

Enforcement Decision Series (E/14/001)

Competition Act 2002

Decision of the Competition Authority (Case COM/13/005)

Alleged anti-competitive conduct by An Post in the market for bulk distribution of pre-sorted publications by post in the State.

October 2014

Executive Summary

In 2013, the Competition Authority (“the Authority”) initiated an investigation into the application of An Post’s Zonal Pricing Scheme for users of its Publication Services product between March 2012 and February 2013.

The Publication Services product is offered by An Post to publishers of newspapers and periodicals (e.g. magazines and newsletters) that post in excess of 100 items in a single mailing. The service involves the delivery by post of newspapers and periodicals presented in bulk to An Post.

The focus of the Authority’s investigation related to the manner in which An Post’s Zonal Pricing Scheme for the Publication Services product was implemented during the above period.

The Authority is of the view that, between March 2012 and February 2013, the manner in which the Zonal Pricing Scheme was implemented raised competition law concerns. The investigation conducted by the Authority indicates that An Post sought exclusivity from publishers by making a reduced tariff for the Publication Services product conditional on An Post providing all of a publisher’s delivery requirements. This had essentially the same effect as granting an exclusivity discount. Given An Post’s likely dominant position in the relevant market, the Authority is of the view that the application of the Zonal Pricing Scheme during this period was likely to amount to a breach of Section 5 of the Competition Act 2002 and/or Article 102 of the Treaty on the Functioning of the European Union.

The Authority is satisfied that An Post’s amended procedures for the application of the Zonal Pricing Scheme, introduced in February 2013, address the competition concerns identified during the investigation. Because An Post amended its procedures in a timely manner following the opening of the investigation, the Authority has decided to close its investigation and publish this Decision notice by way of information and explanation of the issues involved.

Table of Contents

1. Introduction	3
2. The Postal Sector	5
Postal Service Operators	5
How publications are prepared and delivered to subscribers.....	6
3. An Post's Publication Services Product.....	8
An Post's Pricing Policy for Publication Services prior to the Relevant Period	8
An Post's Pricing Policy for Publication Services during the Relevant Period	8
An Post's procedures for its Publication Services after the Relevant Period	13
4. Legal Framework.....	15
Is An Post an 'undertaking'?	15
Is there an 'effect on trade'?.....	16
5. Dominance	17
Relevant Market	17
Dominance	20
6. Abuse of Dominance.....	23
Exclusivity discounts - General	23
The Application of the Zonal Pricing Scheme to Publication Services	24
Objective Justification	26
7. The Decision.....	29

1. INTRODUCTION

- 1.1 In 2012, the Competition Authority (the "Authority") received a number of complaints concerning An Post. These complaints related mainly to the manner in which An Post applied the Zonal Pricing Scheme for its Publication Services from March 2012 until February 2013 (the "Relevant Period").
- 1.2 A zonal pricing scheme is a tariff structure whereby there is a higher price for deliveries to rural areas and a lower price for urban areas.
- 1.3 The Publication Services product is a product offered by An Post to publishers of newspapers and periodicals (e.g. magazines and newsletters) that post in excess of 100 items in a single mailing. This involves the delivery by post of newspapers and periodicals presented in bulk to An Post.¹
- 1.4 The complainants alleged that, during the Relevant Period, An Post applied the Zonal Pricing Scheme for its Publication Services in a manner aimed at securing exclusivity from its customers. According to the complainants, the tariff that An Post charged (or attempted to charge) to publishers who used a competitor was higher, on a comparable basis, than the tariff charged to publishers who used An Post exclusively.
- 1.5 Upon receipt of these complaints, the Authority conducted a thorough investigation and assessed the manner in which An Post applied the Zonal Pricing Scheme during the Relevant Period under section 5 of the Competition Act 2002 (the "Act") and under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). As part of the investigative process, the Authority obtained information from An Post and other sources such as An Post's competitors, customers and trade associations representing publishers.
- 1.6 It should be noted that the Authority has not formed a view on the compatibility with competition law of the Zonal Pricing Scheme itself. Instead the focus of this investigation was on the manner in which the Zonal Pricing Scheme was implemented during the Relevant Period.
- 1.7 For the reasons set out below, the Authority is of the view that, during the Relevant Period, the manner in which the Zonal Pricing Scheme was implemented by An Post raised concerns from a competition law perspective.
- 1.8 Investigative steps taken by the Authority indicate that, in many instances during the Relevant Period, An Post sought exclusivity from publishers by making a reduced tariff for the Publication Services product conditional upon An Post delivering all of a publisher's delivery requirements. This had essentially the same effect as granting an exclusivity discount.² Given An Post's likely dominant position in the relevant market, the Authority is of the view that the application of the Zonal Pricing Scheme during the Relevant Period was likely to amount to a breach of section 5 of the Act and Article 102 TFEU.

¹See

<http://www.anpost.ie/AnPost/MainContent/Business+Customers/Our+Business+Services/Publications/>

² Exclusivity discounts or rebates are also often referred to as loyalty or fidelity rebates.

- 1.9 However, as further explained below, the Authority is satisfied that An Post's procedures for the application of the Zonal Pricing Scheme introduced in February 2013 address the competition concerns identified during the investigation. The Authority has therefore decided to close its investigation of this matter.
- 1.10 Section 30(1) (g) of the Act gives the Authority the function to "*carry on such activities as it considers appropriate to inform the public about competition issues*". In exercise of this function, the Authority may decide to publish a Decision Note in respect of selected investigations. Decision Notes outline the general and economic assessment conducted by the Authority during an investigation. The main objective of such a note is to increase transparency and predictability in respect of the application of competition law to alleged anticompetitive behaviour.
- 1.11 The Authority was of the view that the publication of a Decision Note in relation to this investigation would help clarify the Authority's application of section 5 of the Act and/or Article 102 TFEU to exclusivity rebates and discounts granted by a dominant undertaking. It is intended to provide greater clarity and predictability as regards the general framework of analysis which the Authority employs in determining whether activities of dominant undertakings raise concerns under competition law and to help undertakings better assess whether certain behaviour is likely to result in the intervention by the Authority under section 5 of the Act and/or Article 102 TFEU.
- 1.12 This Enforcement Decision sets out the key factual and legal issues relevant to the application of the Zonal Pricing Scheme by An Post during the Relevant Period along with the Authority's assessment of the competition law implications of those issues.

2. THE POSTAL SECTOR

- 2.1 The Communications Regulation (Postal Services) Act 2011³ provided for the full liberalisation of the postal sector in Ireland with effect from 2 August 2011. This means that all postal services are now open fully to competition and no area of postal services is reserved to An Post.
- 2.2 To ensure that efficient, reliable and good quality postal services are available to everyone at affordable prices, the EU postal regulatory framework imposes obligations on Member States to ensure the provision of a universal postal service.⁴ To achieve this each Member State is required to appoint a “universal postal service provider” which is obliged to provide this service. An Post has been designated as the universal postal service provider in Ireland until 2023.⁵

Postal Service Operators

An Post

- 2.3 An Post is a state-owned operator and the historic monopolist provider of postal services in Ireland. It owns the main postal network and attendant infrastructure. It fulfils the core functions of a postal operator, namely the collection, sorting, transport and delivery of mail.
- 2.4 As indicated above, An Post has been designated as the “universal postal service provider” in Ireland until 2023. The postal services that must be provided by An Post - i.e. the services under the remit of the universal postal service obligation (“USO”) - include a standard single piece postal service⁶ and a service for the collection, transport and distribution of postal packets deposited in bulk which have already been pre-sorted.⁷ The provision of these universal postal services by An Post is regulated by the Commission for Communications Regulation (“ComReg”).
- 2.5 Although An Post is obliged to provide these services until 2023, these universal postal services are not reserved to An Post. Any company can provide these services in competition with An Post should they so wish.
- 2.6 In addition to the universal postal services, An Post provides other postal services (which are also open to competition) including:
- Bulk mail service: for postings of large volumes of mail. There are two categories- one for between 350 and 2,000 items and another for 2,000 and greater items in a single posting.

