

ARTÍCULOS

«Survival of the fittest» in the declining market of postal services: The Chilean case from a comparative perspective

*«La supervivencia del más fuerte» en el decreciente mercado de servicios postales:
El caso chileno desde una perspectiva comparada*

María Francisca Ossa Monge 

Universidad del Desarrollo, Chile

ABSTRACT: This essay seeks to analyse the declining market of postal services of letter delivery as a network industry, specifically in the Chilean market, and contrasting its features with those of different countries through the jurisprudential analysis of competition law cases. These show some remarkable common features with the last competition law case on Chile's postal services market, despite being taken from different jurisdictions (Denmark, UK and Spain). For this purpose, we will briefly analyse the market of postal service as a network industry and the declining performance of the segment of letter-post delivery. We will furthermore analyse the specific features shown in Chile's market of letter-post delivery, its legal and regulatory framework, its market structure, and the implications of said structure for competition, covering the market concentration, economies of scale and sunk costs. Then, we will briefly and generally conceptualise the presence of retroactive conditional rebates in the context of postal services. Finally, we shall contrast different competition law cases that have taken place regarding this segment of the market, in order to answer the question of the reason for the declining feature of the letter-post delivery market and whether this has led more dominant firms to incur in anticompetitive practices, such as discriminatory prices or retroactive conditional rebates.

KEYWORDS: Postal service, conditional rebates, network industries, Correos de Chile.

RESUMEN: Este ensayo busca analizar el decreciente mercado de servicios postales (entrega de cartas) como industria de redes, específicamente en el mercado chileno, y contrastar sus características con las de diferentes países a través del análisis jurisprudencial de casos de libre competencia. En estos se muestran notables similitudes con el último caso chileno en sede de libre competencia que involucra al mercado de servicios postales, pese a venir de distintas jurisdicciones (Dinamarca, Reino Unido y Espa-

ña). Con este objetivo en mira, se analizará brevemente el mercado de servicios postales como industria de redes y el decreciente desempeño del segmento de envío de cartas. A mayor abundancia se analizarán las características de este mercado en Chile, su marco legal y regulación, su estructura de mercado y las implicancias de dicha estructura para la competencia, analizando la concentración de mercado, economías de escala y costos hundidos. Posteriormente se analizará y conceptualizará brevemente la práctica de descuentos condicionales retroactivos en los servicios postales. Finalmente, se contrastarán diferentes casos de libre competencia que han involucrado a este segmento del mercado para responder la pregunta de si el desempeño decreciente del mercado de envío de cartas es lo que lleva a las empresas dominantes a incurrir en prácticas anticompetitivas, tales como precios discriminatorios o descuentos condicionales retroactivos.

PALABRAS CLAVE Servicio Postal, descuentos condicionales, industrias de redes, Correos de Chile.

Introduction

As we increasingly are —willingly or unwillingly— immersed into the digital era, competition law enforcement by authorities is facing interesting challenges regarding the irruption of new technologies and innovative industries, and how to properly address them. In this context, it may seem unorthodox, or even outdated, to venture into analysing in what seems to be an archaic and declining market: the postal service. However, it would be premature and inaccurate to give up this entire market for dead, given the fact that the parcel delivery segment is increasingly expanding due to e-commerce and successful marketplaces that have led to a renewed growth with its correspondent challenges for postal services to compete in the market and, in some cases, adapt their business models. As the latest report provided by the Universal Postal Union (UPU) shows, «the unprecedented shrinkage of letter-post volumes is counterbalanced by an opposite evolution in the parcels segment. In 2020, domestic parcel post registered the highest annual growth in history: 17.7%» (Bodda, De Borba and Piotrowski, 2021).

Nevertheless, and however ironic it might appear to be, the very element that is fuelling the parcel delivery market —the Internet, through e-commerce— is what has caused that the other more traditional segment of postal services, is now possibly facing its last decades: the market of written correspondence and documents delivery. But even while witnessing the fall of a method of communication that might soon cease to exist, from a competition law standpoint, interesting cases related to this market continue to emerge in different jurisdictions. In these cases, some remarkable common features can be extracted that revolve around the different —and yet similar— anticompetitive strategies applied by the more prominent postal offices that

previously held the positions of statutory monopolists in their countries, but are now part of liberalized markets and, in most cases, designated members of the UPU. Now, however, they must face the legal obligation to provide letter-post delivery services (LPD), at least until they stop being requested to do so by authorities.

These commonalities across jurisdictions raise the following question: Is there a correlation between certain anticompetitive practices, such as retroactive rebates and price discrimination, and the fact that the LPD market is in decline? This question is, intrinsically, related to what authors Crew and Kleindorfer (2011) suggested, over a decade ago, as the key strategic priority that should be adopted by Post Offices which is maintaining delivery volumes in the traditional mail business. As will be reviewed in the case-law, the very fact that the dominant postal services offer anticompetitive loyalty or retroactive rebates, or incur in price discrimination, could be a manifestation of this strategy applied by former monopolists in recently liberalised markets to stay in business by keeping their competitors from surviving in this highly declining segment of the postal service. In the case of anticompetitive rebate schemes, the fact that they are offered by the state postal services is also in line with Woktej and Zauner's (2012) idea that «the use of rebates may appear to be the natural way for the ex-monopolist to defend its market share».

To address the potential correlation between anticompetitive practices and the general decline of the market in question, Chile's postal system will be reviewed from a regulatory point of view as well as some competition implications that arise from its current market structure, in light of a recent ruling from Chile's Competition Court (TDLC, Spanish acronym for *Tribunal de Defensa de la Libre Competencia*). The figure of retroactive or loyalty rebates in the postal sector will also be reviewed as well as the evolution of the case-law and its assessment, in order to fully put in context and appreciate the extent to which the different courts or authorities have analysed the economic effects of the practices. And thus, establish, if at all, a correlation between the declining market features of the LPD market and the anticompetitive practices adopted by the analysed dominant postal offices. For these purposes, court cases from Chile, Spain, Denmark and the UK will be reviewed.

