# The Principles of Non-Discrimination and Transparency in Postal Markets with Regard to Abusive Rebate Conditions applied by the Incumbent Universal Service Provider

*Christian Koenig**

## I. Introduction and background

The principles of non-discrimination and transparency are functionally intertwined and inseparable, as codified, inter alia, in the fourth and fifth indents of Article 12 of (Postal) Directive 97/67/EC[1]: Discrimination only becomes systematically visible under basic conditions of transparency, especially for non-vertically integrated market participants, who do not have public powers of investigation while contracting with a vertically integrated incumbent. Furthermore, transparency disciplines the incumbent to abstain from discrimination by eroding the incumbent's gains of abusive selective favoring, thereby strengthening auto-regulation even within a market dominated by the incumbent and avoiding public power interferences of regulatory authorities. Consequently, the principles of non-discrimination and transparency are backed under EU primary law of Article 102 of the Treaty on the Functioning of the European Union (TFEU), especially according to the well established jurisprudence from Luxemburg on the special responsibility of an incumbent (ex/quasi-monopolist) to abstain from any dominant conduct, which might (abusively) impair the fragile rest of competition.

The following comments will focus on the legal foundation of the principles of non-discrimination and transparency under Article 102 TFEU and Article 12 of Directive 97/67/EC to be applied, if an incumbent Universal Service Provider (USP) imposes abusive conditions and pricing to business clients, e.g.

- manifestly discriminatory and non-transparent conditions on the quantity thresholds and on the preparation of letters to qualify for rebates,
- and aggressively approaches the competitor's business clients with discriminatory and non-transparent offers.

This might lead to an abusive leverage from his quasi-monopolist position on the market for normal (letter) postage onto the consolidation market and markets for access services by using its profits from the universal service to cross-subsidize its strategy of leverage. In consequence, cross-subsidized low prices for business clients risk to eliminate any margin for competition (neither via consolidation, nor via end-to-end delivery) and, thus, the extremely vulnerable and fragile rest of competition.

## II. Legal foundation of the principles of non-discrimination and transparency in the Postal Sector

### 1. Under Directive 97/67/EC

Whereas Article 11 of Directive 97/67/EC addresses the European Parliament and the Council to adopt, on proposal from the Commission, harmonisation measures on transparent and non-discriminatory access to the public postal network, the fourth and fifth indents of Article 12 of that directive impose on the Member States the obligation to take active steps to ensure that the tariffs for each of the access services comply with the principles of transparency and non-discrimination.

Furthermore, if the third indent of Article 12 of Directive 97/67/EC stipulates that

*"– the application of a uniform tariff does not exclude the right of the universal service provider(s)*

* Professor of Law Dr. Christian Koenig LL.M. (LSE) is director at the Centre for European Integration Studies (ZEI) and member of the Faculty of Law at the University of Bonn.

1 As amended by Directives 2002/39/EC and 2008/6/EC.

*to conclude individual agreements on prices with customers,"*

these agreements with business clients (e.g. on the quantity thresholds and on the preparation of letters to qualify for rebates) must likewise comply with the principles of transparency and non-discrimination according to the fifth indent of Article 12:

"– whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions."

Unfortunately, secondary law interpretation of Article 12 of Directive 97/67/EC has been "softened" with regard to non-discrimination of rebate schemes to be applied to consolidation service providers since the judgment of the Court of Justice of the European Union (CJEU) of 11 February 2015 in Case C-340/13 (*bpost SA*) has ruled:

*"The principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67/EC (...), must be interpreted as not precluding a system of quantity discounts per sender, such as that at issue in the main proceedings."*

The CJEU argues that consolidators handing on to *bpost* the mail, which they have already collected from different senders, does not have the effect of increasing the overall volume of mail in *bpost*'s favour. According to the Court, it follows therefrom that, except to the limited extent that those consolidators are themselves "senders"[2], their activity does not, of itself, contribute to the increase in the volume of mailings handed on to bpost (para. 38 subs. of the judgment). The Court held that a system of quantity rebates granted to a consolidator and calculated on the basis of the total volume of mail from all the senders to which the consolidator provided its services, were *"likely to compromise the objective of increasing the demand for postal services"* (para. 39 of the judgment).

The aforementioned Court´s reasoning appears to be misleading, because it neglects the positive effects of a system of quantity rebates on the total volume of mail from all senders to generate more mail.

