

Unclassified

DAF/COMP/WD(2016)78

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

09-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/WD(2016)78
Unclassified

ROUNDTABLE ON "PRICE DISCRIMINATION"

-- Note by Romania --

29-30 November 2016

This document reproduces a written contribution from Romania submitted for Item 7 of the 126th OECD Competition Committee meeting on 29-30 November 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm*

Please contact Mr Antonio Capobianco if you have any questions regarding this document [E-mail: [Antonio.Capobianco@ oecd.org](mailto:Antonio.Capobianco@oecd.org)]

JT03404989

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ROMANIA

1. Summary

1. Price discrimination practices by an undertaking in dominant position may represent an infringement of the provisions of Romanian Competition Law. In its practice the Romanian Competition Council has dealt mainly with non-exclusionary price discrimination cases. Usually these cases are investigated acting on a complaint by one or several undertakings claiming to be affected by price discriminations practices. According to the circumstances of the cases, some cases are closed by infringement decisions, others by commitment decisions.

2. Legal framework

2. Price discrimination by a dominant undertaking can represent an abuse of dominant position according to the provision of the article 6 para. (1) letter c) of the Competition law no. 21/1996 (hereinafter *Competition law*). The relevant provisions are:

“(1) Any abuse of a dominant position held by one or more undertakings on the Romanian market or on a substantial part of it is prohibited. Such abusive practices are primarily those:

.....

c) applying unequal terms for equivalent services to trade partners, thereby placing some of them at a competitive disadvantage”.

3. These provisions are identical to the relevant provisions of the article 102 of TFUE.

3. Romanian Competition Council approach to price discrimination

4. Concerning the practice of the Romanian Competition Council (hereinafter RCC):

- RCC has dealt mainly with non-exclusionary price discrimination cases;
- these cases are investigated in order to determine the effect price discrimination by an dominant undertaking might have on downstream competition;
- based on the information available to RCC, price discrimination is not challenged in Romania under any other policy grounds. Therefore, RCC is not responsible for investigations of this kind;
- RCC has not examined until now price discrimination in the context of digital economy.

4. RCC practice

4.1 *Poșta Română joint cases*

5. In 2010, Romanian's Competition Council (hereinafter RCC) found that the Romanian incumbent on postal services markets - Compania Națională Poșta Română S.A. (hereinafter Posta Romana) had abused its dominant position on two markets of postal services: the market of direct mail services and the market of commercial correspondence services (bulk mail services).

6. First of all, between 2005 – 2009 Posta Romana was investigated for a number of alleged anticompetitive practices on postal services markets including an excessive pricing policy for the provision of direct mail services (allegedly started in 2005) and two types of discriminatory treatment: *secondary line discrimination* (July 2005 – August 2009) on the market of direct mail services and *primary line discrimination* (March 2008 – August 2009) on the market of commercial correspondence services (bulk mail services).

7. Even though the investigation was focused on discrimination (Posta Romana was fined for discriminatory treatment and was subject to corrective measures imposed by RCC in order to prevent such behaviour in the future) nevertheless RCC stressed that the purpose of these practices were:

- To prevent the major customers from shifting to alternative suppliers on the markets open to competition (i.e. the market of direct mail services);
- To exclude the rivals on upstream markets (i.e. the market of mail preparation services).

8. The mean used by Posta Romana in order to achieve these goals was price discrimination (i.e. on one hand by granting targeted fidelity rebates to major customers, on the other hand, by artificially reducing the level of rebates granted to intermediaries). This had a complex effect of tying major customers and rising rival's costs, 'foreclosing' downstream market of direct mail services and reducing competition on the upstream market of mail preparation services. .

9. As regards *primary line discrimination*, Posta Romana applied the following discriminatory discount policy for its clients (i.e. undertakings):

- for the supply of direct mail services, there were two situations:
 - if the customer was also the sender¹ of the postal items, discounts were granted for the consolidated volume (i.e. originated only from the respective customer);
 - if the customer was an intermediary, it received separate discounts for the volumes of each client.