Postal service as a network industry

Postal service is a network industry (Panzar, 1993) that consists of different segments, which in their simplest conceptualization are traditionally considered to be: collection, sortation and delivery, also known as «the last mile» (Heitzler, 2009).¹ The first two are conceptualized as «upstream activities», whereas delivery is a «downstream

1. In some specific postal networks there is a subsequent distinction between inward and outward sortation.

activity». In this sense, «these terms follow the physical flow of a letter rather than the economic value, which flows in the opposite direction» (Ofcom, 2014).

The level of sector-specific regulation varies between different jurisdictions, especially in relation to access to different segments of the market. Furthermore, and unlike other network industries, the issue concerning access to the postal network mostly takes place in the downstream or «last mile» segment, also known as «work-sharing» (Heitzler, 2009) in the postal sector, which might display some features that could be viewed as a developmental bottleneck for the industry (Fratini, Roy and Vanomme, 2010: 22).

In turn, the market of LPD can also be divided into three sender-receiver segments. In this sense, the submarket can be:

- business-to-business (or B2B).
- business-to-customer (or B2C).
- customer-to-customer (or C2C).

Currently, the remaining demand for postal services globally is highly reliant on the B2C submarket, since the B2B and C2C have been decreasing for the past decades in a worldwide level (Nikali, 2008: 89). This decrease in demand appears to be one of the causes of a growing level of concentration of the demand for postal services, which in turn entails an increasing level of countervailing buyer power (CBP) that did not quite exist or was not constrained to large customers, such as banks and administrations (Geradin, and Henry, 2010). In other words, a demand that used to come from multiple customers appears to be increasingly reliant on big clients who demand postal services in large quantities.

From a competition law standpoint, this market can be host to a wide range of anticompetitive practices, such as price-based exclusionary conduct, margin squeeze, exclusive purchasing agreements and conditional rebates, among others (Davies, 2011). As already mentioned in the introduction, we will focus on the anticompetitive practices of exclusionary or discriminatory conditional rebates, a practice which will be further described, and the practice of price discrimination incurred by Royal Mail in the UK.

Before analysing Chile's postal system, which will be used as a conceptual benchmark for the case-law further analysed, the main features of the worldwide domestic demand for LPD will be briefly analysed.²

2. For the purposes of this essay, international LPD will be excluded and the focus will be placed on the domestic demand within each country.

Letter-post delivery services: A worldwide declining industry

When it comes to traditional LPD, there has been an undeniable decline on its demand for over a decade. The peak mark reached for the market of first-class mail in the USA, for example, dates back to 2001; and in the EU, the peak for domestic letters posted was reached in 2006 (Sarmiento and Brandão, 2020: 377).

According to the last available report of the UPU, a total of 259.986,5 million letter-post items were sent domestically during 2020 (Bodda, De Borba and Piotrowski, 2021). This report considers the influence of the covid-19 pandemic as a contributing factor for this remarkable drop in the number of letters sent, explained by the fact that «the pandemic has intensified the long-term trend of fewer and fewer letters being sent. In 2020, domestic letter-post volumes fell by 13.6%. This rate of decline is more than three times faster than the pre-pandemic annual trend».³ The report goes further stating that while letters are still relevant in the postal market for some European countries and the USA, the possibility of a recovery for letter-post volumes is feeble (Bodda, De Borba and Piotrowski, 2021). According to some authors, «this declining tendency reaches significant proportions that strongly affect the organization of many institutions and does not seem reversible as it is not expected that agents return to the physical paper as the usual method of sending and receiving information» (Sarmiento and Brandão, 2020: 377).

Not surprisingly, authors have been addressing this issue for some time now, warning years ago that part of the decline in volumes of sent letters could be attributed to the «recent economic downturn» —referring to the subprime crisis— (Flórez, Longman, Mautino and Dudley, 2011: 243).⁴ However, they furthermore argued that the decline was also caused by more «structural trends, primarily stemming from changes in demand and supply of digital communications resulting in the electronic substitution of mail» (Flórez, Longman, Mautino and Dudley, 2011: 243). With this analysis, they address not only the effect of the internet on interpersonal communications, but also the negative impact on bulk mail, including advertising and direct mail, which is also negatively impacted by online advertising.

Crew and Kleindorfer (2011), during the same point in time, also addressed the internet's effect on Postal Offices (POs), describing it as intermodal competition which posed a threat to the traditional postal business in a way that is more serious than any other threat faced by POs in their existence, given the little to no level of complementarity between mail and electronic substitutes. In this sense, they contrasted the postal service's disruption by the internet with the much less harmful

3. Between the years 2015 and 2020, the annual growth compound was -4,6% according to UPU official statistics.

4. See also (Boldron, Borsenberger, Cremer, De Donder, Joram and Roy, 2011).

appearance of the telephone, which did not lead people to dramatically stop sending letters to communicate and therefore it posed as a much lesser threat to the market. They, furthermore, characterized this intermodal competition as the «elephant in the room» which had «the potential to trample down the postal business, if not to death, then in a manner that will inflict severe damage» (Crew and Kleindorfer, 2011).

Moreover, they compared the effect that the internet had on traditional letter-post delivery to the one it had on telecommunications (TELCOs), a sector that was also affected by it but in a different way, since this industry was able to adapt its structure to the disruptive massification and development of the internet. They argue that TELCOs were able to enter the new and fast-growing businesses of wireless and broadband, which enabled them to recoup the losses suffered in traditional telephony. Furthermore, they predicted that for Postal Offices «the way ahead looks unambiguously gloomy [...]. Volume declines for POs are serious because, as a network with resultant scale economies, the very benefits that worked in PO's favor as volumes were expanding work against them now» (Crew and Kleindorfer, 2011).

Finally, the growth of «eRetailing» has been considered to be the silver lining for the internet-disrupted postal service market, which today, over a decade later, their predicted destiny has proven to be increasingly true (Sarmiento and Brandão, 2020).

Legal and regulatory framework for postal services in Chile

The historical beginnings of the postal system in Chile, while interesting to some, are outside the scope of this essay. However, let us just say, for the purpose of providing some context, that the first implementation of a postal network traces back to the 18th century, while Chile was a colony under the rule of the Spanish Monarchy. And afterwards, as an independent republic, the network adopted the Rowland Hill⁵ reform during the midst of the 19th century.

