

Consolidation, discounts and non-discrimination in the Belgian postal market

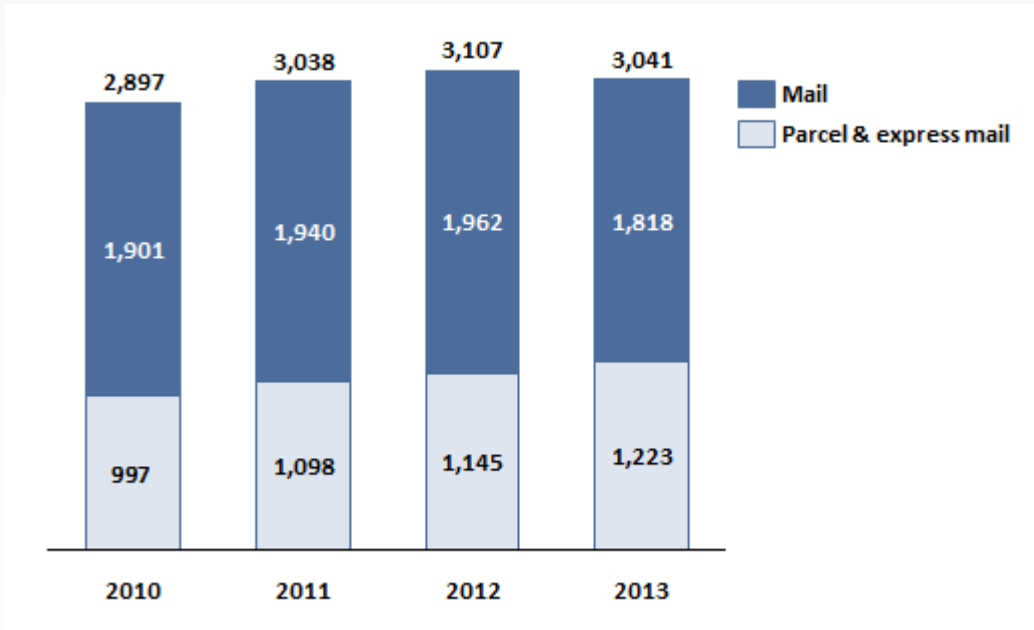
WIK Conference
February 11th 2015

AXEL DESMEDT

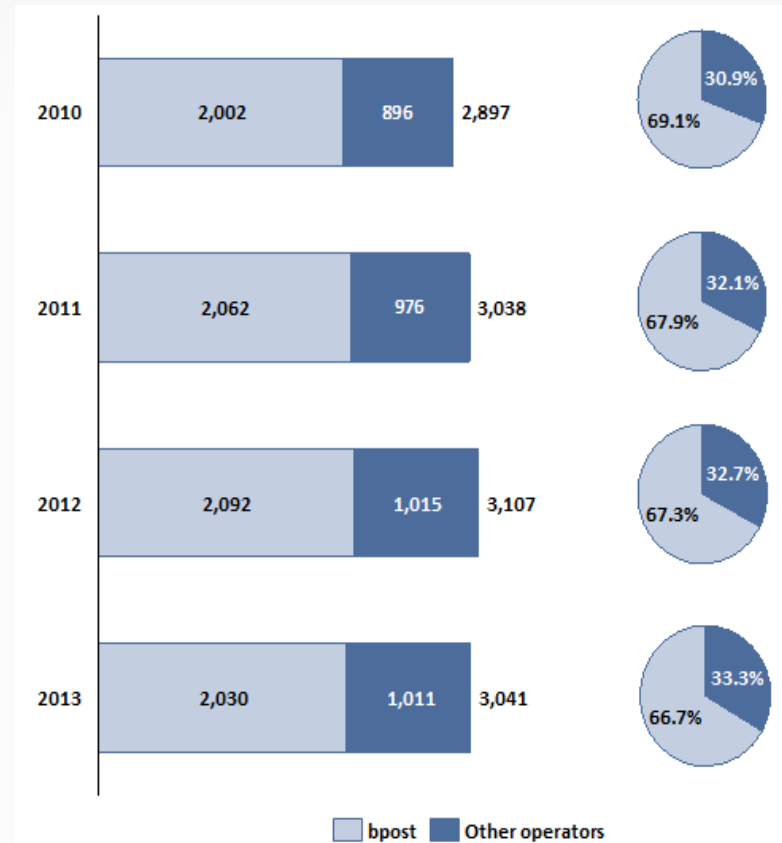
MEMBER OF THE BIPT COUNCIL



Postal market in Belgium

