

Competition Law in the Postal Sector: Trends and Analyses of Competition Cases in Europe



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1 Introduction

The opening of the European postal sector to competition has taken place in a gradual and controlled way. Over the last three decades, the European Commission (EC) has set the regulatory landscape with three Directives. In the meantime, continuing technological developments, in particular, in electronic communication and electronic commerce, have decreased mail demand and increased parcels demands. Postal operators have accelerated their diversification into new activities.

Today, the postal sector is characterized by the coexistence of universal service obligations and activities open to competition after liberalization. In addition, the state monopoly incumbents continue to have predominant market shares. Those specific features of the postal sector make its analysis interesting from a competition law point of view.

The topic of competition law in the postal sector in Europe has already been addressed by diverse researches.¹ But those studies have mainly focused on a case-by-case assessment of the EC decisional practice in the postal sector. We want to tackle the subject in another way. Our objective is to describe the trend in competition case law in the postal sector and identify and understand any link between the

¹See, for instance, Kjolbye and Malamataris (2016), Gerardin and Malamataris (2013), and Valentiny (2015).

This paper represents the personal views of the authors and do not necessarily reflect those of La Poste.

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competition law trend and regulatory changes in the sector. For this purpose, the authors constructed a database on the EC's competition decisions in the postal sector, from 1990 to the current day.

The paper is organized as follows. After this introduction, Section 2 sums up the main regulatory changes and market trends observed in the postal sector. Section 3 explains the analytical framework used by the EC to deal with state aid, mergers and antitrust cases. Section 4 describes the methodology used to answer the research question. Section 5 describes the trend in competition case law in the postal sector and its link to regulatory changes on the sector. Finally, Section 6 presents the main conclusions that can be drawn of competition decisions in the postal sector, as well as possible developments for future research.

2 Regulatory Evolution and Market Trends in the Postal Sector

As explained in the introduction, the specific features of the postal sector in the European Union—recent full liberalization coexisting with a universal service obligation and market trend changes—could affect competition regulation in the postal sector. To understand this influence, this section recalls the main regulatory changes and market trends observed in Europe in the postal sector during the last decades.

2.1 The Regulatory Landscape in the Postal Sector in Europe

2.1.1 Green Paper

The EC's Green paper on the development of the single market for postal services was adopted in 1992. Its objectives were, first, to provide a thorough-going analysis of the situation of the sector at the time; second, to discuss what should be the Community objectives for its postal sector; and third, to discuss how these objectives could be achieved. The guiding principle of the Green paper was the maintenance and the development of a universal postal service which would provide collection and delivery facilities throughout the Community at affordable prices and with a satisfactory quality of services.

The Green paper highlighted a major concern on the sector: the lack of harmonization. At the time when the Green paper was published, each Member State already reserved certain services in order to pursue some universal service objectives. But the scope of such services was usually larger than what was required to meet the objective. Considering this context, the option chosen by the Commission to further open of the market and strengthen the universal service was to implement liberalization and harmonization measures in a gradual manner. The Commission would remove certain services from the reserved area and define the universal service that should be provided in a coordinate manner throughout the Community.

2.1.2 First Directive (Directive 97/67/EC)

The first Postal Directive, adopted in December 1997, established a regulatory framework for European postal services. In line with the conclusions of the Green paper, the first Directive defined the minimum criteria for universal postal services² to be guaranteed by each Member and the conditions governing the provision of non-reserved services. The Directive also established common rules concerning tariff principles, quality and technical standards, and creation of independent national regulatory authorities. According to Hearn (2017), a major legal effect of the Postal Directive was to put in place exceptions from competition law to protect incumbents from the full rigor of the provisions of the Treaty of Rome for a transitional period of gradual and controlled liberalization of the market. The Directive stated that Member States should translate those provisions into national law no later than 12 months after the date of its entry into force (20 December 1997).

2.1.3 Second Directive (Directive 2002/39/EC)

The second Postal Directive, adopted in June 2002, amended the Directive 97/67/EC with regard to the further opening to competition of Community postal services. The Directive provided a timetable for a gradual and controlled opening to competition. The scope of the reserved area was therefore modified. The Directive stated that Member States should bring into force those provisions no later than 31 December 2002.