In 1881, Chile joined as a member of the UPU (Correos de Chile, 2020). The first mailboxes in the country were imported from France and Germany during the 19th century and the stamps were printed by Perkins, Bacon & Co up until the first part of the 20th century, time when they started to be printed in Santiago.

From a regulatory perspective, the origins of the current system that regulates the public entity designed for the reception, transmission, and delivery of correspondence can be traced back to the year 1928, with the dictation of the Law number 4.402, which established that the State of Chile would hold the monopoly regarding the services for letters and correspondence.⁶

5. This British diplomat gives name to the system of previously paid uniform tariffs set by adhesive seals to the letter, that were proportionate to the distance between sender and receiver (Panzar, 1993).

6. The idea of a statutory monopoly of the postal system was later reiterated in 1942 (Law number 7.392) and 1960 (Supreme Decree number 5.037), both from the Ministry of Interior.

The liberalisation of the postal services in Chile was undertaken in the year 1980 by the promulgation of Supreme Decree number 203, which established the National Postal Policy. This made Chile a relatively pioneer country in its liberalisation process compared to most European countries, which went through the process of liberalisation decades later. The adoption of this new national policy required the State to guarantee the existence of a system in charge of the three segments of the market (reception, transmission, and delivery), and that also covered the entire national territory. The aforementioned Supreme Decree also instated, for the first time, the possibility for competition in the market allowing the participation of other entities dedicated to providing this service to users in exchange of a revenue, where its mode of functioning and prices were to be freely chosen by the parties.⁷ The following year, the state company *Empresa de Correos de Chile* (hereinafter, *Correos de Chile*) was created as a public legal entity that is autonomous from the administration of the State and has its own patrimony, pursuing the provision of correspondence delivery both nationally and internationally.

However, there has been an interesting debate on whether *Correos de Chile* should still be legally considered as a monopoly in the correspondence segment of certified letters.⁸ Said debate took place in the context of a case involving competition law, initiated by an incumbent against Chile's Health Superintendence, a public administrative entity that provided a legal interpretation regarding certified letters. And according to the Superintendence, certified letters could only be delivered by *Correos de Chile*.⁹ This interpretation meant that private health insurance companies (ISAPREs) would have to deal exclusively with *Correos de Chile* in the delivery of legally ordered certified letters to their affiliates. The plaintiff brought the case to the TDLC, since the exclusive dealing with *Correos de Chile* regarding certified letters, due to the Health Superintendence's legal interpretation, entailed an important restraint competition in that segment of the market.

The TDLC rejected the claim stating that the statutory monopoly *Correos de Chile* had was never expressly abolished by the Supreme Decree number 203, nor by the 1980 Political Constitution of the Republic of Chile that broadly included a free enter-

7. Article 6 of Supreme Decree number 203. (1980). Ministry of Transport and Telecommunications.

8. Whereas this concept is not legally defined, Chile's Supreme Court characterises them by the following criteria: (1) record of the sender's name and address; (2) individualisation of the recipient and the complete and precise delivery address; (3) hand delivery to the recipient or to a legally authorised person, and in case of not being personally found, the possibility of a search or public notice of that circumstance; (4) in the event of impossibility of being delivered to the recipient, the obligation to be returned to the mail office; and (5) the inscription of these records in a registry that will assign an order number to the letter. See *Demanda de WSP Servicios Postales S.A. v. Superintendencia de Salud*. Chile's Supreme Court (47:555-2016) ground 15.

9. *WSP Servicios Postales S.A. v. Superintendencia de Salud*. (C-297-2015).

prise principle.¹⁰ This ruling was partially revoked by the Supreme Court, stating that there is no legal disposition that prohibits the entry and participation on the market by private competitors in the relevant market of delivery of certified letters sent by ISAPREs to their affiliates.¹¹ Accordingly, the Health Superintendence, by means of its legal interpretation, was excluding the possibility for other competitors under equal conditions to provide the postal delivery service of certified letters from ISAPREs to their affiliates, which restricted competition on the relevant market.¹²

The Supreme Court's ruling, although being restricted to the segment of certified letters within LPD, is still a strong endorsement of the position that considers that *Correos de Chile* is no longer a statutory monopoly. Hence, *Correos de Chile* currently competes in the market of LPD with numerous private entities and its operation and strategies must, therefore, take place within the regulatory framework of Chile's Antitrust Law.¹³ This law deems the practices of abusive exploitation by a dominant undertaking, or group of undertakings, anticompetitive for the market, such as fixing prices, bundling, assigning market zones or imposing other types of abuses like discriminatory pricing or anticompetitive rebates.¹⁴

Additionally, there are some regulatory aspects that are worth mentioning due to their relevance in the shaping on *Correos de Chile's* participation in the market for LPD:

Universal Service Obligation (USO)

Correos de Chile, as a state company, has the legal obligation to offer «end-to-end» letter delivery services. This duty was established during a period in which the demise of this segment of the market was unlikely (1980s), nonetheless, such legal duty remains to this day, regardless of the declining features displayed by the market.

They have recently stated in its latest available annual report of the year 2020, that their mandate is to «continue to offer this service while there are Chileans without access to digital connections, which in turn entails to do so with an in-

10. «Due to all the above, and regardless of the opinion about the convenience for competition of the existence of postal service private enterprises that provide correspondence services, the facts of the case are not enough to sustain that the monopoly held by *Correos de Chile* for the delivery of certified letters is not currently in force, they do not provide an exception of said monopoly, nor allow the Superintendency to act against the law». (TDLC, ground 33).

11. *Demanda de WSP Servicios Postales S.A. v. Superintendencia de Salud*. Chile's Supreme Court (47:555-2016) ground 17.

12. *Demanda de WSP Servicios Postales S.A. v. Superintendencia de Salud*. Chile's Supreme Court (47:555-2016) ground 19.

13. Decree Law N° 211 (1973). Ministry of Economy.

14. Decree Law N° 211 (1973). Ministry of Economy. Article 3(b).

creasing level of efficiency for it to be financially sustainable¹⁵» (Correos de Chile, 2020). Furthermore, during the judicial procedure that will be later examined,¹⁶ the entity argued that

the legal mandate of Correos is to comply with the Universal Postal Service, ensuring that all its users and clients can have access to a quality supply of basic postal services permanently provided in every part of their respective territories, allowing them to send and receive merchandising and messages from and to any part of the world¹⁷ (TDLC Sentence number 178, 2021).