³ See <http://www.irishstatutebook.ie/2011/en/act/pub/0021/index.html>.

⁴ The reference to “universal” implies that it is a service which is available or accessible everywhere and to everyone on the same conditions. Citizens/businesses located in rural areas should enjoy similar or comparable access to basic postal services to that available to their urban counterparts. Such services must also meet specified quality targets and be available at affordable prices. See http://ec.europa.eu/internal_market/post/faq_en.htm.

⁵ See section 17 of the Communications Regulation (Postal Services) Act 2011.

⁶ In accordance with the Communications Regulation (Universal Postal Service) Regulations 2012 (S.I. No. 280 of 2012), deliveries to addresses within the State are to be made within one working day of posting. Deliveries to other addresses within the EU are to be made within three working days of posting, while deliveries to all other foreign addresses are to be made within up to nine working days of posting.

⁷ See Regulation 3 of the Communications Regulation (Universal Postal Service) Regulations 2012 (S.I. No. 280 of 2012). Prior to the making of these Regulations the universal postal service was defined in the following ComReg document: The Universal Service: A Working Definition, Document No. 05/85 (available at <http://www.ComReg.ie/fileupload/publications/ComReg0585.pdf>).

- Publication Services: nationwide service for postings of over 100 newspapers and periodicals in a single mailing. As indicated above, this is the service to which the complaints in the present case relate.
- Postaim: for addressed promotional and marketing mail consisting of over 2,000 items.
- Publicity Post: an unaddressed direct mail service for leaflets, newsletters and product samples.

2.7 With respect to the products referred to in paragraph 2.6 above, as well as the bulk USO product referred to in paragraph 2.4 above, An Post offer reduced tariffs for large volume mailings that are significantly lower, on a unit basis, than those charged for over the counter single piece mailing. The lower tariffs/discounts for these products depend on one or more of the following factors:

- The volume of items presented;
- Weight of the items;
- The degree to which the mail is sorted;
- Required delivery time; and,
- The geographical representation of the delivery destinations.

2.8 An Post's products can be purchased by any user whose mail fulfils the product's criteria. In principle therefore, both business customers and other postal service providers can purchase any product from the range (i.e. the products are both retail products and wholesale products). Irrespective of who purchases the product, the mail goes through the same delivery process.

Other postal service providers

2.9 There are a number of other providers of postal services operating in the State. These include, but are not limited to, CityPost, Cyclone, DHL, DX, Erin Swiftpost, Lettershop and Pony Express.⁸

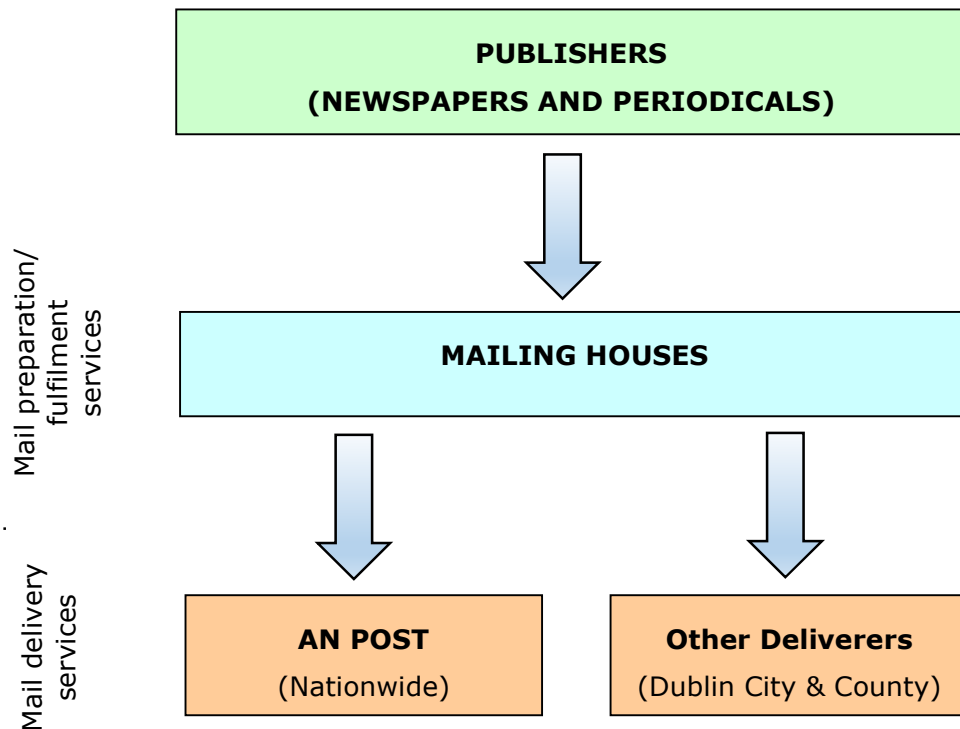
How publications are prepared and delivered to subscribers

2.10 Before addressing the facts surrounding the alleged anti-competitive behaviour of An Post, it is important to understand the functioning of the postal market and, in particular, the market for the delivery by post of pre-sorted newspapers and periodicals presented in bulk.⁹ This section includes a brief overview of this market and illustrates the interactions among the key players.

Diagram 1: Delivery by post of newspapers and periodicals presented in bulk

⁸ This list is not exhaustive and there may be other providers of postal services.

⁹ Note that this describes the structure of the market during the Relevant Period and is not necessarily reflective of the market as it is structured currently or how it will be structured in future.



- 2.11 One of the distribution channels that publishers of newspapers and periodicals use to get their publications to customers is delivery by post. In almost all instances, publishers use a company that provides fulfilment/mail preparation services (i.e. mailing houses). Fulfilment services include printing, enveloping, poly-wrapping, parcel packing, storage, retrieval, pre-sorting and dispatch.¹⁰
- 2.12 When the publications are ready for delivery, publishers (and/or the mailing houses) need to choose a postal service provider. An important factor in the current context is that, in the State, only An Post offers a nationwide service for publications.
- 2.13 In respect of An Post’s Publication Services, the Authority is aware of just two competing providers, Lettershop and DX. The operations of these competitors for the delivery of publications are limited to areas in and surrounding Dublin city.
- 2.14 The Authority understands that, in general, it is the mailing house, not the publisher, who liaises with the postal service provider.¹¹ The mailing house may engage a postal service provider other than An Post to deliver some of its mail in areas where such an alternative postal service provider operates a delivery service. The mailing house itself may also be capable of providing a delivery service in certain areas. Mailings to destinations where no such alternatives are available are injected into An Post’s nationwide network.

¹⁰ In the case of mailing houses that used An Post as their postal service provider, during the Relevant Period, publications had to be sorted to 151 pre-sort areas prior to injection into An Post’s network.

¹¹ There are exceptions, but, in general, publishers that utilise a mailing house have the mailing house inject the mail into An Post’s network as part of the service they purchase from the mailing house.

3. AN POST'S PUBLICATION SERVICES PRODUCT

3.1 As indicated above, one of the products offered by An Post is the Publication Services product.¹² This product is aimed specifically at publishers of newspapers¹³ and periodicals.¹⁴ In order to avail of this service, a customer must present more than 100 items in a single mailing.

An Post's Pricing Policy for Publication Services prior to the Relevant Period

3.2 Until March 2012, two parameters determined the price of An Post's Publication Services product, namely the weight and volume of items posted as shown in Table 1.

