime").

- A properly crafted access regime should not deter incumbents from investing in their delivery network, which in any event they need to maintain for ensuring the provision of universal service. Access regimes should be designed in a way that makes the incumbent indifferent as to whether it carries out the whole postal transaction by itself or whether this transaction is partly taken care of by competitors.

- A properly designed access regime should not subsidise inefficient entry. This can be avoided by setting access prices at a level, which is sufficient to properly compensate the postal incumbent. When access is priced at the right level, only efficient entry, i.e. entry of operators which are more efficient on some segments of the postal transaction (e.g., collection, transport, etc.), will be made possible.[42]

- By increasing competition in postal services, efficient entry should also contribute to lower the price of postal services and thus increase mail volume, thereby helping to feed the postal network of the incumbent. A properly crafted access regime could thus protect the incumbent from the so-called "graveyard spiral", a central cause of which results from significant drop in mail volumes.

- An ex ante access regime may only be temporary. Nothing prevents regulatory authorities to decide to put an end to the access regime when the market circumstances no longer require it. The conditions at which access is granted may also be periodically revised to take into account evolving market conditions. In this regard, mandatory access can help new entrants to reach a sufficient scale to develop their own delivery infrastructure.[43]

- The development of an ex ante access regime may also facilitate the conclusion of agreements between the postal incumbent and new entrants. Because of the existence of a default regime, the incumbent can no longer ignore the access request of new entrants. The ex ante regime may thus never be applied if the parties manage to agree on an access scheme, which better suits them than the one provided by regulation. This can be illustrated by the situation, which prevails in the United Kingdom.

- Finally, evidence suggests that new entrants in Member States where ex ante access regimes have been adopted become profitable faster than those operating in Member

---

[42] See WIK Report, supra note 19, p. 95 ("In a normal commercial market, one would expect postal operators to voluntarily provide any profitable service—including to its competitors. That is, if the access charges exceed the cost of the operator to perform the remaining sorting and delivery activities, he would provide network access. In an imperfectly competitive market, however, the dominant operator may reasonably refuse to provide such profitable service. Since consolidators, for example, will be able to offer mail preparation services (including sorting and possibly some transportation) only when having access to the dominant operator's network, the dominant operator may choose not to grant access and keep the entire business including the mail preparation services. Under such circumstances, mandating network access appears proportionate since regulation would create the market outcome that could be expected from a normal commercial market. Consolidators would be able to enter the market only if they are more efficient in providing upstream services—either because they incur lower cost in performing the upstream activity and/or because they are more efficient in selling the service to customers.")

[43] Report from the Commission and the Council on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), SEC(2005) 388, p. 19 ("Access can help facilitate market entry for upstream consolidators (see figure below). New competitors who want to establish a delivery network can also use access for a transitional period to build up customer relationships and volumes, before being able to compete end to end with the incumbent.")

States where such regimes are absent. This could allow new entrants to compete more vigorously and faster gain market shares.[44]

In sum, the introduction of an access regime would certainly have a number of advantages, which should be taken into account when assessing the desirability of a compulsory access regime. It is submitted that the authors of the report analysed above fail thus to properly balance the pros and cons of access to the postal network regimes and are too quick in dismissing the need for such regimes. Clearly, this question needs further examination.

Assuming that the introduction of access regimes was considered to be desirable, a remaining question would relate to the methodology used to calculate the charges to be paid by the new entrants to the postal incumbent for gaining access to its network. Legislators/regulators have usually the choice between several methodologies to calculate such charges, including LRIC and avoided costs (generally referred to as "retail-minus"):

- The LRIC model considers the incremental costs incurred in the long run, which are causally related to the provision of access, and which would be incurred by an incumbent using the most efficient current technology to provide such access.[45] On the one hand, LRIC promotes competition by new entrants in the downstream market since it does not compensate the incumbent for the profits it might forgo in providing access. Moreover, the incumbent is not compensated for the costs it actually incurs, but for the costs supported by an efficient operator. On the other hand, as under LRIC the incumbent receives no compensation for the profits which it might lose if new entrants use its facilities to take away some of its customers and, in some cases, may be mandated to provide access below its costs, it will have high incentives to engage in exclusionary conduct to drive downstream competitors out of the market. Hence, the risks that the incumbent will engage in exclusionary behaviour are significant.