As mentioned earlier, Chile is a member state of the UPU and *Correos de Chile* is its designated operator, which means that the company must comply with all the international standards of information management and traceability set for the 192 member states, responsibilities —it may be noted— that are not faced by the company's rivals.

VAT exemption

Correos de Chile, as a state company, is exempt from paying value-added tax (VAT), which has been considered by the TDLC as a competitive advantage that allows the company to charge lower rates to some of its clients in a way that its competitors are unable to match (TDLC Sentence number 178, 2021). The TDLC applied this criterion using as a reference the case of Royal Mail's VAT exemption and its influence on impeding the entry and expansion of other competitors (Ofcom, 2018).

Lack of regulation regarding access

Given the lack of sector-specific regulation in postal services in Chile, other than the framework that creates the state company and establishes its duties, structure, and functioning system; this company has no obligation to grant access to its network. Therefore, the type of competition in this market in Chile is conceptualised as «end-to-end», which means that each competitor must develop its own infrastructure to provide the service of distribution. Thus, participating in all the different stages of the productive

15. Free translation by the autor: «El mandato de Correos Chile exige continuar ofreciendo este servicio mientras existan chilenos sin acceso a conexiones digitales, lo cual a su vez demanda hacerlo cada vez con mayor eficiencia para que resulte financieramente sostenible».

16. *Envía Limitada v. Empresa de Correos de Chile y otro.* (C-359-2018). TDLC.

17. Free translation by the autor: «El mandato legal de Correos es cumplir con el Servicio Postal Universal, procurando que todos los usuarios y clientes puedan acceder a una oferta de servicios postales básicos de calidad, prestados en forma permanente en todos los puntos de sus respectivos territorios, permitiéndoles enviar y recibir mercadería y mensajes desde y hacia cualquier parte del mundo».

process. This market feature, at least in principle, is not uncommon in postal services, since «in most situations, if not all, postal services can be duplicated in an ‘end-to-end competition’ market situation without the need to access the incumbent’s infrastructure or other elements of its postal system» (Fratini, Roy and Vantomme, 2010).

Also, as Heitzler (2009) argued, the view that «there are no non-replicable assets (at least in the narrow sense) was confirmed by the Court of Justice of the European Communities in the case decision *Oscar Bronner v Mediaprint (C-7/97)*» (77). This relates to the fact that, unlike other network industries such as telecommunications or railways, the sunk costs are comparatively not as high.

However, when the shrinking demand on the market is factored in with economies of scale, the inevitable result is that, at some point, the minimum efficient cost will no longer be able to be achieved and entry to the market will be eventually rendered unfeasible unless the entrant is able to attain large volume clients. Therefore, the decline of the demand must also be weighed before assessing the viability of an eventual duplication of end-to-end postal networks or the contestability of the demand on the LPD market.

With the regulatory features of the market already analysed, now it is pertinent to proceed with the current market composition of postal service in Chile and the relevance that this structure can have for competition law.

Chile’s postal service market structure and implications for competition

Letter-post delivery services demand in decline

In line with the world’s current trend, there has been a decline on Chile’s market for LPD in the last decade. According to the data provided by Chile’s National Statistics Institute (*Instituto Nacional de Estadísticas*, INE), the decline on the delivery of documents (both regular and registered documents) can be clearly appreciated, as displayed by **figure 1**.¹⁸

This progressive decline on the demand for LPD services has been conceptualized by the TDLC as a barrier to entry to the market. In this sense, said Tribunal has established that a declining demand

disincentivizes the entry by new actors because [...] the economies of scale that feature in this market require a minimum efficient scale to be achieved in order for the operation to be profitable, and the lower demand allows that a more reduced number of companies can achieve that minimum efficient size (TDLC Sentence number 178, 2021).

18. Data obtained by INE from 61 national postal services. Available at: <https://bit.ly/3NoS2OD>.

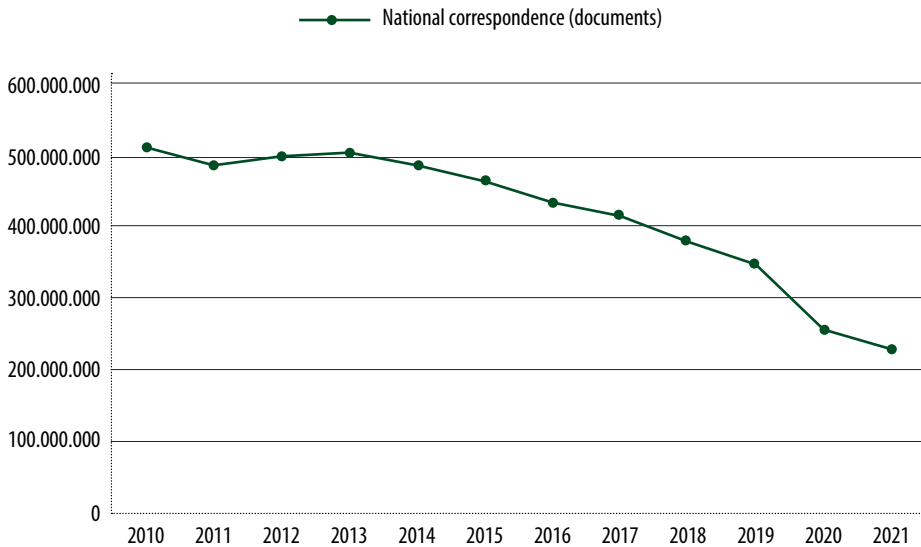


Figure 1. Amount of national correspondence (documents) sent by year. Source: prepared by the author based on the public data obtained from INE (2022).

The declining feature of the demand, in the view of the TDLC, is particularly relevant for smaller firms that will be more affected by the loss of a big client. Therefore, according to the TDLC, «as long as the demand decreases with the pass of time, it becomes less likely that an entrant can achieve said minimum efficient scale, which in turn increases the relative importance of clients that demand large volume of deliveries» (Sentence number 178, 2021).