10. As a result, the intermediaries could not benefit from discounts for the consolidated volume generated by some of their clients (small or medium senders).

11. For the supply of bulk mail services, discounts were granted only if the customer was also the sender of the postal item. As a result, in this market the situation were worse, intermediaries being

¹ The sender is the natural or legal person which originates or generates the postal item. The postal items belong to the senders and the intermediaries provide services of mail preparation to the senders.

excluded from getting discounts for the volume generated by all their clients (i.e. small or medium senders which can't receive the discounts themselves).

12. This policy applied by the Posta Romana with regard to the granting of tariff rebates indirectly created a discrimination between the companies that generated large volumes of commercial correspondence and those that generated lower volumes of commercial correspondence and that could not access directly the tariff rebates due to the fact that the intermediaries/integrators were unable to obtain for the senders tariffs rebates by consolidating the volumes from many such senders.

13. Documents received by RCC during the investigation revealed that Posta Romana intended to exclude its competitors from the upstream market of mail preparation services. The pricing policy described above was clearly oriented only towards senders (especially the large customers), on the ground that they originated the postal items and therefore they should receive the discounts. The incumbent did not intend to grant discounts to intermediaries even though integrators/intermediaries, and not senders, were contracting parties in the agreements concluded with Posta Romana regarding the respective postal services (direct mail and bulk mail postal services).

14. Also relevant was the fact that the incumbent granted additional targeted rebates for postal services to major clients: (i) a so called *fidelity discount* which increased gradually according to the duration of commercial relations with its customers for the provision of the postal services on the relevant markets (during investigation, Posta Romana informed RCC that it stopped implementing this type of discounts), and (ii) supplementary discounts for the postal services that were bundled with its mail preparation services; the level of rebates could exceed 20% in addition to the public rebates scheme (it is worth mentioning that at least at the time of investigation, the bundle of services do not constitute a distinct product/service market from its component services).

15. Posta Romana is a vertically integrated company that carries out activities also on the market of mail preparation service (situated upstream to the market of postal services). The key feature of these upstream markets is the possibility of intermediaries to secure a reduction of postal services costs for their clients, especially for those clients which generate small amounts of volumes (i.e below the threshold of the Posta Romana rebates scheme). Thus, the non-granting of tariff rebates in consideration of aggregated volumes generated by several senders, but by considering only the volumes generated by each sender artificially increase the costs for postal service. Also, the cost structure of the intermediaries' mail preparation services was distorted by comparison to the Posta Romana cost structure for the same mail preparation services. These anti-competitive practices of Posta Romana was combined with the favourable treatment (in fact, fidelity rebates) granted to a particular client, Infopress, described below.

16. The situation was worse in the case of commercial correspondence services (bulk mail postal services), when the intermediaries provided their services (for which they normally would receive tariff rebates) for free to the Posta Romana. This creates prerequisites for Posta Romana to extend the dominant position it held on the markets of the postal services to the markets of mail preparation services (the upstream markets for direct mail services and bulk mail services). Even though this pricing policy was also exploitative (by reducing the possibility of the small and medium clients - the senders - to reduce their expenses with postal services), in fact Posta Romana's conduct had an exclusionary effect by raising the rivals' costs on the upstream markets. The exclusionary effect of the intermediaries was enhanced due to the additional discount granted for major clients described above (for bundling the bulk mail postal services with its mail preparation services).

17. It is worth mentioning that data provided to RCC (by the incumbent and intermediaries) indicated a significant restriction of competition on the upstream market as a result of an anticompetitive practice of the Romanian Post described above.

18. The *secondary line discrimination* regarded the discriminatory treatment by the Romanian Post between its beneficiaries (Infopress and Mailers). At the time of investigation, both companies were providing mail preparation services.

19. In June 2006, one of Mailers' customers, the publishing house Reader's Digest SRL (hereinafter "ERD") renounced the services provided by Mailers and replaces it with those provided by Infopress, invoking the following reasons:

- The tariffs conditions offered by Infopress were better than those offered by Mailers;
- The payment terms offered by Infopress were more advantageous than those offered by Mailers.