The judgment in *bpost* is a doubtable and rather *sector-specific* shift from the wider scope of non-discrimination as applied by the Court in its judgment of 6 March 2008 in Case C-287/06 (*Deutsche Post*, para. 44), in which the Court has held that Article 12 fifth indent of Directive 97/67 precludes refusal to apply to consolidators of postal items from various senders the special tariffs which the national universal postal service provider grants to the senders themselves. In *Deutsche Post* the Court dismissed the argument that permitting consolidators to benefit from certain discounts would threaten the financial stability of Deutsche Post AG (para. 36). Therefore, the Court stresses in its *bpost* judgment that the case which gave rise to the judgment in *Deutsche Post* did not involve *quantity discounts*[3], but *operational discounts*[4]*:*

*"In that regard, the Court considered, in paragraph 37 of that [Deutsche Post] judgment, that, in so far as the special tariffs, which take account of the avoided costs, as compared to the standard service, can therefore be set in such a way that they do not differ from the normal tariffs except due to the fact that the costs actually avoided are deducted from the latter tariffs, with the result that the grant of special tariffs does not affect the financial stability of Deutsche Post AG, as the universal postal service provider."* (Judgment in Case C-340/13 (*bpost*), para. 45)

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2 According to Article 2 number 16 of Directive 97/67/EC a *"sender"* is a *"natural or legal person responsible for originating postal items."*

3 Advocate General *Sharpston* defines *quantity discounts* as follows: *"Quantity discounts reward the sending of large volumes of mail in the course of a given reference period, irrespective of whether that mail is pre-sorted or not when delivered to the USP. They are purely commercial in nature. Their objective is to increase demand for postal services."* (Case C-340/13, para. 16).

4 Advocate General *Sharpston* defines *operational discounts* as follows: *"Operational discounts reward the deposit of pre-sorted mail (above a specified minimum volume) with the USP. They are intended to take into account the cost savings from which the USP benefits as a result of the clearance and sorting of such mail according to, for instance, format, packaging and weight and the delivery of this mail to the sorting offices of the USP. Operational discounts usually require 'downstream access' to the postal network of the USP, particularly its sorting and/or delivery facilities."* (Case C-340/13, para. 15).

However, it should be noted that, if a USP imposes as an incumbent abusive conditions and pricing to business clients, e.g.

- manifestly discriminatory and non-transparent conditions on the quantity thresholds and on the preparation of letters to qualify for rebates,
- and aggressively approaches the competitor´s business clients with discriminatory and non-transparent offers,

this behavior will not be covered (and will certainly not be justified) by the *bpost* rationale on quantity rebates and its underlying premise of *"the financial stability of the USP".*

## 2. Failure of implementation of non-discrimination and transparency by national legislation – the case of the German Postal Act

The German Postal Act (Postgesetz) does not properly implement the principles of non-discrimination and transparency according to Article 12 of Directive 97/67/EC. Directive 97/67 was transposed into German law by the Postgesetz of 22 December 1997, as subsequently amended.

According to Section 28 of the Postgesetz, the competitors of *the incumbent* may request the USP, subject to certain conditions, to give them access to parts of its handling services. In that regard, Section 28(1) of the Postgesetz neglects the EU-principles of non-discrimination and transparency and merely states:

> *"If the holder of a licence occupies a dominant position on a market for postal services which are subject to licensing, he must, if requested, offer parts of his handling services separately on that market, to the extent that he can afford to do so. The obligation stated in the first sentence shall apply in respect of another provider of postal services only if the undertaking making the request does not occupy a dominant position and if competition would otherwise be restricted disproportionately on that or another market. The holder of the licence has the right to refuse partial provision of services if that is likely to put at risk the efficient functioning of his facilities or the security of the business, or if as the case may be he no longer has sufficient capacities to carry out the requested service."*

However, the Postgesetz neither ensures clearly and properly that the tariffs for each of the access services for consolidators comply with the principles of transparency and non-discrimination according to the fourth indent Article 12 of Directive 97/67/EC:

> "– tariffs must be transparent and non-discriminatory,"

nor provides for non-discrimination and transparency with regard to conditions and pricing applied to business clients according to the fifth indent of Article 12:

> "– whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. (...)"

Even if the German Regulatory Authority (Bundesnetzagentur) were obliged to apply the principles of transparency and non-discrimination according to Article 12 of Directive 97/67/EC directly, or at least indirectly by EU-law-conform interpretation of the Postgesetz, the supremacy of EU-law appears to be "underexposed" in practice by the Bundesnetzagentur.