Market concentration

As for the market shares held by different entities on the LPD market, **table 1** shows the main national actors in the market by the year 2017:

As can be appreciated from the **table**, there is a high level of concentration in the market of correspondence which, according to the Herfindhal-Hirschman Index, would constitute a highly concentrated market. This index is preferably, yet not exclusively, used by Chile's Competition Authority (*Fiscalía Nacional Económica*, FNE) in order to determine the market concentration according to the Guide for the Analysis of Mergers provided by the same entity (FNE, 2021). If the HHI exceeds 2.500, the market is considered as highly concentrated and, as can be seen in **table 1**, *Correos de Chile* almost doubles that threshold followed by WSP, which holds a

Table 1. Market shares on the LPD market (2017)

Competitor	Volume %	Value %
Correos de Chile	60-70%	70-80%
WSP	5-10%	5-10%
Envía	0-5%	0-5%
Chile Parcels	0-5%	0-5%
ChilePost	0-5%	0-5%
Other smaller-sized actors	10-20%	10-20%
Total	100%	100%
HHI Concentration Index	4.592	5.300

Source: (ground 61, TDLC, Sentence N°178, 2021)

market share that is very low in comparison. However, taking into consideration the EU case¹⁹ and the Commission’s Guidance Paper²⁰, the interpretation of market shares must be according to the relevant market conditions and dynamics of the market, and product differentiation (European Commission, 2009). In other words, while significant, the concentration of the market must not be accounted for as the only factor of the analysis.

Economies of scale and sunk costs

There are significant economies of scale in this segment of the market given the national distribution network displayed by *Correos de Chile* (TDLIC Sentence number 178, 2021). In this sense, the public entity, during its 273 years of history has achieved a 100% of nationwide coverage, with a network that consists of 208 branches displayed throughout Chile’s territory and 238 offices in total: 4 sorting plants located in the capital city of Santiago; 92 postal distribution centers; and a working network of over 5.000 employees, apart from over 2.000 mailmen, which is considered to be

19. See Hoffmann-La Roche & Co. AG vs. Commission. (1979). Case 85/76, paragraphs 39-41.

20. This document was published in the form of a Communication by the European Commission, of a sui generis and non-legal nature, and is therefore considered to be a soft law instrument, with less value than the European case-law, yet useful for firms in order to obtain clarity regarding the legality or illegality of the practices that may fall within the scope of Article 102 TFEU. Its main aim was to introduce a «more economic approach» to competition law in the EU, thus modernizing it. See (Witt, 2010) and (Geradin, 2010).

one of *Correos de Chile*'s main competitive advantages.²¹ Furthermore, according to the public entity's last available report, its assets represent a value of \$115.914 million Chilean pesos, equivalent to 109 million pounds (*Correos de Chile*, 2020).

These economies of scale, present in this industry due to the fixed costs of production and distribution, «restrict the number of firms that can operate on the market at a minimum cost» (TDLIC Sentence number 178, 2021). This follows a similar rationale as the one applied in the *Deutsche Post* case, in which one of the contributing factors for the German entity's dominance was the considerable sunk costs that the creation of an alternative infrastructure would entail (European Commission, 2001). Similarly, the UK's Office of Communications (hereinafter, Ofcom) considered that the infrastructure investment required to compete in delivery entails significant sunk costs, and that Royal Mail —as former statutory monopoly—, benefited from the economies of scale and scope given the relatively fixed costs for delivery routes, which tend not to vary regardless of the volume of items delivered (Ofcom, 2018).

Moreover, *Correos de Chile*'s infrastructure is considered by the TDLIC as a barrier to entry which in turn serves as a disincentive for potential new competitors who wish to enter the market, and prevents existing competitors to expand their business in this segment of the market turning *Correos de Chile* into an «unavoidable commercial partner for customers that need to send correspondence to zones that are not covered by the rest of the postal operators» (TDLIC Sentence number 178, 2021).

The fact that the industry of correspondence has economies of scale holds a connection with the already addressed issue of the LPD market being in decline. As Crew and Kleindorfer (2011) state,

the shrinking pie from declining volumes means that scale economies in delivery are under pressure. This works against both incumbents and entrants, as there are likely to be fewer routes that have sufficient volumes to be of interest to entrants. However, entrants still want to retain their customers and grow their business.

Although paradoxical, an incumbent like *Correos de Chile*, as a former monopolist that was able to benefit from economies of scale and address the demand on its own, now faces the dilemma of supporting that same infrastructure to comply with its legal obligation to provide postal services in an increasingly letter-less market.

While it is true that adapting its existing infrastructure to the promising parcel delivery segment of the market may result less costly than starting from scratch, it is possible that the adaption costs entail a new wave of sunk costs.²² *Correos de Chile*'s approach seems to be pragmatic, focused on evolving and restructuring in order to become a strategic company from the standpoint of logistics and distribution, ven-

21. Available at <https://bit.ly/3NoRmZB>.

22. Available at <https://bit.ly/3NoRmZB>.

turing in the parcel delivery market that has been reinforced by e-commerce, but without leaving the increasingly decelerated postal delivery sector stranded (Rodríguez, 2018).²³

Before moving on to the analysis of law cases, the figure of conditional rebates in the context of postal services will be briefly overviewed due to its recurrent presence in postal services competition rulings and decisions.

Retroactive conditional rebates in the postal service context

Rebates in general can be defined as a «commercial practice that both dominant and non-dominant (postal) firms rely upon to increase their sales with resulting efficiencies, such as the realization of economies of scale, the faster recovery of fixed costs and so on» (Geradin and Henry, 2010: 53). While a full analysis of the different types of rebates is outside the scope of this essay, the focus will be placed on the type of rebate that has been a recurrent figure in comparative law cases and has also been considered anticompetitive. That is, the figure of conditional rebates which are, according to the Commission's Guidance Paper, «rebates granted to customers to reward them for a particular form of purchasing behaviour» (European Commission, 2009). In this sense, the Guidance Paper distinguishes between «retroactive rebates» —which are granted on all purchases once the threshold is achieved— and «incremental rebates» —which are granted only on the purchases made in excess of the achieved threshold— (European Commission, 2009).

