DOMINANT POSITION (REMAILING): THE DEUTSCHE POST CASE

Subject: Dominant position
Exclusive rights

Industry: Remailing; postal services

Parties: Deutsche Post AG
Gesellschaft fur Zahlungssysteme mbH
Citicorp Kartenservice GmbH

Source: Court Statement 5/2000, dated 10 February 2000, relating to Joined Cases C-147/97 and C-148/97 (Deutsche Post v GZS)

(Note. Remailing, and the role of national post offices, continue to cause difficulties from the point of view of the rules on competition. However, the Court of Justice has now held that, in the absence of an agreement between the postal services of the Member States concerned fixing "terminal dues" on the basis of the actual costs of processing and delivering incoming trans-border mail, a Member State may grant its postal services the statutory right to charge internal postage on items of mail where senders resident in that State post items, or cause them to be posted, in large quantities with the postal services of another Member State for sending back to the first Member State. But the postal services may demand from the senders only the difference between the "terminal dues" (paid by the postal services of the Member State from which the mail is sent) and the full internal postage, as otherwise they would abuse their dominant position within the meaning of Community competition law.)

Case 148/97

Citicorp Kartenservice GmbH ("CKG"), whose registered office is in Frankfurt am Main, is a company in the Citibank group which attends to the preparation and dispatch of statements, confirmations, bills and payment or billing requests for customers holding Visa cards in particular.

In 1993 the Citibank group set up a centralised body responsible for the preparation and dispatch of statements and other standardised banking statements of account, namely Citicorp European Service Center BV ("the CESC"), whose registered office is in Arnhem, Netherlands.

Until 30 June 1995 the data processing was carried out at CKG's computer centre, in Frankfurt am Main. After receiving the data by electronic transfer, the CESC carried out the printing on standardised forms which were then placed in envelopes, and the envelopes were franked for dispatch. Those items of mail were finally handed over to the Netherlands Post Office ("PTT Post") in Arnhem for onward carriage. PTT Post transmitted them to Deutsche Post in order for it to deliver them to addressees resident in Germany (since 1 July 1995 the data have been sent to the Netherlands by satellite from the data-processing centre of the Citibank group in Sioux Falls-South Dakota, United States).

The CESC also prints out and sends from the Netherlands approximately 42,000,000 items of mail per year to addressees resident in other Member States of the European Union (France, Belgium, Spain, Portugal, Greece).

In the case of items of mail to addressees resident in Germany, PTT Post receives, in the Netherlands, the normal postage for international mail (that is to say approximately DEM 0.55). It pays Deutsche Post the "terminal dues" (at the material time, from DEM 0.37 to DEM 0.40 per letter).

Deutsche Post claimed postage at its internal rate (DEM 1 per letter) in respect of the "remailing" of each of CKG's letters delivered in Germany. For the period from 24 February 1995 to 9 July 1995 Deutsche Post sought payment of a sum of DEM 3,668, 916. When CKG refused to pay the sum demanded, Deutsche Post brought the case before the Landgericht (Regional Court) Frankfurt am Main.

Case C-147/97

Gesellschaft für Zahlungssysteme mbH ("GZS") is the largest operator in respect of transactions carried out using Eurocard credit cards in Germany. In the course of its data-processing operations it draws up, for the card holders and the authorised traders, monthly statements which are sent by post.

Since the summer of 1995 GZS has transmitted by electronic data transfer to its Danish contractual partner the data needed to draw up the statements of approximately 7,000,000 credit-card holders, in order for the statements to be sent by the Danish post office. The latter transmits them to Deutsche Post for onward carriage in Germany and delivery to addressees resident in that Member State. The Danish postal service receives the postage charged in Denmark for international mail, which is lower than the internal rate in force in Germany. It pays Deutsche Post the "terminal dues" (DEM 0.36 per letter).

Deutsche Post demanded from GZS payment of internal postal charges of DEM 623 984. When GZS refused to pay that sum, Deutsche Post brought the case before the Provincial Court in Frankfurt am Main.

The Frankfurt court dismissed both of Deutsche Post's actions. On appeal, the Provincial Court of Appeal in Frankfurt was uncertain whether the Universal Postal Convention ("the UPC", transposed into German law in 1989), which allows the Contracting States to charge postage at their internal rates on items which are remailed, was compatible with Community law. It therefore decided to stay proceedings and refer the question to the Court of Justice.