20. RCC's assessment of the contractual conditions revealed the fact that Infopress' offer for the services required by ERD was much better than Mailers' offer for the same services on the grounds indicated above.

21. In order to identify the existence of a discriminatory treatment applied by Posta Romana, the investigation team evaluated:

- The commercial relations between the Romanian Post and Mailers, on one hand, and between the Romanian Post and Infopress, on the other hand, taking into consideration the services involved versus the contractual conditions related to tariffs (i.e. discount scheme) and payment terms;
- The impact of the Romanian Post's tariffs policy on the competitiveness of Mailers and Infopress on the market of mail preparation services – the extent to which the contractual conditions offered by Posta Romana to Infopress and respectively to Mailers would have allowed Mailers to present ERD a competitive offer, comparable with that of Infopress.

22. The contractual conditions for the provision of the services Infadres and commercial correspondence applied by the Romanian Post in its relations with Mailers were those publicly-known, applicable to any company benefiting from the Romanian Post's services on the relevant markets of the postal services.

23. The contractual conditions applied by Posta Romana to Infopress (according to Addendum no.1 to the Framework Agreement of Collaboration (the main contract) concluded on the 30th of June 2005), provided for:

- Granting better tariffs rebates than those in the public offer (i.e. additional 5%);
- The deferral by 10 days (from the date when the invoice was issued) of payments for the services provided to Infopress (and the removal of the bank warrantee obligation);

in exchange of several obligations undertaken by Infopress as follow:

- to allow the access of "Casa de Expediții" (a subsidiary of the Romanian Post) to its own facilities (working space and logistics suitable for postal activities);
- to transport the postal mail items on its own expense to regional access points of Posta Romana's network.

24. Shortly after that, on the 14th of July 2005 Posta Romana and Infopress signed the Addendum no.2 to the Framework Agreement of Collaboration which provided the following:

- Posta Romana granted the maximum level of the publicly available tariff rebates to Infopress (32.5% or 37.5% depending to the sorting degree of the postal items) in an uniform manner, regardless of the monthly volumes;
- The traffic (volume) between the 15th of August 2005 and 15th of October 2006 should reach a minimum target (i.e. at least 36 million direct mail items)²;

in exchange of **no supplementary** obligations to those already assumed by Infopress according to Addendum no.1.

25. Under these circumstances, the equivalence between the counter-obligations assumed by Mailers and by Infopress in their relations with Posta Romana needed also to be reviewed.

26. The analysis revealed that according to Addendum no.1 the supplementary transport service performed by Infopress was valued to 5% supplementary rebate applied to the discounted value that would have been granted based on the publicly available offer³.

27. Even though it could be assumed that the Addendum no.1 provided an equitable mechanism for reimbursing Infopress for the supplementary transport services rendered to Posta Romana, by the application of Addendum no.2 the reimbursement of Infopress by Posta Romana for this supplementary service becomes disproportionate compared to the value set by Posta Romana in Addendum no.1.

28. Thus, without adding any other supplementary services in the burden of Infopress or amending the existing ones, by Addendum no.2 Posta Romana granted solely to Infopress, in advance and over a long of period of time (more than a year) the maximum tariff rebates, regardless of the monthly volumes achieved (of course under the minimum threshold condition). Even though Mailers would have assumed obligations similar to those of Infopress and by this way would have benefited from contractual conditions as those stipulated in the Addendum no.1, Infopress would have continued to benefit from the better conditions stipulated by the Addendum no.2 and had a competitive advantage over Mailers.

29. From the information in the case file, it resulted that Infopress is the only company benefiting from the contractual conditions offered by Posta Romana through the Addendum no.1 and Addendum no.2 described above⁴. Thus, Infopress was the only company benefiting from tariff rebates and payment conditions which are preferential as compared to those applied to its competitors. This has resulted into a significant competitive advantage for Infopress as compared to its competitors (including Mailers) as it

² In case when the set volume threshold of postal item was not met, the Romanian Post reserved itself the right to grant tariff rebates corresponding to the registered volume, in accordance to the rebate scale provided in Addendum no.1. Infopress has committed itself to pay the difference between the tariff payed and the tariff recalculated by the Romanian Post plus a penalty of 20%, without VAT.

