

The confluence of Competition Law, Sector-specific Regulation and Consumer Protection in the postal, delivery and payment sectors.

John Hearn

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THE TREATY OF ROME (25 March 1957)

Is the foundation stone of the “European Project” (an ever-closer union among the peoples of Europe),

Recognized the need to remove existing obstacles in order to guarantee steady expansion, balanced trade and fair competition.

ARTICLE 3 provided that the activities of the Community should include:

(f) the institution of a system ensuring that competition in the common market is not distorted

ARTICLE 8 envisioned a transitional period of twelve years.

THE TREATY OF ROME (25 March 1957)

SPECIFIC PROVISIONS WITH REGARD TO COMPETITION

ARTICLE 85 (TFEU Art. 101)

1. The following shall be prohibited as incompatible with the common market: **all agreements** between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and **which have as their object or effect the prevention, restriction or distortion of competition** within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

THE TREATY OF ROME (25 March 1957)

SPECIFIC PROVISIONS WITH REGARD TO COMPETITION

ARTICLE 86 (TFEU Art. 102)

Any **abuse** by one or more undertakings **of a dominant position** within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of **consumers**;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

THE TREATY OF ROME (25 March 1957)

SPECIFIC PROVISIONS WITH REGARD TO COMPETITION

ARTICLE 90 (TFEU Art. 106)

1. In the case of **public undertakings and undertakings to which Member States grant special or exclusive rights**, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.
2. Undertakings entrusted with the operation of **services of general economic interest** or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of **such rules does not obstruct the performance, in law or in fact**, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

THE TREATY OF ROME (25 March 1957)

SPECIFIC PROVISIONS WITH REGARD TO COMPETITION

ARTICLE 92 (TFEU Art. 107)

1. Save as otherwise provided in this Treaty, **any aid granted by a Member State** or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

ARTICLE 93 (TFEU Art. 108)

1. The Commission shall, in co-operation with Member States, keep under constant review **all systems of aid** existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

Enforcement

Initially centralized within the Commission

Regulation No.17 of 21 February 1962 (First Regulation implementing Articles 85 and 86 of the Treaty)

Whereas, in order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles;

Whereas, in order to carry out its duty of ensuring that the provisions of the Treaty are applied, the Commission must be empowered to address to undertakings or associations of undertakings recommendations and decisions for the purpose of bringing to an end infringements of Articles 85 and 86.

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; ...

Enforcement

Subsequently enforcement devolved significantly to the Member States

COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002

The centralised scheme set up by Regulation No 17 no longer secures a balance between .. [its] two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. ...

Enforcement

Subsequently enforcement devolved significantly to the Member States

COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002

If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. ...

Article 35

1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts. ...

Consumer Protection

Not explicitly mentioned in the EEC/ EC / EU Treaties **BUT** main focus of competition law - control of price fixing, abuses of a dominant position, state aid and provision of services of general economic interest - is to protect consumers.

SPECIFIC CONSUMER PROTECTION LEGISLATION

- Unfair terms in consumer contracts (Directive 93/13/EEC) (specifically applies to postal operators according to recital 34 of PSD)
- Consumer protection in the indication of the prices of products offered to consumers (Directive 98/6/EC)
- Unfair business-to-consumer commercial practices in the internal market (Directive 2005/29/EC)
- Consumer rights (Directive 2011/83/EU)
- Better enforcement and modernisation of Union consumer protection rules. (Directive 2019/2161) which updates the four previous Directives
- And specific sectoral requirements such as Telecoms roaming charges, Airline passenger rights, SEPA etc.

Postal Services

Following reforms of 19th century postal services generally provided by the State and protected by a state monopoly

Monopoly was restricted to “Letters” – see Treaty of Berne 1874

ARTICLE 1

The countries between which the present treaty is concluded shall form, under the title of General Postal Union, a single postal territory for the **reciprocal exchange of correspondence** between their post-offices.

ARTICLE 2

The stipulations of this treaty shall extend **to letters, post-cards, books, newspapers, and other printed papers, patterns of merchandise, and legal and commercial documents** originating in one of the countries of the Union and intended for another of those countries. ...

NO MENTION OF FREIGHT or PARCELS containing merchandise or other services often provided by postal administrations including telephones and telegraphs.

Postal Services

The winds of change – circa 1970 to 1992

Corporatisation e.g. Britain in 1969 – see Hearn (2020)

Divesting of electronic communications etc

Reduction in quality of service, especially number of deliveries per day

Arbitrage of Terminal Dues system – emergence of REMAIL

Emergence of competition in form of courier services, within cities and nationally in response to reduction in quality (speed) of postal services.