Table 1: An Post's old Tariffs for its Publication Services

Weigh not over	Price per item per mailing <u>Rate 1: 100 +</u>	Price per item per mailing <u>Rate 2: 2000 +</u>
250g	€0.77	€0.67
375g	€1.15	€1.03
500g	€1.53	€1.35
750g	€2.62	€2.43
1 kg	€2.81	€2.81

3.3 Table 1 shows that two sets of tariffs were available:

- Rate 1 applied to the delivery of between 100 and 2,000 identical items presented together in a single posting.
- Rate 2 applied to the delivery of 2,001 or more identical items presented together in a single posting.

An Post's Pricing Policy for Publication Services during the Relevant Period

3.4 On 5 March 2012, An Post introduced the Zonal Pricing Scheme for its Publication Services product. This involved a very significant change in the criteria used by An Post to determine the tariffs to certain users of its Publication Services Product. This key change was that the geographical profile of the mailing would now affect the calculation of the tariff. The tariffs introduced under this Scheme are set out in Tables 2 and 3. Shortly after the introduction of the Scheme, the Authority

¹² See:

<http://www.anpost.ie/AnPost/MainContent/Business+Customers/Our+Business+Services/Publications/> for details.

¹³ A newspaper is defined by An Post as a publication which consists of political, news-related articles and/or current topics and can include advertisement material. It must be printed and published at intervals of not more than seven days (see No. 1 Terms and Conditions; An Post Publication Services).

¹⁴ A periodical is defined by An Post as a magazine or similar printed matter published at intervals of not more than three months. Periodicals must be submitted annually for approval prior to being eligible to avail of the service (see No. 2: Terms and Conditions; An Post Publication Services).

received a number of complaints concerning the manner in which the Zonal Pricing Scheme was applied by An Post.

- 3.5 The structure of the Zonal Pricing Scheme and the manner in which it was applied by An Post during the Relevant Period are explained below.

The Zonal Pricing Scheme

- 3.6 When the Zonal Pricing Scheme was introduced, the tariffs for the Publication Services (based on weight and volume) were named "composite tariffs" and were published as shown in Table 2 below. The "composite tariffs" were higher than the pre-March 2012 tariffs.

Table 2: An Post Tariffs for Publication Services after March 2012

Weigh not over	Price per item per mailing Composite Tariff 1: 100 +	Price per item per mailing Composite Tariff 2: 2000 +
250g	€0.85	€0.75
375g	€1.30	€1.20
500g	€1.65	€1.50
750g	€2.65	€2.50
1 kg	€2.85	€2.85

- 3.7 As already indicated, the most significant change introduced by the Zonal Pricing Scheme was that weight and volume were no longer to be the only parameters relevant to the determination of the final price to be paid by publishers. A new geographical parameter became a key factor in determining the final price. This is apparent from An Post's Guide to Postal Rates which explains that the composite tariffs are:

...rates which are indicative of the rate which will apply to mail that is geographically representative of a nationwide posting, where there is a geographical bias, an alternative zonal rate will apply.¹⁵

- 3.8 This means that under the Zonal Pricing Scheme:
- the composite tariffs set out in Table 2 above apply in respect of publications whose mailing is geographically representative of a nationwide posting;
 - an alternative zonal tariff applies in respect of publications with geographical bias.
- 3.9 It is significant that the zonal tariffs were not published by An Post during the Relevant Period as this meant that publishers were not in a position to make clear commercial decisions on which postal service to use during the Relevant Period. They were, however, provided by An Post to the Authority during its investigation and are now published by An Post. These are included in Table 3 below.

¹⁵ An Post; Guide to Postal Rates, effective from 1 May 2012.

Table 3: Zonal Tariffs

Discount 1: 100-2,000				
Weight not over	Composite Min Tariff	Urban A	Sub-Urban B	Rural C
250g	0.85	0.75	1.00	1.50
375g	1.30	1.20	1.40	2.10
500g	1.65	1.55	1.85	2.10
750g	2.65	2.55	2.85	3.10
1Kg	2.85	2.80	2.90	3.20

Discount 2: 2,000+				
Weight not over	Composite Min Tariff	Urban A	Sub-Urban B	Rural C
250g	0.75	0.65	0.90	1.40
375g	1.20	1.10	1.30	2.00
500g	1.49	1.40	1.65	2.00
750g	2.50	2.40	2.70	2.95
1Kg	2.85	2.80	2.90	3.20

3.10 During the Relevant Period, An Post separated all of its pre-sort areas into three zones based on delivery costs: Zone A (urban areas); Zone B (suburban areas) and Zone C (rural areas).¹⁶ Each of Zone A, Zone B and Zone C had a corresponding tariff. According to An Post, Zone C is the highest delivery cost zone (and thus attracts the highest tariff).

3.11 The key elements of the Zonal Pricing Scheme are:

- a composite tariff; and,
- zonal tariffs for each of Zones A, B and C.

3.12 The interaction between the composite tariff and the zonal tariffs and the manner in which they are applied by An Post to determine the final price to be paid by the customers of the Publication Services is explained below and illustrated with examples.

3.13 From An Post's perspective:

- First, it identifies which mail of a particular customer is addressed to each of Zones A, B and C.
- Second, it multiplies the volume of mail going to each of Zones A, B and C by the appropriate zonal tariff.
- Third, it adds together the price of the mail going to Zones A, B and C (as calculated under step 2 above) to calculate the total price.

¹⁶ Based on information provided to the Authority by An Post during the Authority's investigation.

- Fourth, it divides the total price by the overall volume of mail to determine an average tariff per item of mail.
- 3.14 If the average tariff per item is equal to or below the composite tariff, then the composite tariff is applied. In this instance, the mailing is considered by An Post to be “geographically representative of a nationwide posting”.¹⁷
- 3.15 If the average tariff per item is above the composite tariff, An Post considers that there is “geographical bias” and a higher zonal tariff is applied.¹⁸
- 3.16 According to An Post, a mailing which is “geographically representative of a nationwide posting”, and thus liable for the composite tariff, is a mailing in respect of which:
- Approximately 70% of the total mail presented to An Post by the publication in question is destined to Zone A;
 - Approximately 25% of the total mail presented to An Post by the publication is destined to Zone B; and,
 - Approximately 5% of the total mail presented to An Post by the publication is destined to Zone C.

This is referred to as the 70/25/5 rule.¹⁹

- 3.17 However, it must be borne in mind that the 70/25/5 rule is an average. There are upper bounds to the percentage of mail going to Zones B and C which may mean that the average tariff is lower than the composite tariff, in which case the composite tariff should apply to that mailing. The following illustrates these bounds:
- If a publication has no mail going to Zone C, then a 60/40 split between Zones A and B will mean an average tariff equal to the composite rate.
 - If a publication has no mail going to Zone B, then an 86.75/13.25 split between Zones A and C will mean an average tariff equal to the composite rate.
 - As a final example, if a publication has a split of 75/17.5/7.5 between Zones A, B and C, this gives an average tariff equal to the composite rate.
- 3.18 The above examples show that, as long as the average price for delivery by An Post - irrespective of destination - is at or below €0.75 for a mailing greater than 2,000 items, a composite tariff should apply. This should be the case even though using a competitor of An Post for some of the Zone A mailing requirements does increase the likelihood of having a zonal tariff applied.

¹⁷ An Post Publication Services information booklet; March 2012

¹⁸ An Post has indicated to the Authority that economies of density tend to mean that deliveries to rural areas are more costly for a postal service provider. See *The Impact on Universal Service of the Full Market Accomplishment of the Postal Internal Market in 2009. Final Report*; PriceWaterHouseCoopers; May 2006.