2.1.4 Third Directive (Directive 2008/6/EC)

The third Postal Directive, adopted in February 2008, amended again Directive 97/67/EC, with regard to the full accomplishment of the rules for governing internal market for Community postal services. This Directive set a deadline for full market opening of 31 December 2010 for 16 Member States,³ and an exemption was granted to the (then) remaining 11 Member States.⁴ The third Directive did not change the scope of the Universal Services Obligation (USO). All Member States must continue to ensure affordable universal postal services throughout the entire territory.

²Recital 2 of Directive 97/67 considered postal services as an essential instrument of communication and trade. The concept of universal service is not a particularity of the postal sector, but it applies to all Services of General Economic Interest (SGEI) (services provided in the public interest, where the market may not have sufficient incentives to do it, EC's communication 2001/C 17/04).

³Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Netherlands, Portugal, Slovenia, Spain, Sweden, and United Kingdom.

⁴Cyprus, Czech Republic, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, and Slovakia. Although Croatia formally joined the EU on 1 July 2013, its postal market was fully liberalized from 1 January 2013.

Full liberalization implied that maintaining a reserved area closed to competition is no longer an option. Member States could no longer grant or maintain exclusive or special rights for the establishment and provision of postal services. Consequently, Member States were provided with different possibilities to ensure the provision of the universal service, e.g., designation of one or several companies, different undertakings providing different elements of the universal service, and/or covering different parts of the national territory. Regarding financing of the universal service, the third Postal Directive provided a flexible and non-exhaustive list of financing possibilities: state aid, compensation funds, tendering procedures, or the establishment of a universal service fund.

2.2 Market Trends in the Postal Sector in Europe

At the beginning of the 1990s, mail services were provided in the reserved area (letters) and in the non-reserved area (parcels and express services). Those non-reserved areas were more profitable. Private operators were present mainly in parcels and express and in some cross-border letter services.

Since the beginning of the first decade of the year 2000, the postal sector has experienced a slowdown in the growth of mail sector. Each year, postal operators have seen their volume decrease, with an acceleration of the downward trend after the 2008 financial crisis. This decrease is mainly due to the development of new digital forms of communication.

In contrast to the letter volume decline, the postal sector is experiencing growth in parcels and express services. This growth is mainly due to the development of e-commerce, which has created new opportunities for the postal sector. In Europe, e-commerce turnover in 2017 amounted to €540 billion, 12.8% more than in 2016. In France, e-commerce growth in 2017 was 14.4%, with revenues of €81.7 billion. In 2017, there were 505 billion packages, 10.5% more than in 2016 (FEVAD 2018).

In the majority of postal markets, the Universal Service Providers' (USPs') profitability margin has been declining. With the structural changes in the postal sector, postal operators are developing new diversification strategies in other areas, mainly express services, logistics and freight services, and financial services. In France, La Poste has also chosen to focus its diversification strategy on personal services.

3 The EC Analytical Framework for Competition Decisions in the Postal Sector

The EC, as a competition authority at EU level, shall ensure the application of the principles laid down in the Treaty, particularly the competition rules. With regard to the postal sector, the objective is to promote and safeguard effective competition in

the areas of antitrust and cartels, mergers, and state aid. In 1998, a notice set out the Commission's interpretation of the competition rules of the Treaty to the postal sector (European Commission 1998).

This section provides a brief description of how the Commission deals with each type of procedure. A prerequisite to elaborate, treat, and interpret the EC's decisions is to understand how procedures work: what triggers a new investigation, what are the different steps of the investigations, is there a maximum length for those steps, and what could be the possible outcomes of a procedure.

3.1 Antitrust and Cartels Procedure

The antitrust policy is developed from two articles in the Treaty on the Functioning of the European Union (TFEU). Article 101 prohibits agreements between two or more independent market operators that restrict competition. Article 102 prohibits firms that hold a dominant position in a given market from abusing that position. The Commission and the national competition authorities shall apply the provisions on anti-competitive practices in cooperation.