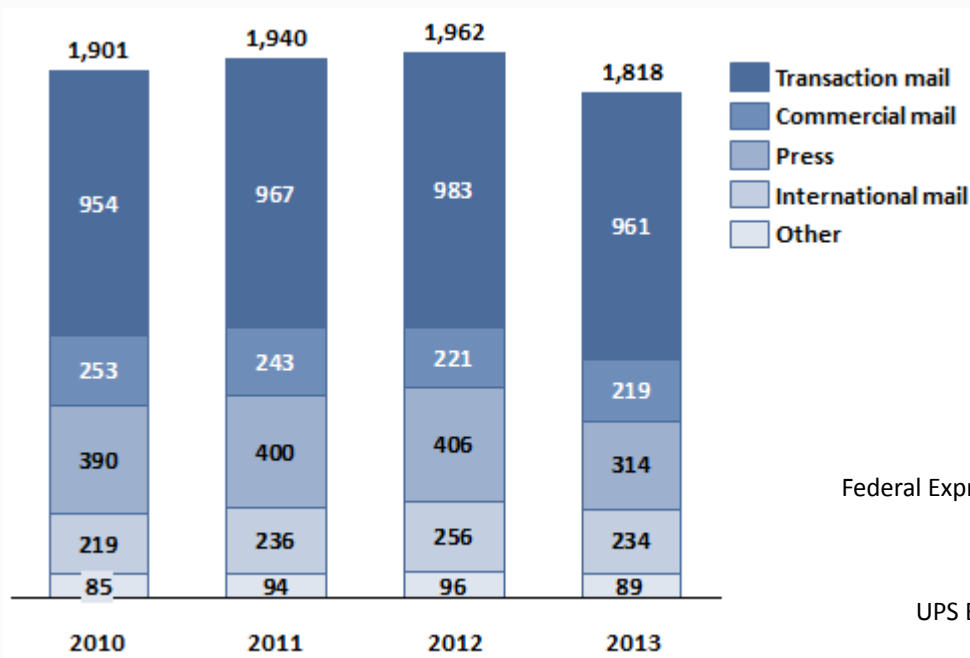


Consolidated evolution of the postal sector's revenue per segment over the 2010-2013 period (in M€)



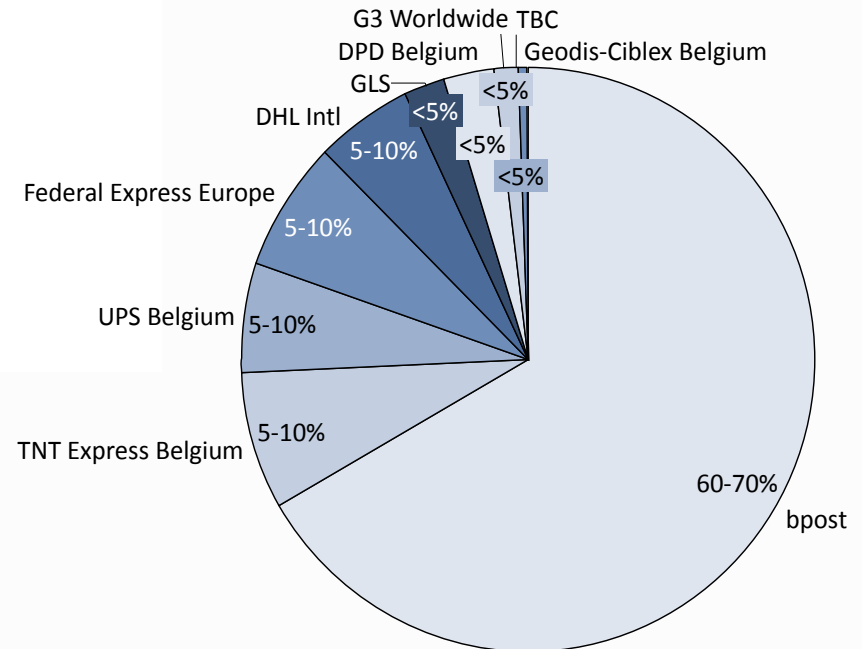
Revenue (in M€) and market shares of the postal sector between 2010 and 2013