- Under avoided costs/retail-minus, the access price equals the price at which the incumbent would sell a service to a given end-user in the downstream market minus the costs which it avoids when the new entrant shoulders some of the costs of providing this service to an end-user. One advantage of retail-minus is that since the wholesale price is linked to the retail price, the incumbent should in theory lose the ability to impose wholesale prices that are lower or equivalent to retail prices. Another advantage is that it only allows efficient entry since, in order to be profitable, the incumbent's competitors will need to have lower costs than the incumbent's avoided costs (e.g., billing, etc.). Finally, a third advantage of this approach is that, since it will generally allow the incumbent to maintain all or a substantial part of its downstream profits, it has little or no incentives to engage into non-price exclusionary strategies. The problem with this approach is that, without retail price regulation, it is not able to bring down excessive wholesale prices to a cost-oriented level. As the wholesale price is calculated as the retail price minus the costs of the incumbent, an excessive retail price will automatically translate into an excessive wholesale price. Another problem is that the margin of these competitors will be typically low unless they are drastically

---

44 Ecorys, supra note 71, at p. 113: When comparing the number of years that it takes for competitor postal operators to gain market share and become profitable, the information on companies like Sandd and Selekt Mail (the Netherlands), CityMail (Sweden) and UK Mail would suggest that this is easier when there is access to the last mile on reasonable conditions – as what could be expected *a priori*.

45 See Geradin and Kerf, supra note 6, at pp. 36-39.

more efficient than the incumbent (in which case they may induce the incumbent to engage into exclusionary strategies). In some cases, retail-minus may thus lead to few or unsustainable entries.

Article 12 of Directive 2002/39 seems to give preference to the avoided costs approach at least as a method to calculate the discounts granted to firms involved in work-sharing with the postal incumbent. The above discussion shows, however, that there is no "ideal" pricing methodology when it comes to stimulate downstream competition. On the one hand, LRIC has strong pro-competitive features, but since it is generally unfavourable to incumbents it gives them incentives to engage in exclusionary strategies. On the other hand, retail-minus has only limited pro-competitive features (because it makes it difficult for new entrants to seriously challenge the incumbent), but considerably reduces the incentives of the incumbent to engage in exclusionary strategies. The choice of a methodology to calculate access charges should thus depend on the objective(s) the legislator/regulator in question seeks to achieve.

A final question is whether an ex ante regime should be adopted at the EU level, as part of the new postal directive, or at the Member State level by the national legislator/regulator. Once again, both options have pros and cons. The adoption of an ex ante access regime at EU level would contribute to harmonize regulatory requirements across Member States and thus prevent regulatory asymmetries. This might be particularly important considering the differences in resources and independence existing between NRAs. On the other hand, it could be argued that, because of the differences in circumstances in the Member States (in terms of population density, mail volumes, etc.), the latter should be free to decide whether they want to set up an access regime.[46] A compromise would be to leave Member States free to decide whether or not to adopt an access regime, but to provide at the EU level guidelines as to the methodologies to be followed to establish the modalities of access (calculation of access rates, etc).

While this section has focused on the issue of access to the postal network, this is of course not the only regulatory measure, which can contribute to the creation or enhancement of competition in postal services. A variety of other measures may be necessary to create a level playing field. Accounting-related requirements, such as the separation of accounts between reserved and non-reserved market segments, cost-allocation rules, etc., are generally of central importance to prevent distortions of competition. Such distortions may not, however, necessarily arise from the inadequacies of the provisions contained in the postal directive, but from insufficient implementation and enforcement of such provisions. Commission reports, as well as recent studies commissioned by the Commission point to the inadequate transposition

[46] WIK Report 2005, supra note 19, at p. 96: ("Whether or not promoting such local market entry is efficient and socially desirable may depend on a variety of factors. For example, setting up a nationwide network from scratch—and thus competing with the incumbent for end-to-end services—may be possible in relatively small Member States. In larger Member States, NRAs may conclude that end-to-end competition can reasonably develop only by an entrant offering local services in a first step. In this case, the absence of network access offered by the incumbent would create an undue barrier to entry and mandatory third party access would be a necessary pre-requisite for competition to develop. Finally, whether or not requiring third party access can be considered proportionate depends on the cost incurred to the incumbent operator by facilitating access. Where the benefits of increased competition and customer choice outweigh the cost, NRAs should choose to require access. However, in other situations cost for the incumbent (and for the regulatory process) may be created that are not justified by the benefits of a tiny demand for network access. Since the possible desirability of mandatory network access depends on the number of local or national factors, it does not appear proportionate to recommend mandatory access for all Member States. NRAs should have the authority to develop specific solutions according to their national postal policy objectives, to the situation in their markets, to the demand for access and ultimately to the benefit for business customers and consumers.")

in national law of the requirements contained in the postal directives.[47] Even when adequately transposed in national legislation, such requirements may be insufficiently enforced by the NRAs.[48] While some Member States have devoted considerable resources to the regulation of postal authorities, others have weak postal regulators. There seems to be a consensus among experts that the new postal directive should provide for stricter requirements as to the creation and functioning of regulatory agencies.[49]

IV. The importance of competition law

Besides ex ante regulation, competition rules can be used to control market power in the postal sector. In fact, the two set of rules are useful complements. Even in the presence of substantial ex ante regulation, the application of competition rules remains essential. This is due to several reasons.