Internationally onboard couriers used by TNT Skypack, DHL, Fedex exploited loopholes in the monopoly – NB UPS always focussed on parcels

Courier companies diversified into Remail, eg KLM's Publications Distribution Service, TNT agreement with Belgian Post.

Postal Services

The Collision

The provision of postal services by the State, or public undertakings, appeared to be inconsistent with the Treaty of Rome

CASE LAW

International Express Carriers Conference 1988 Remail complaint

ECJ Corbeau judgment

Commission Decision 90/16/CEE Express delivery in NL

Commission Decision 90/456/CEE Express courier services in ES

Postal Services

The Green Paper (1992)

All member states maintained a monopoly over “letters” up to 2kg

Exceptions DK, DE (1kg), NL(500G), UK £1

ES, IE AND PT claimed a monopoly over Express Mail, IT over parcels

Started process leading to the gradual and controlled liberalization of the European postal services market.

First Postal Directive 1997 was first step

Third Postal Directive 2008 achieved this objective and there were no reserved areas after 2013

Postal Services

Evolution of Express Services

Courier services were impacted by the emergence of email, the internet and electronic communications generally as much as the postal services.

The global companies such as FedEx, TNT, DHL, UPS focussed instead on the carriage of merchandise (often in parcels). New Regional companies emerged e.g. GLS, DPD

Developed new markets, especially after the single market was achieved in 1992.

TNT badly burned; bought up fleet of Bae146 cargo aircraft, but trucks were no longer held up at borders so aircraft offered no great advantage and costs were higher.

Postal Regulation

Focus is now on provision of universal service

The first objective of the Postal Directives, to ensure the gradual and controlled liberalization of the European postal services market was achieved by 2013.

The second objective, to address concerns that in a fully liberalized market the services offered on an economic basis would not meet the needs of users or guarantee them fair and non-discriminatory treatment, requires continuing regulatory invention.

Regulation overlaps with Competition Law and Consumer Protection Law:

- Price control (cost orientation v LAIRC etc, affordable prices v excessive prices)
- Authorization procedures may limit market entry
- USO financing (v. state aid rules)
- Accounting separation (Fully allocated cost v LAIRC)
- Quality standards
- transparent, simple and inexpensive procedures for dealing with postal users' complaints

Postal Regulation

Conclusions

if sector-specific regulation of postal services did not exist there would be little justification to impose it now; competition law and consumer protection legislation would be sufficient to protect users. (Hearn 2019)

The Commission's 2015 application report on the regulatory framework recognized that significant change had taken place but made no specific proposals for reform.

The Commission's 2021 application report did not make any specific proposals to amend the regulatory framework. Rather it proposed to continue to engage with Member States and other stakeholders "to further explore potential adaptation in the future".

Meanwhile the ERGP continues to argue that the scope of postal regulation should be increased

Postal Regulation

The ERGP position (ERGP 22(4))

- 1 The ERGP has sustained a “greenfield approach” on the ground of the fundamental shifts that have taken place in the postal sector since the last revision of the PSD in 2008. substantial changes (such as the decline in letter mail volumes and the increase of parcel volumes), have persisted. ... new players have entered the postal market such as online platforms bringing together demand and supply in ecommerce. the environmental impact of the postal services activities and its sustainability should be also considered.**
- 2 The regulatory framework needs to adapt to the development of a competitive market and to keep protecting, at the same time, users who rely on post as a means for communication and for the delivery of goods. This should be considered back-to-back to the need for clear rules on consumer protection, which should be explored and adopted in a new and updated regulatory framework.**
- 3 The absence in the EC report of the confirmation of the ERGP’s role as an advisory body at the EU level and the lack of recognition of the ERGP’s role may undermine ERGP’s remit.**

In light of the above, the need for important changes to the postal European legislation

18 is more relevant than ever before

Summary of Case Law

Market Definition

The 1998 Commission Postal Notice (OJ C 39, 6.2.1998), provides that the territories of the Member States constitute separate geographic markets for the delivery of domestic and inward cross-border mail (Para 2.1)

The Commission will in principle consider that a number of distinct product markets exist like the clearance, sorting, transport and delivery of mail, and for example direct mail and cross-border mail (Para 2.2)

Different categories of customers and postal items must be distinguished in terms of market definition (Para 2.5)

- **Confetra**

The Court decided that “haulage, freight-forwarding and express mail undertakings” providing services involving the “clearance, sorting, transport and distribution of postal items”, except where their business is limited to the transport of postal items, are postal service providers.

