

## Press Release

### **Monopolies Commission publishes Special Report on the situation of competition in the postal sector:**

#### **”Post 2015: Immediate reform of the legal and regulatory framework – Now!”**

- The Monopolies Commission finds stagnating competition in the postal sector – the dominant position of the Deutsche Post AG remains unchanged.
- The Monopolies Commission calls for an immediate reform of the legal and regulatory framework and a full application of the existing regulatory framework.

The Monopolies Commission (“Monopolkommission”) has submitted its 9th Special Report under Sec. 44 of the Postal Law today, bearing the title: **„Post 2015: Immediate reform of the legal and regulatory framework – Now!”** (“Postwendende Reform – Jetzt!”). The report analyses impediments to effective competition on the German letter and parcel markets and gives a number of recommendations on how to solve current problems on the political and administrative levels.

**“Politicians und regulators have to set a signal for a more intensive competition on the postal markets”**, said the chair of the Monopolies Commission, Professor Daniel Zimmer. The best way to achieve that goal is to improve the legal and regulatory framework and to fully make use of the existing regulatory framework.

On the letter market, no competition has evolved so far. Deutsche Post AG still acts as a quasi-monopolist on the market for private letters and as a market-dominant player on the market for business letters, in particular, because it is the only player which owns an area-wide distribution network. On the parcel markets, a certain degree of competition can be observed, which is characterized by few parcel operators using their own distribution networks. Nevertheless, Deutsche Post AG also has substantial market power in the field of parcels. In the Monopolies Commission’s opinion, digitalization provides opportunities to more intensive competition and to break into new markets.

**“The federal state should solve the conflict of interests, arising from its double role as the regulator on the one hand and as a shareholder on the other, and should completely sell its shares in Deutsche Post AG”**, said the chair of the Monopolies Commission. Furthermore, the politically responsible persons, or Legislature respectively, should cut back soon Deutsche Post AG’s privileges, such as the exclusive VAT-exemption for Universal Services and the potential to increase non-cost-based fees. In addition, it is advisable to extend the Federal Network Agency’s power (“Bundesnetzagentur”).

According to the Monopolies Commission, the existing regulatory framework provides potential to further improve the protection of both consumers and competition. Increases for

#### **Monopolkommission**

letters postage could normally be lowered, for instance, if the Federal Network Agency calculates an adequate profit margin for a dominant company or Deutsche Post AG respectively based on firm-specific risks, as it had done previously, rather than based on profit margins of European postal operators, as it did in its latest decision in the price cap procedure (“Maßgrößenentscheidung”) in November 2015.

Moreover, the Monopolies Commission recommends that the Federal Network Agency should modernize and effectuate the collection of data from dominant companies for regulatory purposes, implement an ex ante regulation of subservices charges, intensify its market monitoring, and increase its cooperation with the Federal Cartel Office (“Bundeskartellamt”).

The Monopolies Commission is a permanent, independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law and regulation. Its legal responsibilities encompass, among others, the preparation of a Special Report analyzing the development of competition in the postal markets. The Monopolies Commission has five Members appointed by the Federal President based on a proposal of the German government. Professor Dr. Daniel Zimmer of Bonn University is the chair of the Monopolies Commission.

## The Monopolies Commission's Recommendations for the Postal Sector

Addressed to the **German Government** and **Legislature** to improve the **ex ante regulation**:

- The First Regulation to amend the "Post-Entgeltregulierungsverordnung" should be repealed.
- Neutral expenditures should not further be included in ex ante regulation.
- Agreements on partial services, on conditions for the joint use of mailboxes and access to changes in address details should be submitted to the Federal Network Agency two months before the planned beginning at the latest, by analogy with the Telecommunications Act. Furthermore, the Federal Network Agency should be allowed to enjoin the dominant company from changing the postage for letters within two weeks from the application until the end of the Federal Network Agency's examination, if it is suspected that the changes are contrary to the law.
- Individually-negotiated agreements between the dominant company and large (business) customers should mandatorily be submitted to the Federal Network Agency, by analogy with the Telecommunications Act.
- Conditions for the access to address changes and to mailboxes should be set by the Federal Network Agency.
- The authorization requirement for charges for official document deliveries should be limited to the dominant company only.

Addressed to the **German Government** and **Legislature** to improve the **antitrust oversight**:

- The Federal Network Agency's right to obtain information should be extended to include both customers and non-postal enterprises without limitation.
- Third parties, e. g. competitors and customers, should be allowed a formal right of petition to initiate an antitrust proceeding by analogy with the Telecommunications Act.
- A test for margin squeeze and a consistency requirement should be included in the Postal Act by analogy with the Telecommunications Act.
- Administrative Offences violating the postal laws should substantially be fined by analogy with Sec. 81 of the Act against Restraints of Competition and Art. 23 of the Regulation 1/2003. Making false declarations to the Federal Network Agency should be fined by analogy with the Act against Restraints of Competition and the Telecommunications Act.
- The obligation to remedy damages should no longer be conditioned on the violation of legal norms protecting third parties, by analogy with the Act against Restraints of Competition and the Telecommunications Act. Furthermore, victims should obtain

access to all relevant information and evidence upon application. The statutory limitation period for charges subject to the Administrative Offences Act should be increased to five years according to the Directive 2014/104/EU.