Cases under Article 101 and 102 TFEU can begin with a complaint, an own-initiative investigation, an information reported by individuals, or a leniency application from one of the participants to a cartel. Even if the procedure for anti-competitive practices is not precisely structured in the time by specific deadlines, there are two phases: an initial investigation and an in-depth investigation. The Commission and the national competition authorities may sanction and impose fines on companies found guilty, but may also set up a commitment procedure enabling undertakings to advance and implement specific proposals aimed at solving the competition issues.

3.2 Merger Control Procedure

The legal basis for EU merger control is Council Regulation (EC) n°139/2004. According to this regulation, only concentrations that do not impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be allowed.

Authority for merger control is shared by the Commission and the national competition authorities. Parties must notify the Commission of a proposed merger prior to its implementation when it has an EU dimension, if the annual turnover of the combined businesses exceeds specified thresholds in terms of global and European sales. Below these thresholds, the national competition authorities may review the merger. After notification, the Commission analyses the deal during the phase 1 investigation. An in-depth analysis can be opened if the merger raises important competition concerns. The Commission can decide to authorize, authorize under conditions, or forbid the merger.

3.3 *State Aid Control Procedure*

The postal sector is subject to general provisions on state aid (Art. 107 TFEU) and to specific provisions for undertakings entrusted with the operation of services of general economic interest (SGEI) (Art. 106 TFEU). Under the provisions specific to SGEI, Member States can compensate a USP for the net cost of the public service, but they cannot overcompensate it. The control of state aid falls within the exclusive competence of the Commission. Case law begins in different ways: a formal notification by a Member State, a complaint (e.g., from a competing operator), or a self-referral to the Commission.

EC's merger and state aid procedures are very time-bound. The Commission has the possibility of closing cases through simplified procedures. This is why the duration of those types of procedures can be very brief. On the contrary, procedures relating to anti-competitive practices can last longer because of the complexity of investigations, many related exchanges between the competition authorities and the companies concerned, and, sometimes, even the need to undertake public consultations.

4 **Postal Competition Analysis Data**

As explained in Section 2, the postal sector is characterized by the coexistence between universal service obligations and activities left to free competition. According to Valentiny (2015):

[T]he completion of market opening in network services proved that the role of competition rules increase following a full market opening. The new entrants into the market attempt to avert the market-protection steps of the incumbent service providers by using the prohibition on restrictions of competition. (p. 55)

Given specificities and developments in the postal sector as well as the competition rules applying to it, the question arises as how the competition case law has evolved in the sector in Europe, particularly regarding the link with regulatory developments observed. This question has been previously addressed by other researches,⁵ mainly using a case-by-case assessment of the EC decisional practice in the postal sector. We aim to tackle this subject by using a different method of analysis. Our purpose is to focus on the trend in competition case law in the postal sector and identify and understand—if it exists—the link between the competition law trend and regulatory changes and market trends in the sector. To do so, we constructed a database of the EC's competition decisions in the postal sector using the EC's research tool for competition cases available on their website. This database contains general information on the investigations including the date the complaint was filed, the name of

⁵ Kjolbye and Malamataris (2016), Gerardin and Malamataris (2013), and Valentiny (2015).

the complainant, the dates of notification, adoption of the statement of objections and initiation of an in-depth investigation (if relevant), the country related to the case (either if it is the complainant on an antitrust case, the country providing the aid for an state aid decision or the country where a merging company locates), the relevant market, the amount of state aid approved, the final decision, the amount of the fine imposed (for antitrust decisions), the adoption of commitments, and the appeals related to each case (if applicable).⁶

In the EC's website, the postal sector was identified by choosing cases in the "H.53 – Postal and courier activities" category. For this analysis, the postal sector was restricted to those activities related to collection, sorting, transportation, and delivering of postal items—addressed mail, unaddressed mail, catalogues, newspapers, and parcels—including all express and cross-border services related to those items. This study therefore excludes some of the cases under the code H.53, either because they were misclassified and corresponded to another sector or because there were decisions concerning sectors where postal operators may be present but that are not directly related with postal activities (e.g., decisions on the banking sector).⁷

All decisions on state aid, mergers, and antitrust concerning the postal sector and available on the EC's website were listed and analyzed. The EC's advance research tool contains cases that have been the object of a Commission decision since 1 January 2000 for state aid cases, 21 September 1990 for merger cases and 1 January 1999 for antitrust cases. The final dataset covers all the competition cases in the postal sector available on the EC's website and initiated from 1990 to today. In summary, 96 competition cases in the postal sector were listed, corresponding to initiations of new competition cases on state aid, antitrust (including abuse of dominance), and mergers.

