

**OPINION OF THE NATIONAL COMMUNICATIONS AUTHORITY
ON THE DRAFT FINAL DECISION OF THE COMPETITION AUTHORITY
TO ARCHIVE THROUGH THE ESTABLISHMENT OF CONDITIONS,
IN THE ADMINISTRATIVE OFFENCE CASE No. PRC-2015/04 (CTT)**

1. OVERVIEW

In November 2014, VASP Premium - Entrega Personalizada de Publicações, Lda. (hereinafter, "VASP") submitted a complaint to the Competition Authority (hereinafter, "AdC") for alleged refusal of access by CTT - Correios de Portugal, SA. (hereinafter, "CTT") to its postal distribution network. Briefly, according to the complaint, in July 2012 VASP requested access to the CTT postal network, the latter having refused to grant such access.

On 13 February 2015, AdC decided to open an inquiry, pursuant to Article 8(1) and Article 17 of Law 19/2012 of 8 May, subject to subsequent amendment (Competition Law, hereinafter "LdC"), to check for the existence of practices prohibited by Article 11 of the LdC and by Article 102 of the Treaty on the Functioning of the European Union.

Under this procedure, on 17 March 2015, pursuant to the terms and for the purposes of Article 35(1) of the LdC, the AdC:

- a) informed the National Communications Authority (ANACOM) of VASP's complaint and of the decision to open an inquiry; and
- b) requested the opinion of ANACOM on the facts of the case that constitute the subject of the proceedings.

ANACOM sent the AdC its report by letter dated 29 April 2015, which was supplemented by a letter dated 28 August 2015.

By letter dated 24 May 2018, the AdC notified ANACOM of the draft final decision adopted, and asked for the latter's opinion, pursuant to and for the purposes of Article 35(2) of the LdC, within 10 business days.

By letter dated 12 June 2018, ANACOM asked for an extension of the deadline for replying, which was approved by the AdC and notified by letter dated 14 June 2018

In order to respond to the request for an opinion, ANACOM also asked the AdC, by letter of 14 June 2018, to send a copy of the PRC/2015/04 proceedings, which the AdC duly sent to ANACOM as an attachment to their letter of 15 June 2018.

This document constitutes ANACOM's opinion on the said draft decision.

2. OPINION OF ANACOM

2.1. General appraisal

In the first place, this Authority considers it important to point out, without prejudice to the present opinion issued pursuant to Article 35(2) of the LdC, that:

- a) It did not receive any complaint or request for intervention from VASP, but only took note of the communications between that body and CTT and AdC;
- b) in the exercise of its powers and legal competences, it is currently completing the decision-making process regarding the access points to the CTT postal network (cf. draft decision of 16.6.2017)¹, triggered by a request for intervention by Iberomail - Correio Internacional SA (hereinafter, "Iberomail"), with a view to promoting access under transparent and non-discriminatory conditions, so as to foster effective competition and the interests of users;
- c) it will unfailingly exercise all its powers of regulation, oversight, monitoring and sanctioning within the scope of its duties, observing, in particular, the provision in Article 38 of Law 17/2012, of 26 April, in its current wording (Lei Postal - Postal Law), concerning access to postal networks.

In fact, continuing the regulation objectives to be pursued by ANACOM in the postal services sector, which consist, under the terms of Article 2(1) of the Postal Law, of defining the conditions for the provision of postal services under full competition, of ensuring the efficient and sustainable provision of a universal postal service, and of establishing the rights and interests of users, in particular consumers, requires that, in the exercise of its powers within

¹ Available at <https://www.anacom.pt/render.jsp?contentId=1413936>.

the sector, ANACOM considers a range of factors and does not confine itself to examining competition issues raised and considered in one specific concrete case concerning the alleged refusal of access in the face of the LdC, whose implementation is the responsibility of the AdC.

Regarding the draft decision under consideration, although the time allowed for the opinion did not permit this Authority to make an in-depth assessment of all the aspects associated with it, it is generally in agreement with the delimitation of markets that underlie it.

In relation to the commitments submitted by CTT², ANACOM considers that they represent an additional option available to competitors, constituting an extension of the conditions for the provision of access to the CTT postal network, compared to those in force since 15 February 2016. This additional option displays (i) a greater number of access points to the network and (ii) the diversification of types of mail covered by the provision of to the postal network.

However, under the Postal Law there is still a need to assess whether commitments can actually meet the needs of postal operators, enabling them to access the market while at the same time ensuring effective competition and the interests of consumers and other users.