Postal market in Belgium



Details of the letter post segment revenue (in M€)

Detailed shares of the postal sector total revenue for the main players in 2013



Per-sender case

- FULL LIBERALIZATION OF POSTAL SECTOR IN 2010 IN BELGIUM
- NEW DISCOUNT SCHEME ANNOUNCED BY BPOST END OF 2009 (“PER SENDER” MODEL):
 - 3 types of **volume discounts** for conventional tariffs on direct mail and admin mail: direct customer; intermediary; proxy
 - Volumes are recognized only at the senders level (not the consolidator using the intermediary or proxy discounts)
 - Discounts of up to 50% provided at the end of the discount period in case of intermediaries
 - In addition: **operational discounts**
 - Volume discounts are “aimed at stimulating demand” (bpost)
- MAIN CHANGE => NO RECOGNITION OF CONSOLIDATED VOLUMES BY INTERMEDIARIES

Per-sender case


- **BIPT DECISION OF 20 JULY 2011: INFRINGEMENT OF THE NON-DISCRIMINATION AND TRANSPARENCY OBLIGATIONS**
 - VOLUME DISCOUNTS (BASED ON DROPPED VOLUMES) AND OPERATIONAL DISCOUNTS (BASED ON DEGREE OF MAIL PREPARATION)
 - BUT CALCULATED ON AN INDIVIDUAL BASIS “PER SENDER” AND NOT ON TOTAL VOLUME IRRESPECTIVE OF THE ORIGINATING SENDER
 - FINE IMPOSED ON BPOST OF € 2.3M
- **COMPETITION COUNCIL DECISION OF 10 DECEMBER 2012**
 - PER SENDER MODEL IS AN ABUSE OF DOMINANT POSITION
 - FINE OF € 37.4M
- **BOTH DECISIONS ARE CHALLENGED BEFORE THE COURT OF APPEALS OF BRUSSELS**

BIPT Decision of 20 July 2011

- **LEGAL BASIS IS ARTICLE 12,5TH INDENT OF POSTAL SERVICES DIRECTIVE (PSD)**
 - **ARTICLE 12, 5 PSD (144TER,§1ER,5° OF THE BELGIAN POSTAL LAW) APPLIES TO BOTH OPERATIONAL AND VOLUME DISCOUNTS**
 - PRECLUDES USP FROM DISCRIMINATING BETWEEN CONSOLIDATORS, WHO BUNDLE TOGETHER MAIL FROM SEVERAL ORIGINATORS, AND BULK MAILERS, WHO POST THEIR OWN MAIL
 - CONFIRMED BY THE JUDGMENT OF THE CJEU OF 06/03/2008 IN JOINED CASES C-287/06 TO C-292/06 (VEDAT DENIZ)
 - **ARTICLE 12,5 PSD OBLIGES USP TO ENSURE TRANSPARENCY IN RELATION TO ALL CONDITIONS FOR ALL GROUPS OF USERS ENTITLED TO SPECIAL TARIFFS FULL TRANSPARENCY**
 - LACK OF TRANSPARENCY ON DISCOUNT SCHEME PREVENTED INTERMEDIARIES TO PREPARE THEIR BUSINESS CASES AND PROSPECT POTENTIAL CLIENTS ON TIME
 - BIPT SPECIFIED MODALITIES TO ENSURE ADEQUATE TRANSPARENCY; COMMITMENTS WERE MADE BY BPOST ON SUCH MODALITIES