5 Analysis of the Trend in Competition Case Law in the Postal Sector and Link with Regulatory Changes and Market Trends

This section analyses the competition cases in the postal sector in Europe since 1990 as previously classified. The number of competition cases reported by the EC has been much less prolific in the postal sector than in other infrastructure sectors. When filtering on the sector "H.53 Postal and courier activities," 153 cases were reported. Doing the same exercise on other sectors provides a much large number of

⁶Because of lack of data availability and limited time, the database produced by this tool does not include decisions of national competitions authorities—a very interesting extension for future research.

⁷The research using the code H.53 resulted in 153 cases (94 for state aid, 50 for merger, and 13 for antitrust). After refining the perimeter, authors retained 96 cases (47 for state aid, 38 for merger, and 11 for antitrust).

cases: 1054 cases for sector “D.35, electricity, gas, steam and air conditioning supply,” and 671 cases for sector “J.61, telecommunications.” This difference can be explained by different reasons. First, the telecommunications and energy sectors are larger sectors that have opened up to competition earlier and faster than the postal sector. Indeed, the telecommunications sector has been open since 1998 and the energy sector since 2007. Secondly, the energy and telecommunications sectors are dynamic sectors with many growth drivers and innovations. This dynamism attracts many players capable of competing with the incumbent. In contrast, the opening up of the postal sector to competition was completed at a time when mail volumes were falling. The postal sector, with the exception of parcels, is a less dynamic sector. This reduces the incentive for players to enter this market and thus reduces competitive activity of the sector. The importance of competition in a sector will therefore have an impact on the number of competition cases in that sector.

The first step in the research was to elaborate descriptive statistics with this data and extract some conclusions. A second step consisted in studying the trend in competition case law in the postal sector and comparing it to the market trends and regulatory changes in the postal sector. Figure 1 presents the evolution of the number of initiations of new competition cases in the postal sector in the EU between 1990 and 2017, disaggregated by policy areas. Among the 96 cases that were covered, 49% corresponded to state aid cases, 40% were merger cases, and 11% were antitrust investigations. Antitrust investigations were less frequent during the period, but their average duration from the initiation until the termination date was the longest: 40 months for antitrust, against 21 months for state aid cases, and 1.5 months for merger cases.

We observe a variation in the number of cases along the three decades. During the 1990s, the average number of initiations per year was 2.7, whereas in the decade 2000–2010, this number increased to 4.5 initiations per year. After 2010, the average number of initiations has decreased to 4.13.

An increase in the number of initiations of state aid cases has been observed since 2002, which coincides with the date of adoption of the second Postal Directive.

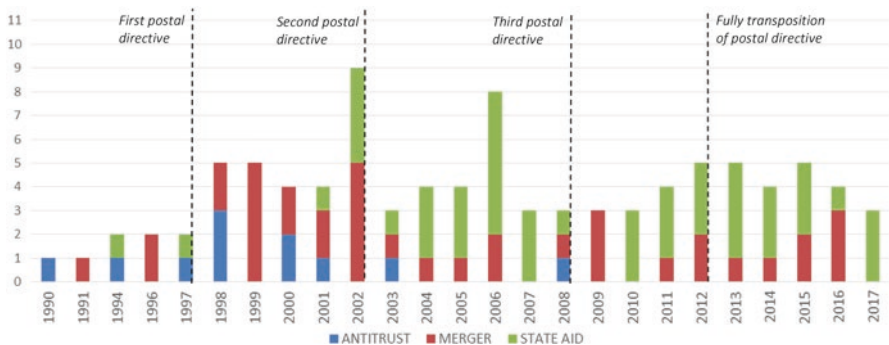


Fig. 1 Number of initiations of new competition cases in the postal sector by type of policy area, 1990–2017

In fact, this Directive provided for the reduction of the scope of reserved area, which was brought into force in 2003, and then further reduced in 2006. Reducing the reserved area may have had a negative impact on the financial sustainability of the USOs, so that Member States started to grant more compensations to Universal Service Providers (USPs).