Indeed, in terms of access points, the possibility of delivering postal objects further downstream in the CTT operational chain, specifically in 217 destination stores (apart from the national standard service up to 50 grams) and in the Production and Logistics Centres (CPLs) of Lisbon and Porto (covering the distribution areas of Lisbon, Porto, Maia and Matosinhos), already separated by postal distribution zone of the Postal Distribution Centre (CDP) and having certain sorting levels, will, it is felt, in an avoided costs rationale, make it possible to provide savings to postal operators who request access to the network.

Thus, the CTT proposal of commitments, which is based on the availability of access points further downstream in the mail chain (more precisely in the destination stores) and on the acceptance of mail with higher levels of treatment, if it appropriately incorporates the savings of associated costs, constitutes a possible improvement of the provision. However, a full assessment of the commitments submitted will also depend, as the AdC itself seems to admit, on the price to be set by CTT to remunerate the access. This price could be subjected to analysis by ANACOM under the powers conferred on it to examine wholesalers' practices and,

² The commitments submitted by CTT on 22 December 2017 are considered, with the changes that were introduced on 23 March 2018 (after the public consultation conducted by the AdC).

where justified, to determine changes to the terms and conditions of access to the CTT postal network (in accordance with the provisions in Article 38 of the Postal Law).

In fact, operators who are already able to efficiently replicate part of the operational chain, including treatment and transport activities, can use their own resources for these purposes and benefit from some cost reduction in the delivery of these items in the original CPLs, which are the currently available access points. These operators do not also need to replicate a distribution network equivalent to that of the CTT, since this activity is carried out by that company.

ANACOM also believes that, in theory, such access to the destination stores does not imply:

- a) changes in the operational process of CTT, since it prevents the company from having to provide material, human, and logistical conditions for the acceptance of postal items in its network, to the CDPs (points in the network to which VASP wishes to have access); such changes might introduce inefficiencies in the production process of CTT and, therefore, jeopardise the fulfilment of the quality of service objectives of the provision of the universal postal service;
- b) the need for CTT to invest, compared to what would happen if it had to provide the CDPs with the said conditions of acceptance; investment which, unless very specific conditions of access (as per the analysis undertaken by ANACOM in the aforementioned draft decision of 16 June 2017, on the CTT postal network access points), could override the potential avoided costs associated with the delivery of postal items to the destination CDPs (this point being a direct consequence of point (a)).

On the other hand, we should bear in mind that, from the point of view of potential competitors that could benefit from the new CTT offer, delivery to the destination stores does not seem to be attractive for two main reasons:

- a) mail transport would normally be ensured at the end of the day, so it would arrive at the destination stores outside their opening hours;
- b) although they are allowed to deliver mail to CTT at a point further downstream in the network, potential competitors will have a longer delivery time for their mail, not comparable to that offered by CTT, since it will only be distributed the next day.

These reasons may lead to a lack of interest in CTT's new offer as proposed, so that it might not have any effective impact in terms of increased competition.

In any case, the fact that the CTT commitments in question cover a wide range of mail, which can also be accepted in the CPLs over a wider timetable than in the destination stores, is a development that tends to be positive compared to the current offer of access to the CTT network.

In this context, given the information that ANACOM has gathered, particularly through actions carried out in the CDPs and CPLs, this Authority understands that the possibilities to take advantage of all points of the network are not completely exhausted and it will continue the regulatory exercise that started with the adoption of the draft decision on points of access to the postal network, where, under certain conditions, access to the CDPs was provided for.

In addition, extending the provision of access to other services - the registered mail and priority mail services, in addition to the editorial service - could also facilitate access to the market and/or the development of offers by postal service providers. Depending on the price that is fixed this could theoretically help to promote competition in the sector and the development of new business by multiple operators, encouraging the full use of the various resources available in the national territory³.

2.2. The specific case of editorial mail

The commitments submitted by CTT do not address all the specific concerns expressed by VASP, or those of other postal operators such as Iberomail, particularly regarding access to the postal network of CTT for the distribution of daily and weekly newspapers and publications (specifically, those delivered up to D+1), since delivery to the recipient in good time will depend on the time of acceptance by CTT.

In fact, the access to destination stores which are normally open until 6 pm, does not allow, for example, the delivery of national daily newspapers and periodicals on the day to which they correspond, given that at this time the editing and printing are generally not completed.