Court of Appeals - 12 June 2013

- **PROCEDURAL ARGUMENTS OF BPOST: REJECTED**
- **SUBSTANTIVE ARGUMENTS:**
 - Court questions whether art. 12, 5 PSD applies also to volume rebates (as in per sender) or only to operational rebates (reference to importance of “avoided costs”)
 - To the extent art. 12, 5 PSD applies, the Court questions whether the per sender scheme is discriminatory under that provision
 - Irrespective of art. 12, 5 PSD, discount scheme must respect art. 12, 4 PSD (general non discrimination rule)
 - Violation of transparency obligations was rejected by the Court on the account that the law did not provide for sufficient clarity on how to execute such obligations



to
the
CJEU

Questions for a preliminary ruling of the Court of Justice of the EU

QUESTION 1: MATERIAL SCOPE OF THE 5TH INDENT OF ART. 12 PSD (RATIONE MATERIAE) – DOES THIS PROVISION APPLY ONLY TO OPERATIONAL REBATES (OR ALSO TO QUANTITY REBATES)?

IF Q1 = YES, THEN

QUESTION 2: COMPATIBILITY OF THE PER SENDER MODEL WITH NON-DISCRIMINATION PRINCIPLE UNDER ART. 12, 4TH INDENT PSD?

IF Q1 = No, THEN

QUESTION 3: DOES A QUANTITY REBATE RESTRICTED TO THE VOLUME OF THE SENDER, AS OPPOSED TO THE VOLUME OF THE CONSOLIDATOR, BREACH THE NON-DISCRIMINATION PRINCIPLE (RATIONE PERSONAE)



BIPT

TIMELINE



First question: scope of art. 12, 5

ART. 12, 5 PSD IS ONLY APPLICABLE ON OPERATIONAL DISCOUNTS

- **BPOST**

- **Operational discounts** are granted in return of **avoided costs**
- **Quantitative discounts** are granted in accordance with volumes: **no avoided costs** (the reduction of the cost per unit following a volume rebate does not correspond to an “avoided cost”)
- **“Special tariffs”** only apply to **operational discounts**
- **Quantitative discounts** fall under the scope of **Art. 12, 4th indent**
- No need for tariffs other than “special tariffs”, to be applied identically to senders as to intermediaries

- **FRANCE**

- Reference **“avoided costs”** indicates “applying exclusively to **operational discounts**”
- Reflects compromise concerning **tariff flexibility for USPs** in order to be able to adapt to growing competition

First question: scope of art. 12, 5

ART. 12, 5 PSD IS NOT LIMITED TO OPERATIONAL DISCOUNTS

- EUROPEAN COMMISSION

- Vedat Deniz Case: no distinction between **types of discounts** when deciding on equality of treatment between bulk mailers or intermediary consolidators
- Special tariffs cover **every tariff** of which the starting point is the standard traditional service and is differentiated considering avoided cost (both operational process and volumes can trigger cost savings)
- Consolidation of postal stream from different senders through mass deposit within the USP network forms a service by which the USP **avoids costs** of intervening for each individual sender
- Applying « special tariffs » as mentioned in article 12,5 PSD on quantity discounts perfectly corresponds to the **objective of the provision**

First question: scope of art. 12, 5

- SWEDEN

- « Special tariffs »: **generic term** designating the tariffs derogating from the uniform tariff and including every type of individually negotiated tariff
- Reference to « Avoided costs » in the preamble: no wording of the fifth indent suggests a purpose of limiting the scope to cost related special tariffs
- If objective would have been to limit the scope it would have been made explicitly
- Fifth indent is therefore applicable to quantity discounts
- Such interpretation contributes to the realization of an essential purpose: creating conditions for well functioning competitive market for postal services

First question: scope of art. 12, 5

- **ITALY**
 - No trace of distinction (between operational and quantity rebates) in the relevant provision and case law
 - Reference to « avoided costs » in preamble cannot be considered as limiting the scope to operational discounts as **quantity discounts also generate cost savings** in mail handling/processing
- **BELGIUM (I)**
 - If “special tariffs” are granted, it should be granted to intermediaries under the **same conditions** as to bulk mailers
 - Art. 12, 5 PSD was added in 2002 because **Art. 12, 4 PSD was considered insufficient** to allow intermediaries to have access at equitable access conditions
 - The reference to “**avoided costs**” was **removed** from art. 12, 5 PSD; the reference to “avoided costs” in the preamble is not sufficient to determine the scope of fifth indent