Addressed to the **German Government** and **Legislature**:

- The Federal Government should sell its remaining 21 percent shareholding in Deutsche Post AG.
- As a first step, the VAT-exemption should be granted to all Universal Service providers without discrimination; as a second step, the Federal Government should work towards the abolition of this exemption on the European level. The power to grant VAT-exemptions should be transferred from the Federal Central Tax Office (“Bundeszentralamt für Steuern”) to the Federal Network Agency.
- Postal operators announcing to make cross-border deliveries should upon application be nominated as „designated operators“ towards the Universal Postal Union. The conditions for nomination should be set by decree. Alternatively, the nomination should be subject to open tender.
- During the modernization of public procurement law, open procedures and restricted procedures should not be equalized. In accordance with Directive 2014/24/EU, it should be considered to introduce a top limit for the minimum level of turnover that is used as an indicator for measuring a postal operator’s capability. Furthermore, public contracting authorities should be allowed to contact experts in terms of Directives 2014/24/EU and 2014/25/EU with a view to aligning public procurement proceedings with competition law. In addition, guidelines for public procurement proceedings should be formulated.
- The Universal Service Obligations should be reduced. The relevant scope of reduction could be identified by the Federal Network Agency by carrying out surveys of both consumers and postal operators.
- Cross references from the Postal Act to the Telecommunications Act should be updated. The Monopolies Commission should be allowed to inspect files of the Federal Network Agency in the field of the postal sector, for which a legal basis should be provided in the Postal Act by analogy with the Telecommunications Act.
- The legal obligations for recording and documentation stated in the minimum wage law should be reduced. Furthermore, and with reference to the minimum wage law, social interests should not be protected disproportionately under the Postal Act in the future.
- Independent IT-experts should be invited to the working group “Arbeitsgemeinschaft De-Mail”.
- According to a European Court of Justice’s judgment, the Federal State is obliged to carry out a postal sector inquiry. In cooperation with the European Commission, the

Federal State should identify the financial advantages and disadvantages arising from its pensions payments that represent a financial relief for the Deutsche Post AG, and, as far as an overcompensation is detected, reclaim payments from Deutsche Post AG.

Addressed to the **Federal Network Agency** and to the **Federal Cartel Office**:

- The cooperation between both authorities should be intensified in compliance with statutory provisions. This should also include an analysis and exchange of information regarding personal details and business secrets, irrespective of the type of proceeding, as far as this is necessary.
- The Federal Network Agency should set accounting standards for the dominant company, i.e., Deutsche Post AG, to get access to the Deutsche Post AG's database for the purpose of improving both the ex ante regulation and the antitrust oversight. To get access to the Deutsche Post AG's database the implementation of an IT-system is necessary that enables data exchanges compliant with data-protection law.
- The market process of developing electronical postal services and hybrid postal services should be monitored also in the future. The market for hybrid postal services should be considered as a single product market as far as this is indicated, subject to market developments.

Addressed to the **Federal Network Agency** with respect to the **ex ante regulation**:

- In the Monopolies Commission's opinion, the German letter market has unique market characteristics, and, thus, is not comparable to other European letter markets. The calculation of the adequate profit margin should be based on firm-specific risks, as had been done in previous years – before the "Post-Entgeltregulierungsverordnung" was reformed – and not based on profit margins of some European postal operators. The key parameter for calculating the adequate profit margin should be the amount of capital employed. The Federal Network Agency could identify an adequate market-based remuneration, for instance, on the basis of asset pricing models.
- Charges for Deutsche Post AG's partial services should be subject to ex ante regulation.
- Universal Services obligations should, also in the future, be considered as a part of the neutral expenditures and not as a part of the cost of an efficient service provision („Kosten einer effizienten Leistungsbereitstellung“).
- The cost assessments should be based on an analytic cost model. The model specification should be determined in cooperation with both market participants and experts.

Addressed to the **Federal Network Agency** with respect to the **market oversight**:

- The net costs of Universal Services Obligations should be published on the occasion

of price-cap decisions.

- In accordance with the Postal Services Directive, reporting obligations should be extended to include a selection of quality parameters, and an annual quality measurement of the provision of cross-border Universal Services carried out by independent auditors.
- A representative consumer survey should be carried out to determine the need for Universal Services. In general, surveys should be carried out biennially to determine the need for Universal Services.
- Studies on the letter market should be extended to include information on the individual letter services and the development of competition at the regional level. The Federal Network Agency should assist in commissioned studies on the parcel markets by use of its right to obtain information from postal operators. Market data on domestic and cross-border parcel deliveries should be published. In cooperation with postal operators and experts, guidelines for data procurement and data modelling should be formulated.

Addressed to the **Federal Cartel Office** with respect to the **market oversight**:

- A sector inquiry according to Sec. § 32e Act against Restraints of Competition should be initiated.