¹⁹ Based on a report prepared by Deloitte for An Post, which was based on the cost of delivering USO mail across each type of mail.

- 3.19 As such, whether or not a particular publication is delivered by a competitor of An Post in certain parts of Zone A should not - on the proper application of the terms of the Zonal Pricing Scheme - be determinative of liability for the higher zonal tariff.

Application of the Zonal Pricing Scheme during the Relevant Period

- 3.20 The Authority's investigation focussed on the application of the Zonal Pricing Scheme during the relevant period and its investigation did not consider how the Zonal Pricing Scheme was structured. As such, the Authority has not reached any conclusion regarding the compatibility with competition law of the Zonal Pricing Scheme itself.
- 3.21 However, the evidence gathered by the Authority indicates that, during the Relevant Period, An Post applied the Zonal Pricing Scheme in a manner that may have led to anti-competitive foreclosure of An Post's competitors. In particular, the evidence gathered by the Authority indicates that An Post's decision to charge the higher zonal tariff was not based only on the application of the relevant parameters (namely, weight, volume and geographical spread of the mail) but also on whether or not a particular publication was being delivered by a competitor of An Post.
- 3.22 The reason for this was that An Post, during the Relevant Period, advised/applied the Zonal Pricing Scheme to publications that An Post knew (or believed) were using a competitor for some deliveries. This had a two-fold effect. First, An Post advised/charged the zonal tariff to some publications whose mailing profile with An Post satisfied the conditions necessary under the rules of the Zonal Pricing Scheme itself to have a composite tariff applied. Second, An Post advised/charged the composite tariff to publications whose mailing profile satisfied the conditions necessary under the rules of the Zonal Pricing Scheme itself to have a zonal tariff applied.
- 3.23 The result of how the Zonal Pricing Scheme was applied during the Relevant Period was that the majority of publications that ought to have been liable under the rules of the Zonal Pricing Scheme for a higher zonal tariff were in fact charged a lower composite tariff. However, some customers of the publications services (namely those that were using a competitor of An Post for deliveries in urban area) were advised of a higher zonal tariff – notwithstanding the fact that at least some of these publications ought to have been liable to the lower composite tariff.
- 3.24 The Authority is of the view that this behaviour had the same effect as applying an exclusivity discount.
- 3.25 The evidence gathered by the Authority during the course of its investigation includes internal correspondence of An Post, the correspondence between An Post and publishers and/or mailing houses, and information provided to the Authority by publishers, mailing houses and trade associations representing publishers.
- 3.26 The following aspects of the application of the Zonal Pricing Scheme during the Relevant Period support the contention that An Post's exclusionary behaviour was capable of leading to anti-competitive foreclosure of competing postal service providers.

An Post sought to ascertain which publishers used a competitor

- 3.27 The evidence gathered by the Authority indicates that, prior to the introduction of Zonal Pricing Scheme in March 2012, An Post sought to ascertain which publishers were using a competitor for some deliveries. As explained above, although using a competitor for delivery in Zone A may increase the likelihood of a zonal tariff being applicable, if the Zonal Pricing Scheme is applied in accordance with its terms, the use of a competitor should not be determinative.

Zonal Tariffs were not published

- 3.28 During the Relevant Period, the zonal tariffs were not published. This meant that publishers and/or mailing houses could not know what the additional charge would be before they submitted a sample of their publication's mailing ("a manifest") to An Post to ascertain the price that would apply to that publication's mailing. This had the effect of making it difficult for publishers to ascertain the most economical method of delivery.

Correspondence between An Post and Publication Services Customers

- 3.29 The correspondence gathered by the Authority between An Post and publishers/ mailing houses during the Relevant Period indicates that publishers needed to use An Post exclusively in order to avoid being subject to zonal pricing.

Initial implementation of the Zonal Pricing Scheme

- 3.30 The evidence the Authority gathered indicates that both in the time immediately preceding the introduction of the Zonal Pricing Scheme and during the initial implementation period after March 2012, publications that An Post either knew (or believed) to be using a competitor were the first ones to be advised that zonal pricing was applicable.

Publications that were not liable for a zonal tariff were charged a zonal tariff

- 3.31 The evidence gathered by the Authority indicates that during the Relevant Period a number of publications that should not have been liable for a zonal tariff were charged a zonal tariff. All such publications used a competitor for some of their delivery requirements.

Publications that were liable for a zonal tariff were not charged

- 3.32 Finally, the evidence obtained indicates that a large number of publications that used An Post exclusively and that ought to have been liable for a zonal tariff were not advised of - or charged - a zonal tariff during the Relevant Period.

An Post's procedures for its Publication Services after the Relevant Period

- 3.33 Following market enquiries during the summer of 2012 involving requests for information to third parties (i.e. customers and competitors of An Post), the Authority approached An Post. An Post independently began an internal review of the application of the Zonal Pricing Scheme at this time.

- 3.34 On 21 December 2012, An Post sent a letter to customers of An Post advising them of the fact that there were new procedures for the

presentation of mail that would be applicable from 1 February 2013. This letter included the zonal tariffs outlined in Table 3 above.

The Procedures post February 2013

- 3.35 In February 2013, there were three key new developments in respect of the Zonal Pricing Scheme.
- 3.36 First, An Post published the zonal tariffs set out in Table 3 above.
- 3.37 Second, the pre-sort areas for Publication Services were aligned to be compatible with the pre-sort areas used for sorting other An Post products.²⁰
- 3.38 Third, An Post set out a more stringent process for the presentation of mail.²¹ Customers now have to:
- Download from An Post's website a spreadsheet relevant to their volume – "Discount 1" (100-2,000 items) or "Discount 2" (more than 2,000 items). The spreadsheet contains the following fields: customer name, name of publication, name of poster, date of posting, and weight band and volume per pre-sort area.
 - Enter the delivery details of the mailing. The spreadsheet calculates the total cost, based on the zonal tariffs. The total cost will either be the total volume multiplied by the composite tariff (where the mailing is representative of a nationwide mailing) or will show the three sub-totals representing the volumes per zone. (An average tariff for mailings that have a geographic bias is no longer calculated.)
 - Print a copy of the spreadsheet to present as the manifest with the mailing.
- 3.39 Essentially, An Post has created a template manifest that must be used. An Post states that customers must present the manifest with the mailing and apply the applicable tariff based on the tariff(s) generated from the spreadsheet. If no manifest is presented, the mail will not be accepted by An Post.²²

The Authority's view on the Procedures post February 2013

- 3.40 The Authority is of the opinion that the procedures for the application of the Zonal Pricing Scheme for the Publication Services product since February 2013 have remedied the competition concerns arising from the application of the Zonal Pricing Scheme during the Relevant Period.

²⁰ This made it easier for mailing houses to prepare mail for insertion into An Post's system as they would also be inserting delivery items for other An Post products.

²¹ <http://www.anpost.ie/AnPost/MainContent/Business+Customers/Our+Business+Services/Publications/>.

²² <http://www.anpost.ie/AnPost/MainContent/Business+Customers/Our+Business+Services/Publications/>

4. LEGAL FRAMEWORK

- 4.1 This section briefly outlines the relevant legal framework for the Authority's assessment of An Post's application of the Zonal Pricing Scheme during the Relevant Period.
- 4.2 Section 5 of the Act prohibits an abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or any part of the State. Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between EU Member States.
- 4.3 The required elements that need to be present for an infringement of section 5 of the Act and Article 102 TFEU are:
- The entity engaging in the alleged abuse is an 'undertaking';
 - The undertaking is dominant in the relevant market;
 - The dominant undertaking has abused its dominant position - this involves assessing the likely foreclosure effect of the conduct as well as any plausible objective justifications; and
 - To establish an infringement of Article 102 TFEU, it is also necessary to show that the abuse "may affect trade between Member States".
- 4.4 This section deals with the first and fourth requirements. The next sections consider dominance and abuse of dominance.