Summary of Case Law

Mergers

Some of the major cases decided by the European Commission:

- **M.843 PTT Post and TNT –approved**
 - **M.2908 Deutsche Post and DHL - approved**
 - **M.6503 La Postev/ SwissPost JV –approved following commitments**
 - **M.6570 UPS and TNT – rejected, reduction in competition**
 - **M.7630 FedEx and TNT - approved**
 - **M.8280 Deutsche Post DHL and UK Mail – approved**
 - **M.9618 La Poste (Geopost) and BRT (Italy) – approved**
 - **M.9957 Advent International and Hermes (Uk and jointky with OTTO –DE) – approved**
- 20 ▪ **Deutsche Post DHL Group and J.F. Hillebrand Group AG (UK CMA approval)**

Summary of Case Law

Rebates, Predatory Pricing and Refusal to supply

Case 35.141, Deutsche Post AG, [2001] OJ L125/27

Deutsche Post AG was condemned for adopting certain anti-competitive practices, involving fidelity rebates and predatory pricing in the market for business parcel services. The Commission in its decision clarified the conditions under which below-cost pricing charged by a monopoly operator would be considered abusive. The Commission also condemned the scheme of fidelity rebates granted by Deutsche Post in the mail order parcel deliveries market because it tended to foreclose competition in this market.

Commission Decision 2001/892/EC Deutsche Post AG L.331/40 15/12/2001

Deutsche Post had engaged in abusive behavior in the German letter market by intercepting, surcharging and delaying incoming international mail. It was found that Deutsche Post had engaged in anti-competitive conduct by discriminating between different customers, by charging excessive prices and by refusing to supply certain services unless an unjustified surcharge was paid.

Summary of Case Law

State Aid

- approved for Universal Service Providers in the Czech Republic, Italy, Poland, and Denmark.
- also approved to facilitate geographic reach across remote regions of Belgium and France as well as for press distribution at preferential tariffs (Belgium, France and Italy).
- In other cases, the Commission adopted decisions requiring the Member State to recover the incompatible aid:
 - In 2018, the Commission found that Correos had been overcompensated for the delivery of its postal Universal Service Obligation (USO) between 2004 and 2010 and had benefited from incompatible tax exemptions. The amount, which had to be paid back, came to €167 million.
 - Two capital injections (circa €66m) granted by Denmark and Sweden to PostNord Group, were found to be incompatible State aid.

Summary of Case Law

Double Jeopardy

Case C-117/20 Bpost underlines that undertakings may be liable more than once on the same material facts when authorities act a under different legal basis but in a complementary manner.

The case relates to a discount tariff scheme operating in 2010 and 2011 allegedly discriminatory against certain customers. Bpost was fined €2.3m by NRA (which was annulled by Brussels Court of Appeal) and €37.4m by NCA

The CJEU has now held that a such double punishment is subject to the following cumulative conditions:

1. There are clear and precise rules that make it possible to predict which acts or omissions are liable to be subject to such duplication;
2. There is coordination between the two competent authorities;
3. The two sets of proceedings are conducted in a sufficiently coordinated manner within a proximate timeframe; and
- 23 4. The overall penalties imposed must correspond to the seriousness of the infringements

Institutional arrangements

Article 22(1) of PSD

“Member States shall ensure, where appropriate, consultation and cooperation between those [National Regulatory] authorities and national authorities entrusted with the implementation of competition law and consumer protection law on matters of common interest.”

In most of the 27 EU Member States, enforcement of the competition rules is committed to the NCA alone.

In the Netherlands the NCA is also responsible for consumer protection and postal regulation

In 4 member states the NCA is also responsible for consumer protection.

In Estonia the NCA is also the postal regulator

Institutional arrangements

Article 22(1) of PSD

5 Member States give the NRA equal (LV) or exclusive (DE, EL, LU, PL) authority over application of the competition rules in the postal sector.

In 12 Member States (BE, CY, DE, ES, FR, IE, LT, MT, RO, SI, IS, NO), the NRA and NCA are obliged to provide each other with necessary information and consult regularly.

In 10 Member States (BG, DK, EL, HU, IT, LV, PL, PT, SE, SK), coordination consists of one or the other form of cooperation

In 5 Member States (AT, CZ, FI, HR, LU), there appears to be no formal coordination between the NRA and NCA

Quo Vadis?

Issues for Governments and European Commission

Extend powers of postal NRAs to include supervision of compliance with competition law by postal service providers

Extend powers of postal NRAs to include supervision of other services where postal service providers are active, e.g. e-commerce, payment services, logistics.

Alternatively restrict powers of postal NRAs to ensuring provision of postal universal service.

Risks

There can be conflicts of interest between ensuring provision of universal service and enforcing competition law. Best to ensure responsibilities are separated?

With online platforms firmly in the focus of NCAs and Consumer Protection authorities, postal NRA involvement is inadvisable?

THANK YOU

John Hearn

**St Anthony's
35 Biscayne
MALAHIDE
Co. Dublin**

**00 353 1 845 3574
00 353 86 264 7054
john@john-hearn.eu**