ABUSE OF DOMINANT POSITION (MAIL): THE DEUTSCHE POST CASE

Subject: Abuse of dominant position
Discrimination
Refusal to supply

Industry: Mail

Parties: Deutsche Post AG
The British Post Office and various other complainants

Source: Commission Statement IP/00/562, dated 31 May 2000

(Note. Considering the discussions carried out in 1998 and 1999 into the activities of the national postal services within the European Union, and particularly the REIMS II agreement – see the Commission's note below – it is surprising that there should be yet another case in which a national post office has apparently made use of its dominant position on the market in a manner which the Commission is rightly challenging. If the practice of the German Post Office is as the Commission describes it, there is not only an abuse of a dominant position but also a serious interference with cross-border trade; and this is ipso facto contrary to the principle of an internal market.)

Commission's Statement of Objections

The Commission has concluded an extensive investigation, prompted by a number of complaints, into the way incoming cross-border mail is handled by Deutsche Post AG (DPAG). The German postal operator has been informed by the Commission that it considers, subject to any arguments DPAG may put forward in its defence, that DPAG abuses its dominant market position and restricts competition. In its Statement of Objections, which is a preliminary procedural document and not a final decision, the Commission considers that DPAG's frequent and systematic interception, surcharging and delay of normal incoming cross-border mail infringes the competition rules of the European Union (EU). If the initial view of the Commission is confirmed, DPAG will be ordered to cease this behaviour.

The original complaint, which was filed by the British Post Office (the BPO) in February 1998, has been followed by five additional complaints including the same allegations, namely, that DPAG infringes EU competition rules by intercepting, surcharging and delaying normal cross-border mail. The BPO has given numerous examples of situations where DPAG has refused to deliver to German addressees bulk mailings coming in from the UK, unless the BPO agrees to pay the full domestic tariff applicable in Germany. DPAG considers mail containing any reference to Germany such as the inclusion of a German reply address in the contents of the mail to have a German sender and charges the full domestic tariff for such mail. (See the note at the end of this report.)

The Commission's investigation indicates that the mailings in question did not have German senders. The mailings were produced and posted in the UK and should be treated as normal cross-border mail. By intercepting, surcharging and delaying normal cross-border mail, the Commission considers that DPAG abuses its dominant position on the German market for the delivery of cross-border mail.

According to the Commission's preliminary assessment, the behaviour of DPAG is abusive in several ways. First, DPAG treats differently incoming cross-border mail which it considers to be "genuine" on the one hand and cross-border letter mail which it considers to be of German origin (that is, mail with a German reply address). DPAG thus discriminates between different customers.

Second, the Commission considers that DPAG's practice of intercepting incoming cross-border mail followed by claims for surcharges of a prohibitive nature, should be regarded as a constructive refusal to supply its delivery service.

Third, the Commission is of the opinion that the price charged by DPAG exceeds the average cost by at least 25%. This price has no reasonable relationship to real costs or to the real value of the service provided. Fourth, DPAG impedes the delivery of mail, thereby damaging the senders' and the sending operator's commercial activities.

Procedure

A *Statement of Objections* is a legal act which opens formal proceedings under EU procedural rules. It lists in detail the allegations against DPAG and includes the Commission's assessment how DPAG infringes Article 82 of the EC Treaty. The party concerned has full rights of defence, including access to the case files and the possibility to respond to the charges made by the Commission. The defendant may produce evidence of its own may request to present its defence orally at a hearing. Based on these elements, the Commission will finally decide whether a prohibition decision is necessary DPAG may then appeal the decision of the Commission before the European Courts in Luxembourg.

Note on Cross-Border Mail

Normally, the receiving postal operator charges a fee from the sending postal operator for each cross-border mail item delivered. These fees, so-called terminal dues, are calculated as a percentage of the applicable domestic tariff in the receiving country. In 2000 the terminal dues are 65% of the domestic tariff. The applicable terminal dues have been set in the REIMS II agreement, which has been concluded by all public postal operators in the EU except the Dutch Post Office. The agreement has been notified to the Commission. On 15 September 1999, the Commission adopted an Article 81(3) decision, exempting the REIMS II agreement until 31 December 2001. ■

The recently announced investigation, at the European level, of the Time Warner / AOL merger will be covered in our next issue.