The number of initiations in merger cases increased during 1998–2002, with an average of 3.2 decisions per year. But it has decreased since 2002, and it is more or less remained stable in the range of 1–3 cases per year, from 2002 to 2017. The number of initiations of antitrust cases has decreased since the 1990s. After observing a peak in 1998 (the year when the first Directive came into effect), the number of antitrust cases decreased to one or no cases per year. This could be explained because of a change of jurisdiction (national competition authorities dealing with most of the antitrust cases of Member States).

With regard to location, cases during the analyzed period were concentrated in Germany, the United Kingdom, France, and Italy.

5.1 State Aid Cases

In the postal sector, state aid control has several objectives: to ensure a level playing field for postal operators, to promote competition between them, and to ensure that high-quality postal services can continue to be delivered at affordable prices. During the analyzed period, 47 cases were state aid procedures. Thirty-eight of those cases were initiated by the notification of Member States, and nine cases were initiated by the EC, following a complaint (most of the time, complainants were the competitors of the national USP arguing against unlawful state aids and potential cross-subsidization). The number of state aid cases has increased over the last 30 years: during the 1990s, there were only 2 decisions; but from 2000 to 2010, there were 25 decisions, 2.7 on average per year.

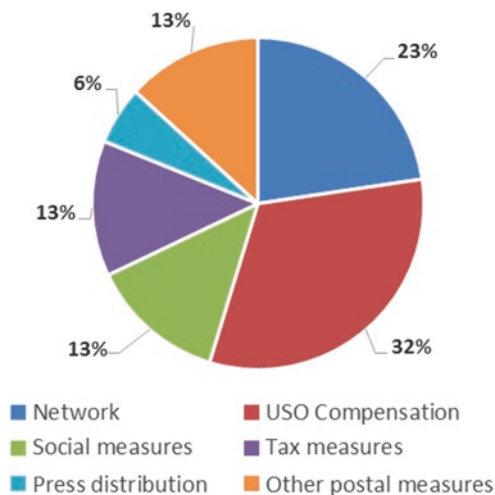
As can be observed in Fig. 2,⁸ state aid proceedings during this time concerned mainly compensations granted to USPs for discharging the universal postal services obligations entrusted to them. Aids granted to guarantee territorial coverage (network aids) were the second most important type of aid analyzed by the Commission during the period. Eight out of 11 decisions on network aids were notified by the United Kingdom.⁹ Only 3 among the 47 cases concerned aid measures for the distribution of the press; these took place in France and Belgium.

Out of 47 state aid decisions, the Commission found it necessary to open an in-depth investigation for only 17, which shows that the state aid control procedure is

⁸Two decisions concerned simultaneously three different types of aids. Each type of aid was considered when computing the shares.

⁹The United Kingdom undertook a series of measures during the 2000s in order to ensure that the post office counter network, Post Office Limited, will remain able to sustain a nationwide network of post offices, particularly in rural areas.

Fig. 2 State aid cases in the postal sector in Europe by type of aid, 1990–2017



quite effective. With the decline in letter volumes, the role of national financing of the USO is increasingly being raised. Of in-depth investigations, six were opened on the financing of the USO, while none were opened regarding the postal operators' network.

Regarding final outcomes, 74% of the cases ended with a decision of the Commission that the measure was no aid, or the aid was compatible with the internal market rules. Only 9% of aid measures were rejected as unlawful by the Commission. Two out of forty-seven state aid measures were compatible, but implementation was subject to commitments. For example, the Commission authorized state aid on condition that the Member State ensures that it improves the definition of the parameters for calculating controlling and reviewing the compensation.

Nineteen percent of the state aid decisions were appealed to the General Court (9 of the 47 cases). Three of those appeals ended with an annulment of the EC's decision by the General Court. In the first case, the Commission's decision had authorized, after a preliminary examination, state aid from Belgium to La Poste.¹⁰ The General Court found that the Commission had carried out an incomplete examination of the measure. The assessment of the compatibility with the common market of the notified measure raised serious difficulties, which should have led the Commission to initiate the procedure referred to in Article 88(2) EC (procedure allowing the Commission to examine the measure in depth).