Is An Post an 'undertaking'?

- 4.5 In light of the above, the first relevant question in this case is whether An Post is an undertaking for the purposes of section 5 and/or Article 102. Section 3(1) of the Act defines "undertaking" as:

"... a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service."

- 4.6 With respect to Article 102 TFEU, the term undertaking is not defined by the Treaty. However, the European Court of Justice held in *Hofner and Elser v Macrotron GmbH* that:

"... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."²³

- 4.7 The Authority is of the view that An Post is both "*engaged in an economic activity*" and "*engaged for gain*" and accordingly is an undertaking within the meaning of the Act and the TFEU insofar as it conducts those economic activities.

²³ Case C-41/90 [1991] ECR I-1979.

Is there an 'effect on trade'?

- 4.8 According to settled case law, it is sufficient that the abuse is capable of affecting trade between Member States for Article 102 TFEU to apply.²⁴ The effect on trade of the abuse must be appreciable. This will mainly be assessed by reference to the position of the undertaking(s) on the market for the product concerned.²⁵
- 4.9 The Commission's *Guidelines on the effect on trade contained in Articles [101] and [102] of the Treaty* (the "Guidelines")²⁶ make it clear that where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected²⁷. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected. In *Michelin*²⁸, for example, the Court of Justice held that a system of loyalty rebates foreclosed competitors from other Member States and therefore affected trade within the meaning of Article 102.
- 4.10 In the assessment of whether the effect on trade is appreciable, the Guidelines make it clear that the very presence of the dominant undertaking covering the whole of a Member State is likely to make market penetration more difficult. Any abuse which makes it more difficult to enter the national market should, according to the Guidelines, be considered to appreciably affect trade. The combination of the market position of the dominant undertaking and the anti-competitive nature of its conduct implies that such abuses have normally by their very nature an appreciable effect on trade²⁹.
- 4.11 Factors indicating that the application of the Zonal Pricing Scheme during the Relevant Period could have an appreciable effect on trade between Member States are the following:
- An Post's likely dominant position in the market the delivery by post of newspapers and periodicals presented in bulk in the State;
 - a large proportion of the customers of competing postal service providers in the relevant market are overseas publishers; and
 - the granting of exclusivity rebates by An Post could have a likely foreclosure effect and hinder the entry of competing postal service providers from other EU Member States.
- 4.12 Accordingly, the Authority is of the view that the application of the Zonal Pricing Scheme during the Relevant Period is subject to both section 5 of the Act and Article 102 TFEU.

²⁴ Joined Cases C-241/91 P and C-242/91 *RTÉ and ITP v Commission* [1995] ECR I-743, paragraph 69.

²⁵ Case 5/69 *Volk v Vervaecke* [1969] ECR 295.

²⁶ Official Journal C 101 of 27.4.2004.

²⁷ Paragraph 93 of the Guidelines.

²⁸ See Case 322/81, *Nederlandsche Banden Industrie Michelin*, [1983] ECR 3461.

²⁹ Paragraph 96 of the Guidelines.

5. DOMINANCE

Relevant Market

5.1 The first step in establishing whether or not an undertaking, such as An Post, holds a dominant position under section 5 of the Act and/or Article 102 TFEU is to define the relevant market or markets. Defining the relevant market requires an assessment of both the relevant product market and the relevant geographic market.

Relevant Product Market

5.2 Market power can exist only in relation to the supply of a particular product or service. It is therefore necessary to ascertain the relevant product market. The judgements of the European Court of Justice show that the definition of the relevant product market is essentially a matter of interchangeability in terms of characteristics, price and intended use.³⁰ Where goods or services can be regarded as interchangeable, they are within the same product market.

5.3 Product market definition in the postal sector can depend on parameters such as:³¹

- The type of item being posted: a distinction can be made between letter mail (e.g. letters, postcards, transaction mail,³² direct mail,³³ catalogues, magazines/periodicals and newspapers) and parcels.
- The quantities of mail being posted: a distinction can be made between individual mail items and bulk mail.³⁴
- The level of service required, including:
 - (a) mail preparation services (e.g. printing, enveloping, labelling, franking, collecting items, placing items in mailbags or containers, sorting them by destination and presenting the mail to access points of the postal operator);
 - (b) other services such as clearance,³⁵ transport and delivery;
 - (c) standard postal services; and
 - (d) courier/express services.
- The type of customers (i.e. private customers and business customers).

5.4 The Authority is of the view that the relevant product market for the purposes of this case is likely to be the market for *the delivery by post of newspapers and periodicals presented in bulk*.

³⁰ Case 6/72, *Continental Can*, [1973] ECR 215, paragraph 32.

³¹ The bullets are based on an ECORYS Research and Consulting study, '*Development of competition in the European Postal Sector*' (2005). This study was prepared by ECORYS for the European Commission. http://ec.europa.eu/internal_market/post/doc/studies/2005-ecorys-final_en.pdf

³² Transaction mail includes bank statements and bills.

³³ Direct mail is a communication consisting solely of advertising, marketing or publicity material and comprising an identical message except for the addressee's name and address.

³⁴ For instance, transaction mail is usually sent in bulk.

³⁵ The operation of collecting postal items deposited at access points.

Delivery

5.5 The Authority is of the view that the relevant market is limited to delivery services. This view is consistent with the European Commission's Notice on the application of the competition rules to the postal sector which states that:

"Market reality supports the opinion that clearance, sorting, transport and delivery of postal items constitute different markets".³⁶

5.6 Large publishing companies usually purchase mail preparation services from intermediaries (such as mailing houses). These intermediaries prepare and pre-sort mail before handing it over to the postal operator for final distribution. This implies that mail preparation services are a distinct market.

5.7 The information gathered by the Authority also indicates that self-delivery is not a substitute for delivery by post. A single publisher is not likely to have the economies of scale required to make self-delivery efficient.

5.8 From the information gathered during the course of the Authority's investigation, it appears that most other companies that provide bulk delivery services in the State (such as courier and express services) do not compete with An Post with respect to publications.

5.9 The majority of these companies offer a *courier and express services*, not standard postal services. The core business of the courier and express industry is the provision of value-added door-to-door transport and deliveries of next-day or time-definite shipments, including documents, parcels and merchandise goods. Usually, the item is collected at the end of the work day at the premises of the sender, transported and then delivered to the premises of the receiver the following day. The sender has access to information on the progress of the shipments from collection to delivery and is provided with proof of delivery. These products appear to have distinct characteristics that differentiate them from a standard bulk postal service in terms of both demand and supply side substitutability.

5.10 In light of the above, the Authority is of the view that the relevant market is limited to the delivery of newspapers and periodicals through a standard postal service.

5.11 Furthermore, the Authority does not think that other distribution methods - such as retail outlets or electronic subscriptions - are sufficient constraints to broaden the market beyond delivery by post. This is for the following reasons:³⁷

- Retail outlets are not likely a substitute for the delivery by post of business/professional/trade magazines or free magazines, given that publishers have a strong preference for postal subscriptions since such subscriptions enhance customer loyalty and are more attractive for advertisers.³⁸

³⁶ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02, 6 February 1998), paragraph 2.5.

³⁷ <http://stakeholders.ofcom.org.uk/binaries/post/1812.pdf>

³⁸ Para S9; *ibid*.