First, the presence of ex ante regulatory remedies seeking to prevent postal incumbents from abusing their market power will not necessarily put an end to all such forms of abuses. There are indeed circumstances where regulatory remedies are not properly enforced by NRAs. In addition, some forms of abuse may not have been anticipated by ex ante regulation. Experience teaches that incumbents may, in some circumstances, resort to a range of pricing and non-pricing abuses to drive new competitors from the market. As a result, over the last few years, the Commission had to intervene to put an end of a variety of exclusionary abuses:

- Cross-subsidisation, predatory pricing and fidelity rebates (Commission decision 2001/354 condemning Deutsche Post AG for using revenues from its profitable letter-post monopoly to finance a strategy of below-cost selling in parcel delivery services, as well as for engaging in fidelity rebates).[50]
- Interception of cross-border mail (Commission decision 2001/892 finding that Deutsche Post AG had abused its dominant position in the German market for the delivery of international mail in four different ways: (i) different treatment of incoming cross-border letter mail which it considered to be “genuine” international mail on the one hand and incoming cross-border letter mail which it considered to be virtual A-B-A remail on the other hand; (ii) constructive refusal to supply its

---

[47] Report from the Commission and the Council on the application of the Postal Directive, supra note 44,, at p. 26 (“The level of transparency of accounts required by the Postal Directive is provided for in national law. However, in practice, transparency of accounts is still only being partially implemented in most Member States. Separation of accounts is meaningful only if costs have been fully distributed and allocated correctly.” and p. 27 (“The Directive’s goal of an open and transparent cost allocation system has yet to be fully reached and this will require greater attention from the Member States together with the Commission.”)

[48] Id. (“In the 2002 Application Report, a concern was raised about the lack of effective regulation in some Member States and an emerging regulatory asymmetry that could in turn foster market asymmetry in the Member States. Even if there has been good progress towards greater independence for NRAs and effective regulation at national and Community level, there is still a significant risk that inadequate regulation in some Member States could prevent the emergence of a single market for postal services.”)

[49] Id. at p. 74: “[M]easures relating to the establishment of NRAs should be better defined at Community level. Increasingly, NRAs will be called upon to make decisions affecting postal operators based in other Member States. NRAs should have no doubt about the independence and impartiality of their sister agencies. They should likewise be assured that decisions are well founded and based on substantial and objective evidence.”)

[50] Commission Decision 2001/354, supra note 8.

forwarding and delivery service; (iii) excessive pricing; and (iv) limitation of the output on the German market for delivery of international mail).[51]

- Leveraging of dominance in the general letter service market into the market for business to business services (Commission decision 2002/180 concerning the cancellation by La Poste of a preferential tariff previously granted to the UPEA for business to private mail covered by La Poste's monopoly and the withdrawal of that act of cancellation only once the UPEA had signed a new business to business service also).[52]

In a number of cases, the Commission did not condemn postal incumbents but State measures, which had the effect of protection or strengthening the position of such incumbents, or of creating conflicts of interest, which could negatively affect the competitors of the incumbent:

- Extension of a monopoly position into a neighbouring and competitive market (Commission decision 2001/176 condemning an Italian legislative Decree, which prevented private suppliers from offering the full range of hybrid mail services).[53]
- Failure to adopt of a regime of independent national regulation (Commission decision 2002/344 against France concerning the lack of supervision by an independent regulatory authority regarding the relationship between La Poste and so-called mail preparation firms).[54]
- Discrimination against mail preparation firms (Commission decision BdKEP ruling against certain provisions in Germany's postal regulatory framework which barred commercial mail preparation firms from earning discounts for handing over pre-sorted letters at Deutsche Post AG's (DPAG) sorting centres).[55]

Second, when there is competition in the market, competition rules will often be needed to prevent the conclusion of anti-competitive agreements between operators which may involve, for example, the fixing of selling or purchase prices, the limiting or controlling of production and investments, the sharing of markets or sources of supply or bid-rigging. With the exception of the REIMS decisions, there has not been any major Article 81 enquiry in the postal services field as the focus has been on preventing dominance. Yet, as competition becomes more present and markets become EU-wide, the risk of collusive behaviour could increase and thus the application of Article 81 become more likely.

Third, competition rules are required to prohibit mergers which would "significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position".[56] In recent years, the

---

51 Commission Decision 2001/892 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, (2001) O.J. L 331/40.

52 Commission Decision of 2002/180 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 of 2 March 2002 pp.32-53.

53Commission Decision 2001/176, supra note 8.

54 Commission Decision 2002/344 of 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services, (2002) O.J. L 120/19.

55 Commission Decision of 20 October 2004, COMP/38.745, *BdKEP/Deutsche Post AG and Bundesrepublik Deutschland*, not yet published.

