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## Competition - Portugal

### Competition Authority plots course for fully liberalised postal sector

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### Introduction

Until the end of the 1990s there was only one participant in the Portuguese postal sector: the public postal service operator. Since then, following the entry into force of EU Directives 97/67/EC, 2002/39/EC and 2008/6/EC and their implementing legislation, a gradual and controlled liberalisation process has been underway.

The incumbent still holds a legal monopoly on specific universal postal services for:

- postal items, including addressed advertising, under 50 grams and at prices two-and-a-half times below the public tariff for a first-class item;
- registered mail with a declared value, including judicial notifications, within the above price and weight limits;
- the issue and sale of stamps and other postal instruments; and
- the installation of postboxes.

However, the incumbent's monopoly expires at the end of 2010. As a guide to the final stage of sector liberalisation, the Competition Authority has published a report which highlights the potential competition law issues that may arise in the sector.

### Main findings

The report identifies conduct in a number of areas whereby incumbent operators with a dominant position in the sector may be able to act autonomously of their competitors, clients and suppliers. Among such forms of illegal behaviour, the authority states that dominant companies may seek to engage in:

- cross-subsidization between reserved and non-reserved activities by leveraging the latter activities through the allocation of costs to the former;
- predatory pricing policies (below variable costs) in non-reserved activities, with the aim of excluding competitors from these services;
- margin squeezes in vertically integrated markets by establishing artificially high prices at wholesale level with the aim of eliminating competitors;
- excessive pricing (ie, setting prices well above cost price for services that competitors cannot easily replicate);
- unjustified rebates, particularly exclusionary rebates;
- discrimination on price and quality, resulting in better commercial and qualitative conditions for companies in the incumbent's economic group and worse conditions for competitors; and
- tying, notably by requiring customers to acquire both reserved and non-reserved postal services.

The authority's report also extensively reviews the European Commission's main findings in its public antitrust enforcement proceedings in the postal sector, including *UPS v Deutsche Post*,<sup>(1)</sup> *British Post Office v Deutsche Post II*,<sup>(2)</sup> and *Hays v La Poste Belge*.<sup>(3)</sup> The authority also considered the commission's merger cases in the sector: *The Post Office/TPG/SPPL*<sup>(4)</sup> and *Posten AB/Post Danmark/S*.<sup>(5)</sup>

In terms of enforcement decisions by national competition authorities in dominant position cases, the report focuses on decisions adopted in Denmark, Germany, Spain, Italy and Hungary against Post Danmark, Deutsche Post, Correos de España, Post Italiane and Magyar Posta, respectively. According to the report, the sole cartel procedure by the competition authority of an EU member state in the postal sector was conducted by the Hungarian regulator against Magyar Lapterjeszto and Magyar Posta.

Most of the cases reviewed in the study relate to discriminatory commercial conduct by incumbents (eg, quantitative and exclusionary rebates, predatory and excessive pricing, margin squeezes, denial of access and tying). The Portuguese regulator envisages an increase in enforcement in the postal sector in line with the full liberalisation of sector services.

### Proposed measures

The authority makes the following recommendations:

- Wherever possible, the conditions under which the postal service operates should be guaranteed by market mechanisms, including tender procedures (in regions where these are feasible).
- The selection procedure for the universal postal services provider should be transparent. It should allow for the highest possible number of qualified entities to participate in providing such services.
- Access to elements of network infrastructure for all economic agents competing with the incumbent should be guaranteed in transparent and non-discriminatory terms; the same should apply to elements allowing for the interoperability of postal service networks.
- The national value-added tax (VAT) rules should be altered to ensure equality among economic agents, without market distortions. At present, the incumbent is the only economic agent exempt from VAT when conducting activities that are considered part of the universal postal service.

### Comment

The authority's report seeks to ensure that the basis for sector operations is fair. From an *ex ante* perspective, it indicates forms of conduct that may be interpreted as anti-competitive, identifying measures that the public authorities can implement in order to foster competition in the sector. However, a careful balance of interests will be vital in implementing the authority's recommendations and the final package of measures for fully liberalising the postal service, as the promotion of effective social, economic and territorial cohesion is one of the service's key characteristics.

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### Endnotes

- (1) COMP/35.141.
- (2) COMP/36.915.
- (3) COMP/37.859.
- (4) M1915.
- (5) M5152.

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