ABUSE OF DOMINANT POSITION (POSTAL SERVICE): THE BPO CASE

Subject: Abuse of dominant position
Predatory pricing
Complaints
Fines

Industry: Postal service
(Some implications for other industries)

Parties: De Post – La Poste

Source: Commission Statement IP/01/1738, dated 5 December 2001

(Note. Predatory pricing is usually difficult to engineer, unless there is some form of cross-subsidisation from other sectors of a company's business. Where the business is a monopoly – however legitimate – it may be in a position to offer preferential prices on the basis of its monopoly revenue. By doing so, it is in a good position to oust competitors from a related market. The Belgian Post Office was in this position; and its main competitor in the market for "business-to-business" mail came perilously close to losing its market in Belgium. However, a timely complaint to the Commission resulted in the Decision described below.)

The Commission has decided that the Belgian Post Office (De Post - La Poste) has abused its dominant position by making a preferential tariff in the general letter mail service subject to the acceptance of a supplementary contract covering a new business-to-business ("B2B") mail service. This new service competes with the "document exchange" B2B service provided in Belgium by Hays, a private undertaking established in the United Kingdom. As La Poste exploited the financial resources of the monopoly it enjoys in general letter mail, to leverage its dominant position there into the separate and distinct market for B2B services, the Commission has imposed a fine of €2.5m.

The Commission pointed out that it would not accept that postal incumbents could exploit the resources of their statutory monopoly to eliminate competitors providing services in areas which were open to competition. In the period ahead, which would be marked by the co-existence of services covered by the postal monopoly and services which were liberalised, the Commission would remain extremely vigilant that the beneficiaries of the monopoly did not extend their dominance into markets open to private operators. Following the Commission's intervention, and without waiting for its final decision, La Poste terminated this abuse of its dominant position.

In April 2000, Hays plc, a private operator of postal services based in the United Kingdom, lodged a complaint with the Commission alleging that La Poste was trying to eliminate the Hays document exchange network, which it had been operating in Belgium since 1982. Hays could not compete with the tariff

reduction offered by La Poste in the monopoly area and was accordingly losing most of its traditional clients in Belgium, the insurance companies.

B2B mail services are offered only to a closed group of subscribers for the mutual exchange of business-related documents. B2B mail services offer overnight delivery and time-certain pick-up and delivery. B2B mail therefore differs significantly from the general letter mail services covered by the monopoly. La Poste and Hays compete in providing B2B services to insurance companies in Belgium.

In the course of the Commission's investigation, the following facts emerged. After Hays' customers in the insurance sector indicated that they were not interested in the new B2B mail service offered by La Poste, within days the latter unilaterally terminated the preferential tariffs that the insurance companies enjoyed previously when sending their general letter mail. Second, La Poste let stand the termination, notified on 30 October 1998, of the preferential tariff until the Federation of insurance companies, on 27 January 2000, subscribed to the new B2B service. Following the installation of a new management team which has cooperated with the Commission investigators, La Poste abolished the tying practice by discontinuing the B2B mail service on 27 June 2001.

By tying the tariff reduction in the monopoly area to the subscription of its B2B service, La Poste made it impossible for Hays to compete on a level playing field because it could not offer a similar advantage. The effects of this tying practice, although it has been terminated in the meantime, still risk the elimination of Hays, a company that has established a cross-border network for the exchange of documents, from the Belgian market. The overnight cross-border exchange of documents between Belgium and the United Kingdom and France, which is at present offered by Hays, would cease if Hays disappeared from the Belgian market. The infringement therefore had a negative impact on trade between Member States and sent a strong negative signal to foreign competitors, who might wish to do business in Belgium.

Article 82(d) of the EC Treaty provides that an abuse of a dominant position may consist in "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".

Context of the decision

Protecting postal services open to competition is the best means of safeguarding the interests of consumers and European industry that require high performance and competitive postal services. The competition rules are being applied in the postal sector against the background of the gradual opening of postal monopolies. The immediate period ahead will thus be marked by the co-existence of services covered by the postal monopoly and services open to competition. The present decision is the fifth in a series of Commission decisions with respect to postal services taken since December 2000. In the Commission's view, this demonstrates its intention to remain extremely vigilant that beneficiaries of the

monopoly do not exploit the monopoly resources to leverage their dominance into markets open to competition.

In December 2000, the Commission adopted a Decision against Italy which confirmed that innovative new services, like time-certain hybrid electronic mail services, could not be included in the postal monopoly. With respect to such new services, there should be open competition on the merits. In March 2001, the Commission imposed a fine on Deutsche Post AG for abusing its dominant position by granting fidelity rebates to almost the entire German mail order industry. The Commission also established the rule that revenues from the monopoly should not be used to finance a predatory pricing policy in markets open to competition. The Commission's proceedings resulted in a structural separation of competitive parcel services from the Deutsche Post AG monopoly services. In July 2001, a further decision was adopted which stated that Deutsche Post AG must not levy the full domestic tariff on all forms of incoming cross-border mail. In October 2001, a decision against France demonstrated the Commission's ongoing concern that there must be adequate and independent regulatory supervision by the Government vis-à-vis the beneficiary of the postal monopoly.. All of these decisions serve as useful precedents and thereby give guidance to public postal operators as to the Commission's clear policy goal to protect competition in those postal markets which are close to, but distinct from, the postal monopoly. ■

The Tetra Laval / Sidel Case

The Commission has adopted a decision requiring the separation of the Swiss-based company Tetra Laval from the French company Sidel through the divestiture of Tetra's shareholding in Sidel. This follows the prohibition on 30 October 2001 of Tetra's acquisition of Sidel. Applying the principle of proportionality, the decision allows Tetra flexibility in choosing an appropriate buyer and a suitable method of divestiture within the time limit fixed by the Commission. Tetra's acquisition of Sidel, which was notified to the Commission on 18 May 2001, was prohibited by the Commission on 30 October 2001 because it would significantly impede competition in the European Economic Area in distinct markets for liquid food packaging equipment to the detriment of innovation, choice and competitive prices for consumers. Tetra's bid for Sidel was unconditional in accordance with French stock exchange rules. Tetra has already acquired around 95% of Sidel's shares. The Merger Regulation, exceptionally in the case of public bids, allows such acquisitions even before the Commission's final decision. As a result, Tetra had already implemented a concentration which was later prohibited by the Commission. The Commission has therefore considered it necessary to adopt a decision pursuant to Article 8(4) of the Merger Regulation which provides that the Commission may "require the undertakings or assets brought together to be separated (...) or any other action that may be appropriate in order to restore conditions of effective competition". In adopting the decision the Commission has sought to adopt the measures necessary to restore conditions of effective competition.

Source: Commission Statement IP/02/174, dated 30 January 2002