First question: scope of art. 12, 5

- **BELGIUM (II)**
 - If scope of art. 12, 5 PSD is limited to operational discounts, such discounts would be submitted to stricter regime than volume discounts for which art. 12, 4 PSD was considered insufficient by the EU legislator
 - Note: in the per sender case, volume discounts were much bigger (up to 50%) than the operational discounts (up to 10%)
 - In any event, **avoided costs** can result from both operational activities as of effect of large volume postings
 - Interpretation of the **Vedat Deniz** case:
 - prohibits discrimination between bulk mail and consolidated mail and can be transposed to the present case
 - reference to avoided costs should be linked to the text of art. 12, 5 PSD which applied then and to the facts of that case
 - the Vedat Deniz case does not restrict the scope of art. 12, 5 PSD which prohibits discrimination in special tariffs

Second question: art. 12, 4 PSD

- **EUROPEAN COMMISSION, SWEDEN:**
 - Since the first question was answered negatively, the second question does not need to be answered
- **ITALY**
 - Per Sender model constitutes a discrimination (not applying equivalent conditions on bulk mailers and intermediaries)
- **BELGIUM**
 - **Same service** implies **identical treatment** irrespective of the status of the users (mail handlers or direct clients)
 - **Economic justifications** for the discrimination are invalid:
 - equilibrium of USO is guaranteed by cost orientation;
 - not all intermediaries will have access to the highest rebates in a more competitive market;
 - additional reductions obtained by intermediaries can be passed on to final clients and thereby stimulate demand also (just like per sender rebates)

Second question: art. 12, 4 PSD

- **FRANCE**
 - **Only senders** generate **demand** for postal services → quantity discounts stimulate that demand
 - PSD does NOT require USP to set tariffs in favour of large consolidators
- **BPOST (I)**
 - Quantity discount scheme does not entail difference in treatment
 - Only senders generate demand → quantity discounts stimulate that demand
 - Result might be a classic '**no-win**' situation → abandon system of quantity discounts to protect financial equilibrium

Second question: art. 12, 4 PSD

- **BPOST (II)**
 - Quantitative discounts: effective instrument for convincing senders of using large volume distribution → limiting decrease of demand
 - Per Sender model aims to maintain quantitative discounts in viable financial conditions
 - Per Sender model applies both on senders and intermediaries
 - Senders and intermediaries are NOT in the same situation
 - Per Sender model does NOT cause crowding-out effect vis-à-vis intermediaries

Third question: personal scope

- **EUROPEAN COMMISSION**

- Vedat Deniz: intermediaries should benefit « the same tariffs under the same conditions »
- Fifth indent compels USP to respect the equal treatment of senders and consolidators when handling mail volumes in the same conditions
- Intermediaries are not senders *stricto sensu* but this has no impact on fact that intermediaries are explicitly covered by art. 12, 5 PSD as direct clients of the USP, requesting access to the postal network (like bulk mailers): equal treatment must be ensured

Third question: personal scope

- **SWEDEN**
 - Equal treatment of senders and intermediaries for beneficiating special tariffs
 - The service of transport mail volume is same, regardless of deposit by intermediary
- **ITALY**
 - The Per Sender model violates principle of *non-discrimination since not offering equivalent conditions*
 - National market of intermediaries characterized by fragmentation and presence of small operators => aggregation of postal streams, based on efficiency motives, should not be considered restrictive on competition
 - Development of intermediaries' activities could decrease market power of the postal operator in the market and improve the competitive conditions of the postal market

Third question: personal scope

- **BELGIUM**

- Vedat Deniz case: same conditions in relation with third parties (intermediaries are third parties)
- Non discrimination for equivalent services :
 - Transport from postal center and distribution to addressees
 - Origin (bulk mailer of intermediaries) of no incidence on the service rendered
 - Origin of no incidence on cost of service
- Nature of service offered to third parties and special tariffs are the main elements for the assessment of discrimination
- Type of beneficiary of the service is of no importance

Third question: personal scope

- **FRANCE**

- Since the first question was answered positively, and the second question was also answered, no need to answer the third question