56 In the past, the ECMR only made reference to the creation or strengthening of a dominant position. The recent adoption of Regulation 139/2006, led to the adding of the "significant impediment to effective competition criteria", bringing the EC in line with the US test of "substantially lessening competition". See

Commission has ruled on a large number of transactions involving mergers in postal services. The Commission has used its power under the Merger Control Regulation to impose a wide variety of remedies designed to prevent merger transactions from reducing competition in one or several postal markets. These remedies include: (i) limitation to a given period of time of exclusive access to a facility (e.g. post offices); (ii) obligations of non-discrimination; (iii) requirements to keep separate accounts for services within the reserved sector on the one hand and non-reserved services on the other hand; and (iv) divestitures.

A contentious issue with respect to postal mergers is whether the source of the funds used by a postal incumbent to acquire other postal activities is a factor to be taken into account by the Commission in its merger assessment. Competitors of postal incumbents have indeed expressed concern that the profits generated in markets where the incumbents hold a monopoly (because they belong to the reserved area) could be used to acquire activities in competitive markets. The Commission has traditionally considered that the origin of funds used to make the acquisition was not a relevant factor to its assessment, which should only focus on the impact that the acquisition would have on the competitive situation in the relevant markets. Interestingly, however, in *UPS Europe v. Commission*, the Court of Justice considered that:

> "the acquisition of [by Deutsche Post of 22.498% of the shares of DHL] 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."[57]

While the Court considered that proof that the funds used for the acquisition were generated by abusive pricing practices of the buyer in the reserved area was not established in the case, this passage establishes an interesting precedent, which makes it clear that funds derived from a monopoly and used for acquisitions cannot stem from excessively high prices or other abusive practices on the reserved postal market. This calls for tight price regulation of activities belonging to the reserved sector.

Finally, State aid rules are helpful to prevent that advantages offered by public authorities to postal incumbents distort competition in the market place. The prevention of illegal State aids is particularly important in the postal sector because of the universal service obligations imposed on postal incumbents. While proper compensation for the provision of such obligations is entirely justified, it is of critical importance that compensation does not exceed the costs incurred by the universal provider on pain of creating distortions of competition, which could seriously affect the incumbent's competitors.

The preceding developments illustrate that, in recent years, competition law has played a significant role in the postal sector. It does not mean, however, that competition is, at this stage, sufficient to control market power in the postal sector. First, we have seen that this sector suffers from significant market failures, which have to be corrected through regulation. Were such market failures to disappear, there is little doubt that competition rules could play

---

Article 2(3) of Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24/1 of 29 January 2004.

[57] Case T-175/99 UPS Europe v Commission [2002] ECR II-1915.

have even greater role in the sector, but we are not there yet. Moreover, while competition rules present the advantage of flexibility, the application of such rules may lead to protracted litigation before competition authorities or courts and, as already noted above, the outcome of competition cases is often uncertain. In such circumstances, some degree of ex ante regulation remains necessary to provide certainty to investors.

In the aftermath of liberalization, ex ante regulation and competition rules will thus play a complementary role. Evidence in network industries suggest that a good balance between regulation and competition rules is a factor contributing to the success of liberalization strategies.

V. Conclusions

The Commission has been engaged for ten years in the liberalization of the postal sector. While this liberalization process has stimulated competition in a range of postal services, competition is still impeded by the maintenance of a reserved area in a number of Member States. Preserving such areas not only prevents consumers from enjoying the benefits of competition for all postal services, but it also the source of various kinds of distortions such as cross-subsidization of competitive services with the proceeds of monopoly activities. It is therefore desirable that the new postal directive confirms that all postal services will be open to competition by 2009.

Market liberalization does not, however, translate in immediate competition in industries, which have been controlled by statutory monopolies for a long period of time. The adoption of a pro-competitive regulatory framework is thus essential to facilitate entry and stimulate competition in the market place. Ex ante regulation should not unnecessarily burden operators, but it should contain the necessary provisions to create a level playing field between incumbents and new entrants. Some postal operators are lobbying for a light-handed regulatory framework, which in particular would not provide for ex ante access to the postal network requirements. As we have seen, while regulating access may not be without costs, it may also present a number of advantages, which have not been sufficiently explored for rejecting without much analysis such regulation. This paper takes no definitive position as to whether the next postal directive should provide for an access regime, but it lays out a number of advantages of doing so. At the very least, the access issue should be seriously explored by the Commission.

Adoption of sector-specific regulation does not eliminate the need for the application of competition rules. Quite the contrary, competition rules should play a central importance in preventing that market opening be impeded by various anti-competitive behaviour on the part of postal operators. Article 82 has a particularly important role to play considering that liberalization transforms legal monopolies in dominant firms, which will often have incentives to preserve their market share by restricting entry. Merger control rules and State aid provisions also have a major role to play.