The other two cases concerned state aid notified by Germany to Deutsche Post. The first case concerned a Commission's decision declaring state aid incompatible for reasons of overcompensation.¹¹ The European courts considered that the Commission had not verified that the notified aid was less than the total amount of

¹⁰General Court's decision (T-388/03) and Court of Justice's decision (C-148/09).

¹¹General Court's decision (T-266/02) and Court of Justice's decision (C-399/08).

Deutsche Post's net additional costs relating to its SGEI missions. In essence, the Commission had not proved the existence of an unlawful advantage. The second case concerned a Commission decision declaring certain measures incompatible.¹² The General Court held that the assertion that pension costs are part of the costs that are normally included in a company's budget was not sufficient to establish the existence of an economic advantage for Deutsche Post. Also in this case, the Commission had not provided sufficient evidence for the existence of an unlawful advantage.

5.2 *Merger Cases*

The aim of merger control in the postal services market is to prevent effective competition from being hampered by merging companies, in particular in new market segments. During the analyzed period, 38 of the investigations carried out by the EC were merger control procedures. All cases were initiated by the notification of the companies involved. In the 1990s, the average number of merger cases was of 2.5 cases per year. Most of the cases during those years concerned international services and parcels. Concentrations were mainly led by Dutch and German operators and were aimed to organize the international delivery business.¹³

During the 2000s, the average number of cases per year decreased to two. The concentrations took place on parcels, mails, and various postal services. The average number of cases continued to decrease to 1.6 during the period 2010–2017. Those cases concerned mainly parcels and mails (see Fig. 3).

As Fig. 4 illustrates, 87% of the cases initiated between 1990 and 2017 were reviewed under a simplified procedure, and the EC decided not to oppose to the merger. On 5% of the cases, the Commission decided not to oppose after a simplified procedure, but remedies were required. Two mergers (5%) were cleared after undertaking and an in-depth, phase 2, investigation; one case required commitments.

Only one merger was prohibited, but the Commission's decision was canceled by the General Court and by the Court of Justice.¹⁴ This case concerned the acquisition of TNT Express by UPS. The European court considered that the Commission failed to respect UPS's right of defense. The econometric analysis was based on a model different from the one that was the subject of an adversarial debate during the procedure, and for this reason the General Court annulled the Commission's decision.

¹² General Court's decision (T-143/12).

¹³ For example, decision M.102 concerned the creation of a JV between TNT and five postal operators.

¹⁴ Case M.6570: Acquisition of TNT Express by UPS, on the small package sector.