Judgment of the Court of Justice

The German court asked whether it was contrary to the provisions of the EC Treaty relating, in particular, to undertakings entrusted by a Member State with the operation of services of general economic interest and to the prohibition on abuse of a dominant position, for a body such as Deutsche Post to exercise the

right provided for by the UPC to charge internal postage on items of mail posted in large quantities with the postal services of another Member State.

The Court noted first of all that a body such as Deutsche Post, which has exclusive rights as regards the collection, carriage and delivery of mail, must be regarded as an undertaking to which the Member State concerned has granted exclusive rights within the meaning of the EC Treaty.

It then pointed out that, in accordance with settled case-law, an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as holding a dominant position within the meaning of the EC Treaty.

According to the Court, one of the fundamental principles of the UPC is the obligation of the postal administration of the Contracting State to which international mail is sent to forward and deliver it to addressees resident in its territory using the most rapid means of its postal service. For the postal services of the Member States, performance of the obligations flowing from the UPC is in itself a service of general economic interest within the meaning of the EC Treaty. German legislation assigns the operation of that service to Deutsche Post.

Under the UPC, the postal services of the Contracting States may charge postage on items of mail at their internal rates in certain circumstances.

The grant to a body such as Deutsche Post of the right to treat international items of mail as internal post in such cases creates a situation where it may be led, to the detriment of users of postal services, to abuse its dominant position resulting from the exclusive right granted to it to forward and deliver those items to the addressees.

It was accordingly necessary for the Court to examine the extent to which exercise of such a right is necessary to enable a body of that kind to perform its task of general interest pursuant to the obligations flowing from the UPC and, in particular, to operate under economically acceptable conditions.

If the body were obliged to forward and deliver to addressees resident in Germany mail posted in large quantities by senders resident in Germany using postal services of other Member States, without any provision allowing it to be financially compensated for all the costs occasioned by that obligation, the performance, in economically balanced conditions, of that task of general interest would be jeopardised.

It must be regarded as justified under Community law, for the purposes of the performance, in economically balanced conditions, of the task of general interest entrusted to Deutsche Post by the UPC, to treat cross-border mail as internal mail and, consequently, to charge internal postage.

On the other hand, in so far as part of the forwarding and delivery costs is offset by terminal dues paid by the postal services of other Member States, it is not necessary, in order for a body such as Deutsche Post to fulfil the obligations flowing from the UPC, that postage be charged at the full internal rate on items

posted in large quantities with those services. The exercise by such a body of the right to demand the full amount of the internal postage, without the senders having any choice but to pay it in full, may be regarded as an abuse of a dominant position within the meaning of Community competition law. ■

The Volvo / Scania Case

The Commission has decided to prohibit the acquisition by Volvo of Scania. Both are Swedish manufacturers of trucks, buses and engines. This decision follows an in-depth investigation of the relevant markets for heavy trucks, city buses, inter-city buses and touring coaches. In adopting this decision, the Commission concluded that the remedies proposed by Volvo were insufficient to resolve the competition concerns resulting from the proposed acquisition of Scania. Both Volvo and Scania are Swedish companies, with activities across Europe and beyond, primarily in the manufacture and sales of trucks, buses and engines.

In its decision, the Commission has concluded that the concentration as originally notified would have caused serious competition concerns by creating dominant positions in the respective markets for:

heavy trucks in Sweden, Norway, Finland and Ireland;
touring coaches in Finland and the United Kingdom;
inter-city buses in Sweden, Denmark, Norway and Finland;
for city buses in Sweden, Denmark, Norway, Finland and Ireland.

The combined market share of Volvo and Scania is very high in each of these markets, ranging from around 90% (in the Swedish heavy truck market and the Finnish and Irish city bus markets) to around 50% (in the UK coach market and the Irish heavy truck market). The parties' market positions have been largely symmetrical in all markets and the merger would in most of these markets combine the two largest competitors.
The market investigation conducted by the Commission confirms that Volvo and Scania have been each other's closest competitors and that they are competing strongly.

On 21 February 2000, Volvo proposed a number of undertakings intended to address these concerns. After consulting the other market participants, as well as Member States, the Commission concluded that the proposed undertakings were insufficient to resolve the competition concerns resulting from the proposed acquisition of Scania. The undertakings would not significantly facilitate access to the markets by competitors. Given the gravity of the competition concerns resulting from the proposed merger between the two closest competitors, and the fact that Volvo was unable to propose undertakings that would have removed all competition concerns, the Commission had no other choice but to prohibit the merger. (Source: Commission Statement IP/00/257, dated 14 March 2000.)