However, according to information (i) from CTT itself, sent to ANACOM at the request of this Authority, and (ii) gathered in the context of actions performed in several CDPs and CPLs,

³ It should be noted that the commitments submitted by CTT also allow the injection of incoming international mail (see point 169 of the AdC draft decision).

both obtained in the current month of June, in the particular instance of despatching newspapers and periodicals with pre-division by four-digit postal code (CP4) and sent to specific forwarding groups (as explained in the following paragraphs), the time limit for acceptance in the CPLs (more precisely, the Business Mail Counter - *Balcão de Correio Empresarial* - BCE⁴) which CTT provide for their customers, is:

- a) at the Lisbon BCE, until 2.30 am if the forwarding region is Lisbon City and until 1.30 am if the destination regions are Torres Novas and Lisbon Region;
- b) at the Coimbra BCE, until 3.55 am and 4.30 am if the forwarding region is the Coimbra region (the two times vary depending on the destination postal code for the items) and, in accordance with the current operational organization, until 2.45 am if the forwarding region is Aveiro, Viseu or Leiria;
- c) at the Maia BCE, until around 3.30 am if the destination region is Porto or Braga and until 2.30 if the destination region is Mirandela, Aveiro or Viseu.

In these cases, same day delivery is possible for certain forwarding regions, particularly for those closest to the CPLs. This access to the CPL (by other postal operators), in the early morning, minimizes ANACOM's concerns in relation to end-user interests in the case of these forwarding regions since it ensures the delivery of daily and weekly newspapers and periodicals on the day to which they relate. But in terms of competition it does not improve the efficiency of the operation of the transport network and other activities that other postal operators could develop.

It should be noted that the acceptance times mentioned above are a practice⁵ of CTT and not a formal rule, because these are the times that result from the supposed official acceptance times⁶. ANACOM will continue to intervene to ensure that this practice is reflected in the CTT offer of access and to improve the conditions of transparency in the sector.

It is clear that if there is no negative impact on the CTT production chain, access to the CDPs could better promote competition by allowing other postal operators to utilize their transport

⁴ That is, outside the normal opening hours of these establishments.

⁵ This practice has the potential risk of promoting a discriminatory treatment, between the service that the CTT ensures for its own customers and the service that it will ensure for the companies that benefit from a future provision of access as is expected with the commitments proposed by CTT.

⁶ As could be ascertained by this Authority *in loco*, from the CPLs.

networks to deliver these items at a point further downstream of the CTT productive chain. This would imply that the time for this delivery and acceptance by CTT could occur in a reduced time window between the opening hours of the CDPs and the start of the sequencing activity by delivery route.

Furthermore, in view of the above, given the low importance of editorial mail, particularly daily and weekly newspapers and periodicals in total postal items, less than 4%, any potential access to the CDPs must be properly studied, weighing the costs (particularly the cost of investing in providing the CDPs with postal acceptance conditions) and the inherent benefits. These benefits include promotion of competition and protection of users' interests with respect to the use of information goods which by their nature are considered 'merit goods', such as the media, and especially relevant to territorial cohesion, such as the regional press.

In addition, it should be noted that the delivery standards for the various services the commitments are concerned with are generally compatible with the delivery standards offered by CTT to retail customers, such that the various commitments will ensure that CTT's competitors' customers will enjoy conditions similar to those offered by CTT to its retail customers. Furthermore, in the case of newspapers and periodicals with a higher than weekly periodicity, the standard of delivery available under the commitments, in the case of access to the destination stores, is better (D+2) than that provided by CTT (D+3).

2.3. Other issues

– Any inadequacy of the destination stores for mail acceptance

This Authority wishes to point out that destination stores may not be able to accept large volumes of mail, or at least they may be unable to accept deliveries of postal items of a certain volume or weight. Depending on the amounts delivered to the stores, new equipment (e.g. larger weighing scales or ones with greater capacity) or changes in how the stores operate may be needed (for example, creation of a specific counter for customers of the access provision), since it is not clear in the commitments whether CTT has anticipated this. Moreover, if such in-store changes are required, associated incremental costs may be involved.

– **Licensed operator's own mail**

In relation to the applicability of the provision of access to the licensed operator's own mail, there is a need to ensure that major customers do not benefit from the provision by being licensed as postal operators; on the other hand, it could facilitate competition through the emergence of new operators who used to be retail customers.

– **Minimum period of access provision**

The provision of access to the destination stores lasts for a minimum period of three years. It is expected that, according to the commitments, access to the destination stores will be discontinued when, at least two years after the provision was made available, CTT achieves a level of automated sequencing of more than 50% for a continuous period of at least one year. This minimum period should enable the access operator to develop its activity and gain visibility with retail customers, allowing it to recover at least part of the investment made. However, given the minimum period of depreciation of any equipment that the postal operators might need to invest in (seven years), it could prevent the provision from being seen as attractive in practical terms, as its potential users might not be willing to make new investments, given the risk of failing to obtain a timely return.

It should be noted, however, that the notice period for the closure of the access points in the destination stores is, in this case, 30 calendar days (15 calendar days for other cases), which requires a reaction from the access operator in a short space of time.

– **Discontinuation of access to destination stores**

According to the commitments, if, in the context of the rationalization and optimization of the postal network a destination store that is an access point is closed, CTT shall make a new destination store available in the postal distribution area of the same CDP (if any).