- Subscriptions are very valuable to publishers. Subscribers ensure a certain volume which helps the publisher negotiate with advertisers as subscriptions guarantee revenue for a fixed period of time, usually a minimum of 1 year.³⁹
- Web based content is used to advertise the purchase of the printed version. Online versions also have an expectation for regularly updated information, instead of a monthly or weekly basis. In general, electronic and web based content complements the printed version.⁴⁰

Newspapers and periodicals presented in bulk

5.12 The relevant market includes the delivery of newspapers and periodicals. Periodicals include magazines or similar products published at intervals of not more than three months (e.g. academic journals and non-daily newspapers or newsletters). The European Commission's 1998 Notice on the application of the competition rules to the postal sector suggests that items such as magazines, newspapers and periodicals form part of a distinct product market.⁴¹ Similarly, PostComm in the UK has indicated that there is a separate market for the delivery of publications by post.⁴²

5.13 An Post's service for the delivery of newspapers and periodicals is offered only to publishers that post in excess of 100 items in a single mailing.⁴³

Relevant Geographic Market

5.14 In deciding whether a firm is dominant, it is necessary to consider the geographic extent of the market on which it is operating in order to determine the other undertakings with which it is in competition. The Commission provides useful guidance on the definition of the geographical market in its 1997 Notice on the definition of the relevant market.⁴⁴ At paragraph 28, it says that its approach can be summarised as follows:

"[...] it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition".

5.15 Since the publication of the Notice, the Commission has consistently found that markets for mail delivery services are national in scope, irrespective of the precise manner in which the relevant product market is defined.⁴⁵ Furthermore, the Danish Competition and Consumer

³⁹ Para 2.165 *ibid.*

⁴⁰ Para 2.193 *ibid.*

⁴¹ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02, 6 February 1998).

⁴² Postcomm, *The building blocks for a sustainable postal service: Analysis of Markets* (March 2011) (available at: <http://stakeholders.ofcom.org.uk/binaries/post/1812.pdf>).

⁴³ It should also be noted that this particular market was liberalised and removed from the USO in 2011.

⁴⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 09/12/1997 P. 0005 – 0013.

⁴⁵ COMP/M.1410 - Deutsche Post/Danzas, para 6; Case No COMP/M.5152 - POSTEN AB / POST DANMARK A/S; Case No COMP/M.6503 — La Poste/Swiss Post/JV.

Authority has found that a similar publications service market in Denmark was also national in scope.⁴⁶

- 5.16 In light of the above, the Authority is of the view that the relevant geographic market is likely to be the State.

Conclusion on Relevant Market

- 5.17 The Authority is of the view that the relevant market is likely to be the market for *the delivery by post of newspapers and periodicals presented in bulk in the State*.

Dominance

- 5.18 Section 5 of the Act and Article 102 TFEU apply only to dominant undertakings. It is thus necessary to assess whether An Post could be considered dominant in the market for the delivery by post of bulk publications in the State.

- 5.19 The Court of Justice in *United Brands v Commission* laid down the following test of what is meant by a dominant position:

“The dominant position thus referred to by Article [102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.

- 5.20 The Commission’s “*Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*”⁴⁷ (the “Guidance”) states that to establish dominance it is necessary to examine three issues:

- constraints imposed by actual competitors (the market position of the dominant undertaking and its competitors);
- constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry);
- constraints imposed by the bargaining strength of the undertaking’s customers (countervailing buyer power).

Each of these issues is addressed in turn.

The Market Position of the Dominant Undertaking and its Competitors

- 5.21 Market shares provide a useful first indication of the relative importance of undertakings in the relevant market.

- 5.22 The European Court of Justice (ECJ) considers that high market shares may be evidence of dominance. In *Hoffmann-La Roche v Commission*⁴⁸, it said:

⁴⁶ See <http://en.kfst.dk/Indhold-KFST/English/Decisions/20070830-Post-Denmark-has-abused-its-dominant-position-in-the-market-for-magazine-mail?tc=4A956D90381749C0889CC46FA0598901> for details.

⁴⁷ OJ C 45, 24.2.2009.

⁴⁸ Case 85/76 [1979] ECR 461, [1979] 3 CMLR 211

“Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that **very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.** An undertaking which has a very large market share and holds it for some time...is by virtue of that share in a position of strength which makes it an unavoidable trading partner...” (Emphasis added).

5.23 The ECJ in *AKZO* referred to the passage from *Hoffmann-La Roche* and continued that a market share of 50% could be considered to be very large so that, in the absence of exceptional circumstances pointing the other way, an undertaking with such a market share will be considered dominant and that undertaking will bear the burden of establishing that it is not dominant.⁴⁹

5.24 The Guidance on Article 102 sets out a threshold of 40% above which dominance may be established when it states that:

“The Commission’s experience suggests that dominance is not likely if the undertaking’s market share is below 40 % in the relevant market”⁵⁰

5.25 In this case, the Authority is satisfied that An Post’s market share is well in excess of 50% in the market for the delivery by post of newspapers and periodicals presented in bulk in the State.⁵¹

Expansion and Entry

5.26 The Authority is of the view that An Post’s behaviour is unlikely to be constrained by the credible threat of future expansion by actual competitors or entry by potential competitors in the relevant market.

5.27 Entry and expansion on a nationwide scale appears to be difficult. Competitors are likely to enter market segments such as urban areas where they can avail of economies of scale and density.⁵² As the historic incumbent, An Post is the only operator controlling a public postal network covering the entire State. To provide a nationwide service, a competitor of An Post needs either to develop its own network throughout the State or to access An Post’s network for deliveries to some areas.

5.28 An Post also avails of significant advantages that allow it to act independently from actual/potential competitors. An Post has the important advantage of being regarded by the public (including business customers) as the main postal operator and is therefore the natural first choice. An Post is the sole provider of postal services to personal customers (not business customers). This allows for important economies of scope which benefits it in its provision of business mail and other services, including the Publication Services.⁵³

5.29 In reality, there has only been limited entry in the provision of postal services in the Dublin area, and no entry in other urbanised centres or rural areas. It seems likely therefore that the level of entry has not been

⁴⁹ Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, [1993] 5 CMLR 215 at para 60.

⁵⁰ Paragraph 14, Guidance on Article 102; European Commission.

⁵¹ Information gathered during the investigation indicates that competitors of An Post together have markets shares amounting to less than 10%.

⁵² Economies of scale refers to the phenomenon where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm (OECD, 2008). Economies of density refers to the lower average cost of service provision due to lower geographic distance between customers.

⁵³ Economies of scope exist when it is cheaper to produce two products together (joint production) than to produce them separately (OECD 2008).

significant enough to assuage An Post's market power in the relevant market for this case.

Countervailing Buyer Power

- 5.30 The Zonal Pricing Scheme is a non-negotiable uniform tariff. Responses by publishers to information requests issued by the Authority during the course of its investigation indicate that the tariffs are not subject to any negotiation. As explained above, the entry into operation of the Zonal Pricing Scheme entailed a price increase in the composite rate as compared to the rates charged by An Post pre-March 2012, as well as the introduction of zonal pricing. Increases of the published price ranged from 1% to 16% depending on the weight and volume of mail.⁵⁴ The information gathered by the Authority indicates that prior to the proposed increase, publishers and their representative bodies tried to resist the increases.
- 5.31 It should also be noted that An Post is an unavoidable trading partner for publishers that wish to deliver publications to the vast majority of the country, outside of the area in and around Dublin where some limited competition as emerged. Therefore, there appears to be little countervailing buyer power that constrains An Post from increasing prices or altering tariff structures for its Publication Services.

Conclusion on Dominance

- 5.32 Based on the above, it is likely that An Post can act independently from its competitors, customers and ultimately its consumers in the relevant market. The Authority has not found evidence showing that constraints exercised by expansion of existing competitors, entry of potential competitors and/or countervailing buyer power undermine a presumption of dominance.
- 5.33 Thus the Authority considers that An Post is likely to be dominant in the market for the delivery by post of newspapers and periodicals presented in bulk in the State.