Also addressing retroactive rebates, the Discussion Paper (European Commission, 2005) established that the dominant supplier must set the threshold «above the level that the buyer would purchase from the dominant company in the absence of any loyalty enhancing obligation or rebate» (European Commission, 2005). If this is the case, the rebate could have the effect of inducing the buyer to buy more than it would otherwise do, which in turn attracts purchases from other suppliers to the dominant company, acting as an incentive to concentrate their demand and benefit from the rebate on all its purchases to effectively lower the price for all of these (European Commission, 2005). If, on the contrary, the threshold is set on a level that «would anyhow be purchased by the buyer from the dominant company, the rebate will not have a loyalty enhancing effect» (European Commission, 2005). As can be appreciated, «the loyalty-enhancing effect on the customer towards the supplier is of the utter relevance in the economical assessment of whether a discount is abusive or not» (Eccles and Kupiers, 2008).

As for the practical application of the soft-law policies actively developed by the Commission in the Guidance Paper (Akman, 2010) there has been quite an evolu-

23. Available at <https://bit.ly/44epqON>.

tion during the last years regarding the approach to rebates by the Commission in the case-law, from a formalistic approach —or a quasi *per se* rule illegality²⁴—, in cases such as *Deutsche Post*, to a more effects-based level of analysis or, as O’Donoghue and Padilla (2020) put it, «a rebuttable presumption» of anticompetitive foreclosure effects. Therefore, the competition authority must consider the evidence from the dominant firm (O’Donoghue and Padilla, 2020) and furthermore analyze the economic elements of the case, as seen for instance in *Post Danmark II*,²⁵ a case which, according to Geradin and Malamataris (2014) is important «beyond the guidance that the CJEU gave to the national court on the case at hand. In this case, the CJEU appears to endorse the “effects-based” approach to article 102 that the Commission introduced in its 2008 Guidance Paper». After the Intel Corporation decision in 2017, and its inferences or reinterpretation of the *Hoffmann-La Roche* case law²⁶ —and reaffirmed by the 2022 Intel *renvoi* judgement²⁷—, the table is set for future conditional rebates which are likely to be analyzed under a more economic approach, as shown in the recent decision by the Spanish competition authority, *Consejo de la Comisión Nacional de los Mercados y la Competencia* (CNMC) against *Correos y Telégrafos España*.²⁸

Law cases analysis (Chile, Spain, Denmark and UK)

The different cases that have recently taken place in the letter-post markets will be now analyzed, considering some of the aspects and concepts that have already been addressed through this essay. The criteria for the selected law cases, which are taken from jurisdictions with legal systems and economic scales that differ from Chile’s, were three or more of the following:

1. Postal services that showed a declining volume in the demand of letter sending, a matter that is given different levels of relevance in the overall analysis by most of the different courts or competition authorities.²⁹
2. Dominant postal services companies are former statutory monopolies in recently liberalized markets.³⁰

24. For a further analysis between the relationship between the formalistic approach in competition law and *per se* rules, see (Lindeboom, 2022).

25. *Post Danmark A/S vs. Konkurrenceradet*. (C-23/14).

26. *Intel Corp. vs. European Commission* (Case C-413/14 P).

27. *Intel Corporation vs. Commission*. T-286/09 RENV.

28. *CNMC vs. Sociedad Estatal Correos y Telégrafos S.A.* (S/0041/19).

29. This issue is not addressed in *Post Danmark II*.

30. Except for *Post Danmark*, which held a statutory monopoly on 70% of the bulk mail. See *Post Danmark A/S vs. Konkurrenceradet*. (C-23/14), paragraph 39.

3. Large companies, such as banks, being usually the clients of the incumbents in question.
4. Exclusionary rebates as the anticompetitive practice incurred by dominant companies.³¹
5. A temporal proximity between the cases that does not exceed a decade. Although not being formally a criterion, being Chile's analyzed law case used as a benchmark, it is interesting to note that Chile's TDLC ruling mentions the analyzed cases from Denmark and the UK as relevant foreign law cases, regardless of the differences between jurisdictions.

Apart from the impact of the declining demand in the LPD market, we will focus our analysis on: the foreclosure, loyalty-enhancing or «suction effect» of the practices incurred by the dominant firms which were given a different level of prominence in the different decisions; the economic circumstance of being considered as unavoidable trading partners; and, where relevant, the objective justification arguments, if any, given by the dominant companies will be also accounted for.

Post Danmark II³²

As mentioned, this case was an important step taken by the Commission in order to move to a more effects-based approach, and accordingly there are some elements notable for analysis.

Firstly, the «suction effect» caused by the rebate scheme is, in Commission's opinion, «capable of making it easier for the dominant undertaking to tie its own customers to itself and attract the customer of its competitors, and thus to secure the suction to itself of the part of demand subject to competition on the relevant market» (European Commission, 2015). Accordingly, the Commission considered that this «suction effect» was enhanced, since the rebates were applied indistinctly to the part of the demand in which Post Danmark held a statutory monopoly, and to the part that was contestable by competitors.

Secondly, the fact that Post Danmark held 95% of the bulk mail market share was a circumstance that made it an unavoidable trading partner (European Commission, 2015). However, as Ibáñez (2018) puts it, the Commission implies that there is a possibility for the dominant undertaking to «adduce evidence showing that it is not an unavoidable trading partner for its customers and thus that anticompetitive effects are implausible. In such circumstances, the whole of customers' demand would be contestable, which could render exclusion unrealistic».

31. Except for Royal Mail, which used the figure of price discrimination.

32. Post Danmark A/S vs. Konkurrenceradet. (C-23/14).

Thirdly, it is important to highlight that according to this case, the exclusionary effect can be actual or likely, but not purely hypothetical. Echoing the judgement in *TeliaSonera Sverige*,³³ the Commission states that the practice «must have an anticompetitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking» (European Commission, 2015). It furthermore argues that «the anticompetitive effect of a rebate scheme operated by a dominant undertaking must be probable, there being no need to show that it is of a serious or appreciable nature» (European Commission, 2015). This reasoning will be further replicated in Chile's case against *Correos de Chile* and Ofcom's infringement decision regarding Royal Mail.