It is not clear from this whether, in the event of the closure of a destination store that is an access point and there is no another store, it means that access to the distribution of items in the area of distribution of that CDP is no longer possible.

It should be ensured that, in this case, it would still be possible to forward mail to that CDP from another destination store.

– **Situation of CityPost SA and Widecare, Lda**

I should be noted that the following companies are currently insolvent:

- Citypost SA (mentioned on page 2, paragraphs 7 and 11 of point *IV. Investigation Proceedings*)
- Widecare, Lda. [mentioned on page 2, subparagraph (ii) in paragraph 17 of point *VI Written Defence and Additional Inquiry Measures*].

Note that on 7 December 2016 Widecare, Sociedade Unipessoal, Lda., changed the company name to Widecare, Lda.

– **CTT position in the markets**

Regarding the position of the CTT in the markets, ANACOM states that the report on the postal services relating to 2017 was published on 23 May 2018⁷. On this matter, especially what was written by the AdC in paragraph 80 of its draft final decision, it can be stated that the conclusions are unchanged, as can be seen in Table 1, which concerns the shares of total postal traffic.

⁷ At <https://www.anacom.pt/render.jsp?categoryId=277884&languageId=1&tab=>.

Table 1 - Shares of total postal traffic in Portugal in the last five years

	2013	2014	2015	2016	2017
Grupo CTT	94,7%	94,5%	94,5%	93,0%	92,2%
Grupo Adicional	0,1%	0,2%	0,3%	0,9%	2,1%
GEOPOST / DPD Group	0,9%	1,1%	1,3%	1,5%	1,7%
Vasp Premium	0,7%	0,7%	0,7%	0,8%	0,9%
Notícias Direct	0,5%	0,8%	0,6%	0,6%	0,6%
Urbanos	0,3%	0,3%	0,3%	0,4%	0,4%
Grupo Nacex	0,2%	0,2%	0,2%	0,2%	0,3%
Iberomail	0,3%	0,3%	0,3%	0,3%	0,3%
City Post SA	0,0%	0,0%	0,2%	1,0%	0,3%
TNT Express	0,2%	0,2%	0,2%	0,2%	0,2%
SDIM	0,2%	0,2%	0,2%	0,2%	0,2%
UPS	0,1%	0,1%	0,1%	0,1%	0,2%
Best Direct	0,2%	0,2%	0,2%	0,2%	0,2%
Grupo MRW	0,0%	0,1%	0,1%	0,1%	0,1%
Other operators	1,5%	1,2%	0,7%	0,4%	0,2%
Total	100%	100%	100%	100%	100%

Unit:

%

Source: ANACOM

Note: The CTT Group includes CTT Expresso and CTT Contacto. CTT Correios de Portugal, SA, acquired 100% of the share capital of Transporta - Transportes Porta a Porta SA on 4 May 2017. However, this company has not reported any traffic since 2014.

– VAT

Point 77 of the draft final decision of the AdC contains a reference to “(...) *exemption from value added tax on services covered by the USP...*”. In this regard, it is clear that the tax exemption referred to is restricted to services covered by the universal postal service supplied by the provider with the duty to provide that service, that is to say, CTT [see, for this, Judgement of the Court of Justice (Second Chamber) of 23 April 2009 in Case C-357/07].

– **Report on the monitoring of compliance with the commitments on the part of CTT**

In relation to the annual report to be sent by CTT to the AdC, with a view to monitoring compliance with the commitments and assessing the success of their implementation, this Authority is hereby expressing its interest in knowing about these same reports, as soon as the AdC receives them, pursuant to Article 8(4) of the Postal Law and Article 5(4) of the LdC.

3. CONCLUSIONS

This Authority considers that the commitments submitted by CTT amount to an extension of the conditions of the current provision of access to the CTT postal network, which has been in force since 15 February 2016, although we may come to see a lack of interest in the new offer from CTT in the manner proposed, and so it might not have any effective impact in terms of increased competition.

ANACOM's pronouncement, made known through the issuance of this Opinion, confines itself to investigating the administrative offence proceedings initiated by the AdC, without limiting ANACOM's mission of upholding the principles and objectives of regulating the postal services sector, in particular by ensuring a competitive market and safeguarding the interests of end users.

In fact, ANACOM's tasks could go beyond analysing the competition-related issues raised and considered in one specific concrete case concerning the alleged refusal of access in the face of the LdC, whose implementation is the responsibility of the AdC.

ANACOM considers that the possibilities for access to the CTT network are not completely exhausted, and so it will continue to exercise all its powers of regulation, oversight, monitoring and sanctioning provided for in the scope of its competences and duties, in particular those provided for in Article 38 of the Postal Law.