- **BPOST**

- Vedat Deniz applied PSD 2002, not 2008: was then justified, but not anymore
- Quantitative discounts aim to stimulate demand and senders are the only ones doing so, since intermediaries act for senders
- Quantitative discounts granted to intermediaries do not constitute a violation of non-discrimination principle if the level of it equals the sum of discounts granted tot the sum of bulk mailers based on the volume of each bulk mailer individually

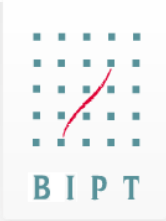
Opinion of Advocate General Sharpston (1)

FIRST QUESTION – SCOPE OF ART. 12, 5 PSD

- Scope of art. 12, 5 PSD is limited to operational discounts (“special tariffs”) only
- Non discrimination is contained in art. 12,4 PSD which covers quality rebates such as the ones at stake
- *“It follows that, should the Court disagree with my view and conclude that the fifth indent applies to quantity discounts as well as to operational discounts, the answer I propose to Question 2 below can be applied by analogy to answer Question 3”.*

• REASONING

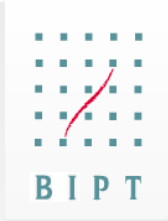
- No definition of special tariffs in the PSD
- AG refers to legislative history (EC proposal of 2000 which refers to USP practices as regards operational discounts)
- Volume discounts generate lower per unit costs but this does not fall in the concept of “avoided costs” targeted by operational discounts (due to lack of predictability)
- The removal of the words “avoided cost” (indicative of operational discounts) in 2008 did not change the scope of “special tariffs” in art. 12, 5 PSD



Opinion of Advocate General Sharpston (2)

SECOND QUESTION – DISCRIMINATION IS JUSTIFIABLE?

- System of quantity discounts does effectively entail a different treatment between consolidators of mail and individual bulk senders
- But Vedat Deniz does not apply as that case relates to operational discounts
- Senders and consolidators are not in a comparable situation as regards volume discounts
- “Per Sender” model is likely to stimulate demand as senders have an incentive to send more mail
- Risk of “aggregation” model: “no win” as quantity rebates will be removed (hence reducing demand)
- Possible negative impact on the financial equilibrium of the USP
- Neutrality of ‘per sender’ model: not liable to distort competition, no threat for viability of consolidators



Opinion of Advocate General Sharpston (3)

THIRD QUESTION – ANSWER TO SECOND QUESTION APPLIES
MUTATIS MUTANDIS

Comments

- **FIRST QUESTION**

- Legislative history: EC proposal of 2000 refers to a need for an enhanced non discrimination rule in view of anti-competitive practices (e.g. cross subsidization) by monopoly holders: no willingness to limit the proposal to “operational rebates”
- Volumes also generate cost savings (economies of scope and scale) and can therefore generate “special tariffs”
- Removal of “avoided costs” in 2008 has emphasized generic nature of “special tariffs”
- Vedat Deniz holding is not limited to operational discounts just because of its factual context

Comments

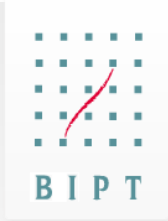
- **SECOND QUESTION**

- Discrimination justified by different identity of the client (consolidator vs bulk mailer): delicate precedent
- Only senders generate demand: highly disputable as intermediaries can also stimulate demand through consolidation of small/medium mailers (cf. Competition Council Decision, § 248)
- Financial equilibrium of USO is ensured via cost orientation principle (rebates cannot lead to below cost pricing)
- Reluctance against aggregation (which allegedly puts financial equilibrium at risk) questions market opening objectives and ladder of investment

Comments

- **THIRD QUESTION**

- AG does not answer as the first question is answered positively
- AG considers that answer to second question is *mutatis mutandis* answer to third question
- In doing so, AG considers that non-discrimination regime of art. 12, 5 PSD is identical to art. 12, 4 PSD
- However, Vedat Deniz shows that regime is different, stricter than art. 12, 4 PSD: different identity of the clients is not a valid reason for discrimination for the same service



Judgment of the Court of Justice

February 11th 2015





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THANK YOU FOR YOUR ATTENTION