Royal Mail³⁴

As previously mentioned, the practice incurred by Royal Mail was discriminatory pricing. Unlike the other dominant incumbents being analyzed here, Royal Mail is under the regulatory condition to offer a specific form of access — and charging the companies that rely on this access— known as «access operators», which set up their own networks to collect bulk mail from retail customers and then transport it to the pertinent part of Royal Mail's network. Royal Mail will afterwards process the bulk mail and deliver it to the final addressee (Ofcom, 2018).

Ofcom found that Royal Mail was an unavoidable trading partner for access customers who wished to enter or expand in the market of delivery or expand its end-to-end service. Since Royal Mail displays some discretion over the terms of access, it can —and did— unilaterally alter the terms of access to its delivery network (Ofcom, 2018).

Regarding the possible foreclosure effect of this practice, Ofcom found that the introduction of the price differential «was reasonably likely to have a foreclosing effect because it made entry less likely to occur» (Ofcom, 2018) which would potentiate Royal Mail's dominant position on the market. In line with the *Post Danmark II* case, Ofcom (2018) also made the preventive statement that it had not reached the conclusion that «entry was rendered impossible or totally unprofitable by the introduction of the bulk mail delivery market». Instead, the entity concluded that the anticompetitive practice incurred by Royal Mail penalized growth on the competition in the market beyond a limited scale, hence being less likely to take place which would in turn harm consumers (Ofcom, 2018).

33. *TeliaSonera Sverige*, C-52/09.

34. Decision of the Office of Communications (Ofcom, 2018). Discriminatory pricing in relation to the supply of bulkmail delivery services in the UK (CW/01122/14).

In its decision, Ofcom does not consider the decline in the LPD to be a barrier to entry *per se*, but it does establish that «the high barriers to entry and expansion in the bulk mail delivery market were exacerbated by the declining volumes in that market» (Ofcom, 2018). In this sense, it details that «since 2006, the volume of letters and large letters delivered in the UK has declined significantly, with volumes falling by 6,3% per annum from 2008 to 2013» (Ofcom, 2018). More recent data shows that in the years 2020-2021 these volumes declined by 22%, and that «access or bulk mail collected by competing access operators from larger businesses and organizations continued to make up the majority of letters sent» (Ofcom, 2021). This relates to part of the reasoning presented by Royal Mail regarding the objective justification for the pricing changes, which was based on Royal Mail's

desire to protect the USO, in particular, by protecting the volumes delivered through the Universal Service. [...] The improved ability to adjust (otherwise fixed) costs in advance would reduce the overall cost base of the USO and so mitigate the rise in average unit costs as volumes dropped (Ofcom, 2018).

However, Ofcom considered that the objective of supporting the universal service was not legitimate nor did it justify a conduct that would otherwise be considered as an abuse from a dominant position (Ofcom, 2018).

Correos de Chile³⁵

The TDLC determined that the practice incurred by *Correos de Chile* was the use of conditional retroactive rebates or all-unit discounts. These rebates were considered by the Tribunal to have been individualized target rebates, that is, tailor-made, -as opposed to Post Danmark's 'standardised' rebate scheme- for each of the large clients in question -three important Chilean banks- and were therefore not available for other clients, nor did they coincide with the discounts generically offered to the segment of companies and industries (TDLC Sentence number 178, 2021).

Part of *Correos de Chile*'s defence was that its price structure cross-subsidizes its competitors, since the price charged by the entity for the access to its network is not enough to cover the real cost incurred by *Correos de Chile* for this service, therefore its competitors not only have access to secluded areas, but they can access at subsidized prices. This is categorised by *Correos de Chile* as a possibility held by its competitors to cream skimming the market (TDLC Sentence number 178, 2021). For the TDLC, the fact that the public entity already has the infrastructure to cover the entire national territory is to be considered as a barrier to entry and turns *Correos de Chile* into an unavoidable commercial partner for clients that need to send correspondence

35. Envía Limitada vs. Empresa de Correos de Chile y otro. (C-359-2018). TDLC.

to zones that are not covered by other postal operators, which consists of approximately 20% of the demand of the market (TDLC, Sentence number 178, 2021).

As for a costs-based justification for these discounts, *Correos de Chile* tried to establish that the discounts offered to the three banks were justified by the lesser costs of providing services to them, based on the volumes demanded and by ‘worksharing’ in the upstream segment (TDLC Sentence number 178, 2021). However, the TDLC concluded that there was a significant proportion of the rebates offered by *Correos de Chile* that was not justified by cost-saving reasons, and that the percentage of discounts that is not justified displays significant levels of variation between the three banks. This allowed the TDLC to conclude that the discounts were unjustified and tailor-made for each of these three banks and were, therefore, prices that held no connection to the costs (TDLC Sentence number 178, 2021).

Moreover, the rebates offered by *Correos de Chile*, in the opinion of the TDLC were able to generate exclusionary effects and had the potential to restrict competition on the market. The TDLC, with a reasoning that echoes that of *Post Danmark II*, (TDLC Sentence number 178, 2021) considers that it is not correct to limit the economic analysis to whether the conduct renders the effective close or exit of the company, since there are other possible conducts, including discounts over a relevant amount of costs that may be or tend to be exclusionary (TDLC Sentence number 178, 2021).

Finally, as discussed above, the decline in the demand on the LPD market is addressed as a barrier to entry by the TDLC, emphasizing that the more this demand decreases, the less likely it will be for small companies to be able to compete in the market.

It is relevant to note that the analyzed ruling from the TDLC was subject to a claim³⁶ filed by *Correos de Chile*, the decision of which is -at the time of this article- pending before Chile’s Supreme Court.³⁷

Sociedad Estatal Correos y Telégrafos S.A.³⁸

Sociedad Estatal Correos y Telégrafos, (hereinafter, *Correos*) used to hold the statutory monopoly in Spain until 1998. In 2010, when the postal delivery market was liberalized, it maintained both its market share —between 85% and 95%— and its dominant position given the natural and regulatory barriers of entry, and the strategic advantages attained by being the historical incumbent operator in the market (CNMC/Sociedad Estatal Correos y Telégrafos S.A., 2019).

36. The procedural term used in competition law cases in Chile for claims is *recurso de reclamación*.

37. *Empresa de Correos de Chile / Tribunal de Defensa de la Libre Competencia*. (95523-2021), Chile’s Supreme Court.