## III. Discrimination and non-transparency abuses of *the incumbent´s* dominant position under the scrutiny of Article 102 TFEU

Both, the judgment *bpost*, which exclusively refers to the secondary law interpretation of Article 12 of Directive 97/67/EC, and the regulatory shortcomings in the case of the German Postal Act, which does not correctly implement Article 12 of that directive, strengthen the approach not to rely only on sector-specific regulation by the German Regulatory Authority (Bundesnetzagentur), but to address the German Federal Cartel Office (Bundeskartellamt) in a complaint against the "hard core" abuses of *the incumbent´s* dominant position as a "quasi-monopolist" under Article 102 TFEU.

Under Article 102 TFEU and according to the consistent case law of the Court of Justice of the European Union an incumbent USP has an increased and a special responsibility for fair competition pricing and for applying non-discriminatory and transpar-

ent conditions, e.g. on the quantity thresholds and on the preparation of letters to qualify for the rebates. And, furthermore, an incumbent USP has to refrain from aggressively approaching the competitors' business clients with discriminatory and non-transparent offers. The Court has consistently held that dominant undertakings with quasi-monopolist market positions, especially those which have been released from a (State) monopoly, have a *special responsibility* not to allow their conduct to impair the fragile rest of competition (Case C-280/08 P, *Deutsche Telekom*, para. 176; Case T-271/03, *Deutsche Telekom*, [2008] ECR II-477; Case C-209/10, *Post Danmark*, para. 23; Case C-52/09, *TeliaSonera;* Case C-295/12 P, *Telefónica*).

The judgment of the CJEU in Case C-280/08 P ( *Deutsche Telekom*), which has been confirmed in *TeliaSonera* and in *Telefónica*, stipulates the increased and special responsibility of an incumbent (ex/quasi-monopolist) according to Article 102 TFEU as follows:

> *"83 According to the case-law of the Court, dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market (Case 322/81 Nederlandsche Banden-Industrie-Michelin v Commission [1983] ECR 3461, paragraph 57).*
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> (...)
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> *176 Since Article 82 EC [now Article 102 TFEU] thus refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition, a dominant undertaking, as has already been observed in paragraph 83 of the present judgment, has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market (see, to that effect, France Télécom v Commission, paragraph 105 and the case-law cited).*
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> *177 It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate (see, to that effect, Nederlandsche Banden-Industrie-Michelin v Commission, paragraph 73; AKZO v Commission, paragraph 70; and British Airways v Commission, paragraph 68).*
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> *178 In the present case, it must be noted that the appellant does not deny that, even on the assumption that it does not have the scope to adjust its wholesale prices for local loop access services, the spread between those prices and its retail prices for end-user access services is capable of having an exclusionary effect on its equally efficient actual or potential competitors, since their access to the relevant service markets is, at the very least, made more difficult as a result of the margin squeeze which such a spread can entail for them.*
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> (...)
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> *182 By further reducing the degree of competition existing on a market – the end-user access services market – already weakened precisely because of the presence of the appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that consumers suffer detriment as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market (see, to that effect, France Télécom v Commission, paragraph 112)."* (emphasis added)

If the CJEU requires an incumbent, according to his increased and special responsibility,

- either to increase its retail prices for end-user access services
- or to adjust its wholesale prices for access services (based on a new application to the National Regulatory Authority)

(both alternatives amount to severe interferences in the business autonomy of an incumbent in order to avoid the margin squeeze of its competitors)

a quasi-monopolist like the incumbent must — *argumentum a fortiori et a maiore ad minus* — be obliged to comply with the much more basic principles of transparency and non-discrimination while applying

tariffs and conditions on rebate schemes and access services.

Transparency and non-discrimination obligations, i.e. well established principles under Article 12 of Directive 97/67/EC, interfere much less in the business autonomy of an incumbent than the requirements imposed under the case law of the CJEU in *Deutsche Telekom*, *TeliaSonera* and in *Telefónica*.

## IV. Conclusions to debate

If an incumbent USP abuses quasi-monopolist power, thereby exploiting regulatory gaps between the regulated standard postage and the downstream access, which are not adequately remedied by the respective National Regulatory Authority, the National Competition Authority can be addressed and requested under Article 102 TFEU to order *the incumbent*

- to apply non-discriminatory and transparent conditions (especially on the quantity thresholds and on the preparation of letters to qualify for the rebates),
- and to refrain from aggressively approaching the competitor´s business clients with discriminatory and non-transparent offers.

By contrast to a request to stop predatory pricing and the abuse of cross subsidies (with corresponding high thresholds of proof that pricing is substantially below the incremental costs), it is much easier to establish obvious discriminatory and non-transparent conditions.