⁵⁴ Comparison of pre-March 2012 tariffs and post March 2012 composite tariffs.

6. ABUSE OF DOMINANCE

- 6.1 As further explained below, the evidence gathered by the Authority indicates that the manner in which An Post applied the Zonal Pricing Scheme during the Relevant Period amounted to an exclusivity discount scheme in breach of section 5 of the Act and Article 102 TFEU.
- 6.2 The application of competition law in the postal sector is not exceptional. Postal incumbents have been found to have abused their dominant position by the European Commission⁵⁵ and national competition authorities⁵⁶ in several instances.

Exclusivity discounts - General

- 6.3 The European Commission and the European Courts have consistently condemned exclusivity discounts or exclusivity rebates (also known as loyalty rebates or fidelity rebates) granted by a dominant undertaking on the grounds that they constitute a breach of Article 102 TFEU.⁵⁷
- 6.4 Exclusivity rebates are discounts offered in return for a commitment from the purchaser to acquire all or most of its requirements from the dominant undertaking.
- 6.5 The rebate or discount given by the dominant firm can take various forms (a discount granted off a set price, a bonus given to certain customers, etc.). For instance, in the *Deutsche Post* case, the German postal operator granted a "special price" in return for the customer's undertaking to send all or a significant part of his or her parcels or catalogues through them.⁵⁸
- 6.6 Exclusivity rebates have traditionally been condemned by the European Courts as being unlawful *per se* without it being necessary to prove actual or potential anti-competitive effects. For instance, in *Hoffmann-La Roche*, the Court of Justice held that it is abusive to offer rebates:

"...conditional on the customer's obtaining all or most of its requirements – whether the quantity of its purchases be large or small – from the undertaking in a dominant position".⁵⁹

⁵⁵ See, for example, Decision of 25 July 2001, Case COMP/C-1/36.915, *British Post/Deutsche Post*; Decision of 20 October 2004, Case COMP/38.745 BdKEP/Deutsche Post AG + Bundesrepublik Deutschland; Decision of 7 October 2008, Case COMP/39.562, Slovakian Postal Law.

⁵⁶ See, for example, Decision of the Belgian Competition Council dated 10 December 2012 (http://ec.europa.eu/competition/ecn/brief/01_2013/be_post.pdf); Decision of the Spanish Competition Commission dated 22 April 2013 (http://ec.europa.eu/competition/ecn/brief/03_2013/es_corr.pdf); Decision of Swedish Market Court dated 6 June 2011 (http://ec.europa.eu/competition/ecn/brief/04_2011/brief_04_2011.pdf); Decision of the Danish Competition and Consumer Authority dated 22 December 2010 (<http://en.kfst.dk/Indhold-KFST/English/Decisions/20101222-Danish-postal-incumbent-Post-Danmark-has-abused-its-dominant-position?tc=E54958826ADF4DA190FADFA134162E12>); Decision of the EFTA Surveillance Authority from 2010 (<http://www.antimon.gov.sk/data/att/1277.pdf>).

⁵⁷ Case 85/76, *Hoffmann-La Roche v Commission*, [1979] ECR 461; Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621; *Deutsche Post* OJ [2001] L125/27; *DSD* OJ [2001] L166/1; Case T-65/89 *BPB Industries plc and British Gypsum v Commission* [1993] ECR II-389; *Irish Sugar*, OJ [1997] L258/1; Cases C-395/96 P etc., *Compagnie Maritime Belge Transports v Commission*, [2000] 4 CMLR 1076; Case T-286/09 *Intel Corp v Commission*, not yet published.

⁵⁸ OJ [2001] L 125/27.

⁵⁹ Case 85/76, *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraph 89.

- 6.7 The same approach was followed by the Commission in the more recent *Deutsche Post* case⁶⁰ concerning the granting of loyalty rebates in the postal sector:

“the systematic agreeing of fidelity rebates with cooperation partners leads, according to the case-law of the European courts, inevitably to the conclusion that DPAG [the German postal operator] is seeking to tie customers to it and hence is preventing or eliminating competition. It is settled European case-law that rebate arrangements which are linked to meeting a percentage of customer requirements have, solely by reason of the method by which they are calculated, an anti-competitive tying effect.”

Customers who have entered into such a rebate agreement will generally be inclined to have their parcels distributed exclusively by the company giving that rebate. Rebate arrangements linked to a percentage of customer requirements, moreover, owing to the method by which they are calculated, have an obstructive effect that is not linked to anything actually performed. This can be seen by the fact that competitors are compelled to offer discounts to offset the loss which customers suffer if they have a smaller percentage of their parcels distributed by DPAG and hence fall into a lower rebate bracket”. (Paragraph 39) (Emphasis added)

- 6.8 The Guidance states that the Commission will prioritise cases where the allegedly anti-competitive conduct is liable to result in anti-competitive foreclosure. According to the Guidance, in order to establish a breach of Article 102 it must be shown that exclusivity rebates have either an actual or a potential (i.e. they are “likely” or “capable” of having) an anti-competitive foreclosure effect on competitors that are as efficient as the dominant undertaking.⁶¹
- 6.9 The Authority is of the view that, under both a “per se” approach and an “effects-based” approach, the application of the Zonal Pricing Scheme during the Relevant Period was likely to amount to an exclusivity discount in breach of section 5 and/or Article 102.

The Application of the Zonal Pricing Scheme to Publication Services

- 6.10 The information gathered by the Authority indicates that during the Relevant Period An Post engaged in exclusionary conduct.
- 6.11 An Post, attempted to seek exclusivity from publishers by charging (or attempting to charge) lower prices (i.e. the “composite” tariff) in respect of publications that used An Post exclusively, irrespective of whether a higher zonal tariff ought to have been applied given their mailing profile. Furthermore, they charged (or attempted to charge) a higher price (i.e. the “zonal” tariff) in respect of publications that used a competitor. This occurred - in some instances - even if that publication’s mailing profile with An Post meant that a lower composite tariff ought to have been applied on the proper application of the terms of the Zonal Pricing Scheme.
- 6.12 The Authority is of the view that a scheme under which a dominant undertaking grants lower prices in return for exclusivity amounts to an exclusivity discount scheme that raises concerns under section 5 of the Act and Article 102 TFEU.

⁶⁰ OJ [2001] L 125/27.

⁶¹ The Authority investigated a similar issue concerning loyalty inducing rebates in relation to television advertising in 2012. See <http://www.tca.ie/EN/Enforcing-Competition-Law/Decisions-and-Notices/Enforcement-Decisions/Decisions/RTs-Conduct-in-the-TV-Advertising-Market.aspx> for more details.

- 6.13 The fact that not all publications (and/or mailing houses) that were advised of a zonal tariff were eventually charged the zonal tariff does not significantly affect the Authority's view that An Post granted (and/or attempted to grant) exclusivity discounts during the Relevant Period. Furthermore, neither does the fact that during the Relevant Period An Post charged the zonal tariff to some publications that used An Post exclusively affect the Authority's view. This is because the balance of evidence indicates that An Post actually granted discounts in exchange for exclusivity during this period.
- 6.14 The evidence gathered by the Authority indicates that during the Relevant Period it was mainly publications which used a competitor that were advised of (and in most instances charged) the zonal tariff. Furthermore, in the majority of cases, publications that used An Post exclusively were not advised of a zonal tariff, even if their mailing profile meant that - on the proper application of the terms of the Zonal Pricing Scheme - they ought to have been liable for the higher tariff.
- 6.15 During the initial application of the Zonal Pricing Scheme the correspondence between An Post and publishers/ mailing houses indicates An Post's intention and strategy to seek exclusivity from publishers. Under the formalistic per-se approach followed by the European Courts, this behaviour would automatically amount to a breach of section 5 of the Act and Article 102 TFEU (assuming the requisite cross-border effect on trade can be shown).
- 6.16 Furthermore, the application of the Zonal Pricing Scheme during the Relevant Period was likely to have anti-competitive exclusionary effects.
- 6.17 The following factors can be relied upon to show that the application of the Zonal Pricing Scheme during the Relevant Period prevented competing postal service providers from attracting new customers and thus was likely to have foreclosure effects:
- Publishers' understanding of the Zonal Pricing Scheme;
 - Lack of transparency;
 - Direct evidence of exclusionary strategy; and,
 - Competitors' ability to compete with exclusivity discount.