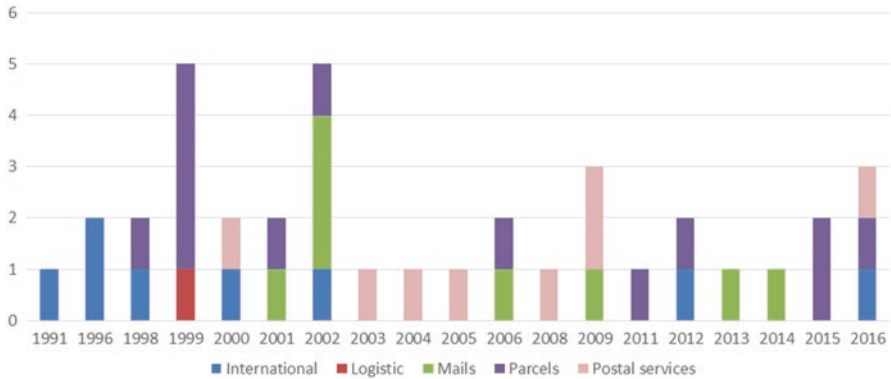


Fig. 3 Merger cases in the postal sector in Europe by market segment, 1991–2016

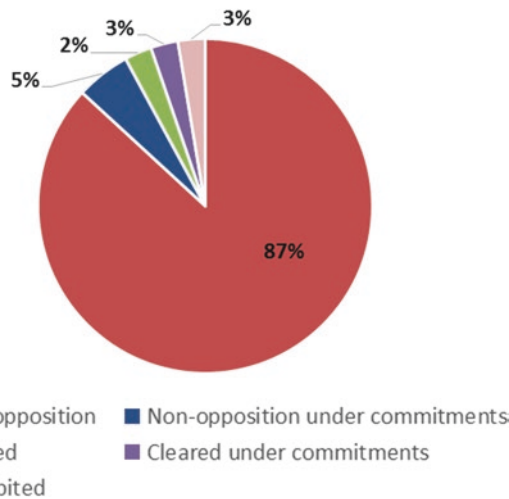
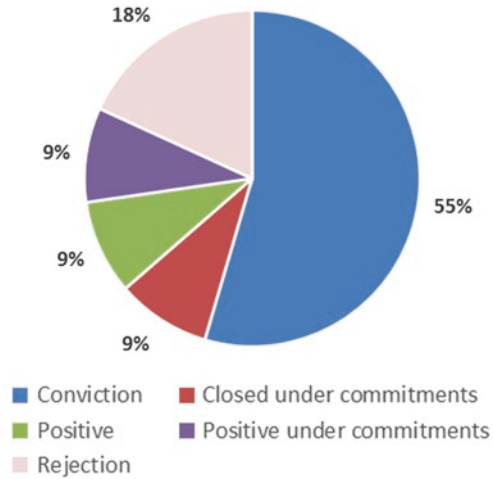


Fig. 4 Merger cases in the postal sector by final outcome: cases initiated between 1990 and 2017

5.3 Antitrust Cases

During the analyzed period, the EC only dealt with 11 antitrust cases. Seven investigations started after the filing of a complaint, and four cases were triggered by the EC’s own initiative. This low number of cases is due to the fact that generally the EC deals with cases that have an impact on the entire EU. For example, the Commission examined on the basis of Article 101 TFEU agreements on terminal dues, which concerned all postal operators. National competition authorities deal with a majority of cases concerning postal operators, as the effects are mainly within a Member State.

Fig. 5 Antitrust cases in the postal sector by final outcome: cases initiated between 1990 and 2017



The most important antitrust issues in the postal sector generally concern allegations that incumbent operators have engaged in abusive conduct to foreclose competitors. Out of 11 decisions, 9 concerned abuse of dominant position. Two main practices emerged: granting of selective and discriminatory rebates and refusal to give access to non-replicable parts of the postal network. In the case of abuse of a dominant position, it is not difficult to establish a strong market position, i.e., to satisfy the dominance requirement, since the incumbents tend to have a significant position in the local postal market.

As Fig. 5 shows, 55% of the cases ended with a conviction after finding an abuse of dominance. Those decisions concerned mainly mail services (hybrid mail, cross-border mail, B2B mail, and mail preparation). Two decisions ending with a positive outcome corresponded to the granting of an exemption to postal operators to sign an agreement to remunerate terminal dues (REIMS and REIMS II). The remaining cases were either closed by the Commission if the investigation did not prove any abuse of dominance or rejected.

6 Conclusion and Possible Extensions

This paper studied trends in competition case law in the postal sector during the last three decades, with the purpose to identify and understand (if existent) the link between the competition law trend and regulatory changes in the sector. To our knowledge, no other academic papers have attempted to analyze the EC’s competition law decisions in the postal sector by studying their trend over time.

In the first part of the paper, we reviewed the main regulatory changes and market trends observed in the postal sector. This review confirms the particular context of the postal sector liberalization. When adopting the three Directives, the

Commission had a twofold objective: guarantee the maintenance of the universal postal services at affordable prices and gradually achieve the full liberalization of postal services market. The second part of the paper recapped the analytical framework used by the EC to deal with state aid, mergers, and antitrust cases. In fact, understanding the different stages of the EC proceedings was required to construct and analyze the decisions' database.

The third part of the paper focused on the results and lessons from the analysis of the database. The analysis shows, first, that competition cases reported by the EC have been much less prolific in the postal sector than in other network sectors. Second, the Commission deals with very few antitrust decisions. Third, the trend of EC's decisions shows a clear increase in state aid decisions that coincides with the adoption of the second Postal Directive. Reducing the reserved area may have had a negative impact on the sustainability of the USOs, so that Member States started to grant more compensations to USPs, triggering more inquiries by the Commission.

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