38. *CNMC vs. Sociedad Estatal Correos y Telégrafos S.A.* (S/0041/19).

The Competition Chamber of the CNMC, analyzing the rebate scheme displayed by the dominant incumbent *Correos*, considered that there were significant variations of discounts among the different clients of the same segment and similar volumes of delivery, therefore presenting an asymmetry in the treatment of clients with similar conditions. This unequal application of discount, in the opinion of the CNMC, was a manifestation of the loyalty objective sought out by the rebate scheme regarding large clients (CNMC/Sociedad Estatal Correos y Telégrafos S.A., 2019). The CNMC, furthermore, stated that *Correos*' clients are faced with a clear incentive to maximize their volume of correspondence demand by *Correos* and to avoid situations that might lead to a reduction of said demand, which would lead to a lower discount. Therefore, the fractioning of the demand among different providers would entail assuming the risk of receiving a significantly inferior discount (CNMC/Sociedad Estatal Correos y Telégrafos S.A., 2019).

Unlike Chile's ruling, the declining demand of the LPD market is not expressed as a barrier to entry in this case. However, said decline is a reality faced by *Correos* —who reported in 2020 that the decrease of postal volumes had doubled in regard to the volumes shown in 2019 (Grupo Correos, 2020)³⁹— and by the Spanish domestic market as a whole (UPU, 2022). In fact, one of the justifications that *Correos* gave for its rebate scheme was the reduction of the volumes of postal deliveries, arguing that «the emergence -and further settling- of alternative methods of communication has caused for *Correos* not to be able to behave independently from its clients and competitors» (CNMC/Sociedad Estatal Correos y Telégrafos S.A., 2019). In this sense, while the decline of the LPD demand was not directly considered in the decision, the fact that the practice incurred by *Correos* was intended to capture the demand of massive sender clients (CNMC/Sociedad Estatal Correos y Telégrafos S.A., 2019), goes in line with what was pointed earlier in this essay: it is the remaining part of the demand in this segment of the market, and dominant companies may effectively try to keep that key strategic demand even if it means incurring in anticompetitive behavior.

Furthermore, CNMC weighs the fact that none of *Correos*' rivals have the capacity to provide postal services in the entirety of the national territory. Therefore, *Correos*' competitors are not able to compete for the totality of the massive sender clients, but only for their respective coverage areas. Hence, *Correos*, as a former monopolist and in its current dominant position, is an unavoidable service provider for clients (CNMC/Sociedad Estatal Correos y Telégrafos S.A., 2019).

As for an objective justification, the CNMC states that *Correos* has not provided an economic analysis to justify its conduct. Citing the 2022 *Intel* ruling, the authority concludes that while acknowledging the need for analysis of the economic justifications presented by the interested party, in this case due to the absence of said justifi-

39. Available at <https://bit.ly/3NikaxF>.

cation by the dominant firm, there is no possible analysis of economic justification to be made by the CNMC as per the *Intel* law case mandates.

Conclusion

There are several conclusions to be made regarding the numerous topics covered throughout this essay. The main lesson, taken from Chile's «benchmark» for the LPD market analysis, at least partially confirmed while contrasting it to other cases, revolves around the concept of Darwin's idea of natural selection, reinterpreted later by Spencer with the iconic use of the phrase «the survival of the fittest» (Offer, 2014: 156). This idea, applied to the market of LPD, implies that now, regardless of the level of resilience shown by competitors in the postal service market, the resurgence of the letters' delivery segment seems unlikely. That being the case, as per the question raised at the beginning of this essay, there appears to be a correlation, at least from the perspective of most of the incumbents reviewed, between the decline of the market and their use of anticompetitive practices, such as retroactive rebates or price discrimination. This correlation seems fueled by the need to keep providing letter delivery services to comply with their USOs. The economies of scale, often mentioned in the different cases to denounce a barrier to entry to the market, are a double-edged sword for these companies. Considering that the revenues attained from them are no longer what they used—or were projected—to be when the sunk costs took place, a network solely dedicated to the delivery of letters seems no longer viable, not even in the B2C segment. And if it were, it is likely to keep decreasing over the next years. Moreover, the shift towards the parcel delivery segment and the readaptation of the postal network towards this goal, while profitable in the long term, is not exempt from a second wave of sunk costs to be incurred in the short term.

Furthermore, the liberalization process taken place in the postal service market is likely to have occurred without acknowledging nor forecasting the decline in the industry, due to the intermodal competition that soon after arose from the internet and its role on the tools, platforms and communication channels that continue to emerge every day. In a way, were it not for the parcel delivery segment, it is not unreasonable to sustain that there might have come a point in time where the LPD sector—which never really stopped being handled by incumbents that display very high levels of market concentration—became a state subsidized monopoly again, just before being left behind as an outdated method of communication.

While this decline is approached with different levels of intensity in the cases analyzed, being acknowledged as a barrier to entry in Chile but disregarded without much consideration in the UK and Spain, it is possible that proceedings of similar nature will continue to emerge in the future. Particularly, if the demand in this market

keeps decreasing and the incumbents in question do not adapt their networks to the parcel delivery market quickly or efficiently enough.

If the role of competition is to make markets work better, it is worth asking ourselves to what extent —from an economical standpoint— are these types of decisions by the authorities useful for a market that is increasingly, and perhaps irreversibly, declining with no solution in sight?

Furthermore, if USOs keep the dominant incumbents' hands tied, there is a chance that the latter are no longer able to be financially viable if the volumes of sent letters keep decreasing, with the subsequent harm for rivals that depend on the «last mile» segment, which is something that should be more deeply considered in future similar cases.

Perhaps the conclusion, then, is to accept the fact that the former statutory monopolists in the LPD sector are not merely dominant, but also the only «fit to survive» during the end of the letters era.

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About the author

MARÍA FRANCISCA OSSA MONGE is a lawyer graduated from the Pontificia Universidad Católica de Chile. She earned a Master of Laws degree (LLM) at the London School of Economics and Political Science, with a specialty on Competition, Innovation and Trade Law. She is also a Law School professor at Universidad del Desarrollo. Her email is mfossa@uc.cl.  <https://orcid.org/0000-0002-5960-1519>.

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