Publishers' understanding of the Zonal Pricing Scheme

- 6.18 The information gathered by the Authority indicates that there was an understanding among publishers that the lower composite tariff would automatically apply to customers that used An Post exclusively.
- 6.19 In the Authority's view, this understanding of the Zonal Pricing Scheme, incentivised publishers to remain with An Post mainly in respect of publications with a strong "geographical bias". The exclusive use of An Post meant that these publications could avail of the lower composite rate for the items delivered to the more expensive Zones B and C.

Lack of transparency

- 6.20 Another factor relevant to assessing foreclosure effects is the lack of transparency in the application of the Zonal Pricing Scheme. From the evidence gathered by the Authority, it appears that none of the

Publication Services customers knew how the Zonal Pricing Scheme was applied by An Post during the Relevant Period. As indicated above, An Post did not publish the zonal tariffs during this period. This lack of transparency restricted the ability of competing postal service providers to provide more favourable quotes to potential customers and thus attract new customers.

Direct evidence of exclusionary strategy

- 6.21 When assessing foreclosure effects, the European Commission's Guidance on Article 102 also relies upon direct evidence of any exclusionary strategy, for instance, internal documents which contain direct evidence of a strategy to exclude competitors such as evidence of concrete threats of exclusionary action. Such direct evidence may be helpful in interpreting the dominant undertaking's conduct.
- 6.22 From the correspondence gathered by the Authority, it appears that during the Relevant Period, An Post targeted publications that it knew or believed were being delivered by competitors.

Pricing by competitors

- 6.23 When zonal pricing is targeted at publishers who used a competing postal service provider for urban deliveries, that competing provider would have had to charge a price for the deliveries in Zone A that compensated the publisher for the loss of the composite rate that would otherwise have applied in respect of mail delivered by An Post to Zones B and C.
- 6.24 Rewarding exclusivity by charging a composite tariff where a zonal tariff ought to have been applicable is, in effect, offering a discount. The value of the discount depends on the proportion of mail to be delivered to Zones B and C and the proportion of mail to be delivered by the competitor. The higher the proportion of mail going to Zones B and C, the higher the value of the discount and hence the lower the rate a competitor would have to charge for any Zone A deliveries in order to compensate the customer for the loss of the composite rate.
- 6.25 The evidence gathered by the Authority indicates that, during the Relevant Period, An Post either did not charge or advise a zonal tariff to a significant number of publications which should have been subject to a zonal tariff. These publishers were, in effect, beneficiaries of an exclusivity discount.
- 6.26 Given the above, the Authority is of the opinion that a competitor as efficient as An Post would have had serious difficulty in competing for deliveries to Zone A for many of these publications during the Relevant Period.⁶² As such, the manner in which the Zonal Pricing Scheme was applied during the Relevant Period was likely to have an anti-competitive foreclosure effect.⁶³

Objective Justification

- 6.27 An anti-competitive behaviour may escape the prohibition of section 5 of the Act and Article 102 TFEU where the dominant undertaking demonstrates that its conduct is objectively necessary or produces

⁶² See paragraphs 31-44 of the European Commission's Guidance on Article 102.

⁶³ It should be noted that this is no longer an issue since the new procedures were implemented in February 2013.

substantial efficiencies which outweigh the negative effect on consumers. In this context, it is necessary to assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

- 6.28 According to the Guidance, the question of whether specific conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking (e.g. health or safety reasons related to the nature of the product in question).⁶⁴
- 6.29 If the dominant undertaking attempts to justify its conduct on the grounds of efficiencies, the following cumulative conditions must be fulfilled:⁶⁵
- The efficiencies (e.g. technical improvements in the quality of goods, or a reduction in the cost of production or distribution) have been, or are likely to be, realised as a result of the conduct;
 - The conduct is indispensable to the realisation of those efficiencies;
 - The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and,
 - The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.
- 6.30 During the investigation, An Post put forward justifications for the manner in which the Zonal Pricing Scheme was applied during the Relevant Period. These centred on the necessity to introduce zonal pricing for the Publication Services as quickly as possible after approval from An Post's board was granted.
- 6.31 An Post also acknowledged that there were numerous problems with the procedures followed when the Zonal Pricing Scheme was introduced. In particular, An Post identified three main problems to explain why incorrect tariffs were charged under the Zonal Pricing Scheme.
- First, the evidence gathered by the Authority indicates that there were issues surrounding the submission of the required manifests by customers when the Zonal Pricing Scheme was introduced.
 - Second, there were delays in An Post setting up a "zonal tariff" on An Post's administrative system for publishers that had been advised of a zonal tariff.
 - Third, some publishers did not select the correct tariffs when presenting their mail for delivery.
- 6.32 However, the Authority is of the view that these explanations did not demonstrate that the manner in which the Zonal Pricing Scheme was applied during the Relevant Period was objectively necessary or that such application gave rise to substantial efficiencies which outweighed any anti-competitive effects on competitors and consumers.

⁶⁴ Paragraph 29 of the European Commission's Guidance on Article 102.

⁶⁵ Para 30; *Ibid.*

6.33 Therefore, the Authority is of the view that the application of the Zonal Pricing Scheme for Publication Services during the Relevant Period was likely to amount to an abuse of a dominant position in breach of section 5 of the Act and Article 102 TFEU.

7. THE DECISION

- 7.1 The Authority is of the view that, during the Relevant Period, the application of the Zonal Pricing Scheme for An Post's Publication Services product was likely to amount to an abuse of a dominant position in the market for the delivery by post of newspapers and periodicals presented in bulk in the State.
- 7.2 This type of exclusionary behaviour meets the Authority's prioritisation criteria and is the type of behaviour against which the Authority would generally take action, either by seeking satisfactory commitments or initiating court proceedings.
- 7.3 However, the evidence obtained by the Authority during the investigation indicates that An Post:
- Acknowledged that there had been certain procedural issues regarding the application of the Zonal Pricing Scheme and had commenced a review of its procedures in the third quarter of 2012.
 - Implemented new procedures for the application of the Zonal Pricing Scheme in February 2013 which remain in operation to date. Under these procedures, An Post determines the price to be paid by publishers based on the three key parameters (i.e., weight, volume and geographical destination of the publication) and not on whether publications are delivered by a competitor of An Post.
- 7.4 The Authority is of the opinion that An Post's revised procedures for the Publication Services product from February 2013 address the competition concerns identified during the investigation. For this reason the Authority has decided to close its investigation into this matter. However, the Authority will reconsider its decision if An Post engages in similar behaviour in respect of this market or any other market in which the Authority considers An Post to hold a dominant position.

For the Competition Authority



Gerald FitzGerald

Member and Director of the Monopolies Division

30 October 2014

vigorous
competition
drives
productivity
growth,
innovation
and
value
for
all
consumers
in
the
economy

GROWTH

productivity

competition



vigorous
competition
drives
productivity
growth,
innovation
and
value
for
all
consumers
in
the
economy

economy