³ Subsequently, in its publicly available offer, Posta Romana valued the supplementary transport service performed by its customers (similar to Infopress) to 1% supplementary rebate applied to the discounted value that would have been granted according to the mail volume and sorting degree.

⁴ From the offers sent by Posta Romana to other intermediaries (competitors of Infopress), it results that the incumbent did not present either to Mailers or to other competitors, a real and non-equivocal offer, containing the same contractual conditions in exchange of the same obligations, as those offered to Infopress at list by Addendum no.1.

allowed Infopress to set a long term strategy with regard to the provision of its services that in respect competed with those of Mailers.

30. Thus, the contractual conditions offered by Infopress to Reader's Digest, as compared to Mailers, were a direct consequence of the advantages obtained by Infopress from Posta Romana in respect of the provision of the standard postal service of domestic direct mail.

31. Following the analysis of the circumstances in which the preferential treatment was granted to Infopress, the following conclusions were drawn:

- Posta Romana was an inevitable trade partner;
- From the assessment of invoices it results that the discrimination was significant, the favoured part, namely Infopress, paid significantly less than the other clients of Posta Romana's services;
- The product/the service provided by Posta Romana represented a large proportion in the total cost of the services of direct marketing by post provided by Infopress and by their competitors (including Mailers). In these circumstances, obtaining a tariff rebate played an important role in the activity of the direct marketing companies;
- The discriminatory treatment was persistent and had a long enough duration (July 2005 – August 2009) to have a direct and significant impact on the activities of the disadvantaged beneficiaries/clients, started from the moment when Posta Romana and Infopress entered into commercial relations concerning the direct mail services (in fact, after the Addendum no.2 was concluded).

32. Consequently, the preferential treatment granted by Posta Romana to Infopress made impossible for Infopress' competitors to efficiently replicate the service of direct mail preparation offered by Infopress. Thus Infopress' offer was not the result of a real competition between this undertaking and Mailers but a result of a favourable treatment to Infopress in comparison with its competitors. Consequently, it was noticed that between 14.07.2005 and August 2008, Infopress held a significant competitive advantage as compared to its competitors.

33. The analysis conducted by RCC, but also the statement of Posta Romana, revealed that this favourable treatment of Infopress was implemented due to the fact that this firm was the biggest client of the incumbent on the relevant market of direct mail services. The investigation concluded that the rebates granted by Posta Romana to Infopress according to Addendum no.1 are fidelity rebates due to the fact that these were subject to the condition of achievement of minimum volume target, aiming to keep this firm as client of the incumbent.

34. Consequently, on the one hand, this anticompetitive behaviour had a foreclosure effect on the relevant market (maintaining the dominant position on the relevant market), and on the other hand, it distorted the competition on the upstream market of direct mail preparation services.

35. Moreover, as was showed in the case presented above, between March 2008 and August 2009, Posta Romana engaged itself in a new major discriminatory practice with regard to the granting of tariff rebates for the direct mail services and bulk mail services. The continuation of the preferential treatment to Infopress following its new approach by Posta Romana of tariff rebates, was likely to enhance the anticompetitive effects of the preferential treatment granted by Posta Romana to Infopress, by significantly

reducing the possibility of other direct marketing companies to provide their services in competition with those of Infopress by matching the offer of this company⁵

4.2 Timișoara Airport case

36. Acting on a complaint, RCC investigated a possible abuse of dominant position by Timișoara Airport, abuse concerning a possible price discrimination. At the moment the investigation was opened, Timișoara Airport granted volume discounts to airlines using its services.

37. The Airport granted reductions on the landing charges based on the criterion of embarked passengers/month. These volume reductions were provided within reduction grids the Airport published and were included in the contracts concluded with the airlines. When the investigation was opened there was a single airline capable of embarking on Timișoara Airport a number of passengers big enough to obtain the maximum level of discount. The other airlines that were present on Timișoara Airport obtained smaller levels of discounts for the payment of the different airport charges.

38. The criterion used by the Airport to grant reductions for the payment of the airport charges was not considered to be objective and non-discriminatory. Through the application of this criterion a single airline was capable of obtaining reductions for the majority of the airport charges, including the landing, lighting and parking charges.

39. According to the assessment of RCC, the landing, lighting and parking charges were charges paid by the airlines for the use of the airport infrastructure by the airplanes. Therefore, the reductions for the landing, lighting and parking charges had to take into account the economies of scale and/or the volume of activity the Airport realized when it supplied these services.

40. The criterion of embarked passengers/month was considered to be relevant concerning the granting of reductions for the payment of different charges that had to be paid by the airlines for use of airport infrastructure services by the passengers (embarkation, security and transit/transfer charges).

41. Put into practice, the criterion of embarked passenger/month may lead to the situation in which an airline that achieves a certain number of landings/year at Timișoara Airport obtains a reduced level of discount in comparison with an airline that achieves the same number of landings/year, but transports a bigger number of passengers. In practice, this led to a situation in which dissimilar conditions (different prices) were applied to equivalent transactions (the same number of landings/year).

42. Prior to this reduction grid, the Airport used another mean of price discrimination between the users of the Airport. The discounts were granted for aircrafts with over 70 tons maximum takeover weight (hereinafter MTOW). This time the reduction was granted for all the airport charges and not only for the landing charges.

43. When put into practice, the MTOW criterion for the granting of reductions for airport charges led to the situation in which the vast majority of the airlines operating from Timișoara Airport (with the exception of a single airline) were not in position to obtain the maximum amount of discount. These airlines used, for the vast majority of their flights to and from Timișoara Airport, airplanes whose MTOW was inferior to the 70 tons threshold established by the Airport.

⁵ Infopress has benefited further from the Romanian Post's preferential treatment compared with its competitors, getting, unlike them, tariff rebates based on the a volume achieved through the consolidation (aggregation) of volumes submitted monthly by many senders.

44. Additionally, if the MTOW criterion was put into practice, this led to a situation in which an airline achieving a certain number of landings/year at Timișoara Airport obtained a reduced level of discount for the landing charges in comparison with an airline that achieved the same number of landings/year, but used airplanes whose MTOW exceed 70 tons and embarks a certain number of passengers.

45. Because the level of the landing charges is reflected in the price of the airplane tickets charged to the consumers, the discrimination concerning the landing charge might cause a competitive disadvantage to certain airlines that do not meet the conditions concerning the MTOW and the number of embarked passengers.

46. In conclusion, the practices of the Airport of granting reductions for the payment of different airport charges according to criteria that cannot be considered objective and discriminatory could be considered to represent *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*, a practice that is punished by the provisions of the *Competition law* mentioned above.

47. The investigation was closed when RCC accepting the commitments offered by the Airport in order to remove the reasons which led to the opening of the investigation. The commitments provided that:

- any reduction system has to be based on objective, relevant, non-discriminatory and transparent criteria;
- any volume based reduction system for the airport charges has be justified by the increase in economic efficiency it brings to the Airport, through the volume of activity generated by the airlines meeting various reduction thresholds and/or through the economies of scale achieved by the Airport from the increase of the quantity of services sold and from the better use of its production capacity;
- in order to determine and apply a volume based reduction system the Airport will take into consideration its legitimate interest to obtain a global increase of its activity volume, increase which can be attributed to: (i) an increase in the number of passengers or (ii) an increase in the number of airplane operations;
- the reductions for the landing charge had to be granted according to the criterion of number of movements of airplanes;
- the reductions for the passenger service charge had to be granted according to the number of passengers.

48. According to the provisions of the *Competition law*, the fulfillment of the commitments was monitored in order to assess whether the Airport was complying with the commitments it had accepted. During the monitoring process it became clear that, as a result of the reduction grids, the Airport managed to substantially increase the number of the passengers, the number of airplane movements and the revenues derived from providing services for the airplanes and for the passengers.