

# E-commerce and the Return of Unwanted Goods: A Case for Cooperation Among Providers of Postal and Non-postal Parcel Services

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## 1 Introduction

With the rapid development of e-commerce, new forms of distance sales have developed. Although consumers still prefer to order goods from domestic suppliers,<sup>1</sup> the market for consumer goods has grown global. As a consequence, the European Commission in its Green Paper on Parcels (European Commission 2012, p. 4) expresses its intention to improve the conditions for the cross-border transportation of goods in order to facilitate e-commerce. In Chap. B of the Roadmap issued subsequently to its Green Paper (European Commission 2013), the Commission defined as its objective to help boost e-commerce in the EU by providing e-traders and consumers with parcel delivery services that meet their needs in terms of quality, accessibility and affordability. The Roadmap defined two areas of concern: from the consumers' perspective, the lack of transparency and information about available redress mechanisms; and from the e-traders' perspective, a lack of transparency on delivery services and choice of availability of delivery solutions. In addition, the Roadmap focuses on the lack of interoperability between delivery companies when faced with diverging operational solutions.

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<sup>1</sup> Hearn (2014, p. 146), with the significant exception of consumers living in small countries that share a common language with a larger neighboring country.

The analysis contained in this chapter reflects the personal views of the author and is not related to any litigation involving any of the parties.

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Issues of consumer protection relating to distance and off-premises contracts are addressed in the Consumer Rights Directive (European Union 2011), which must be implemented by Member States until 13 June 2014. Under the Directive consumers must be informed about the total price, including transportation costs (Art. 6), they must receive the goods without undue delay (Art. 18), and are entitled to withdraw from the contract within 14 days from the date on which they acquire physical possession of the goods, or within 12 months if the trader has not provided the necessary information on the right of withdrawal. In order to be able to comply with these obligations, e-traders must rely on parcel services offering residential delivery (B2C) and consumer-friendly solutions for the return of unwanted goods.

While the Directive allows for transportation delays of up to 30 days, consumers expect instant fulfillment of their orders even if delivery involves cross-border transportation. In addition, consumers expect to be able to return unwanted goods from anywhere within the EU at reasonable or no cost at all. Research conducted at the University of Regensburg shows that part of any e-commerce transaction is the right of consumers to return unwanted goods not only if they are defective but also if they do not fit customers' expectations (University of Regensburg 2012, pp. 6–21). As Borsenberger (2015) argues, e-commerce consumers are price-sensitive and expect bargains. In order to meet customers' expectations e-traders must, therefore, not only provide for prompt delivery but also for a convenient and cost-efficient system of collecting and returning unwanted goods throughout the internal EU market.

Rapid transportation of e-commerce parcels requires dense delivery networks covering the entire area of service, particularly residential areas. Although there are only a few delivery companies capable of servicing every residential area in the EU, a parcel company without such capability will usually find a local provider. More difficult is the handling of return parcels. According to ibi Research (University of Regensburg 2013, pp. 33–39) for the German market, participating e-commerce traders active in the clothing sector indicated that between 25 % and 50 % of all purchased goods are returned by the customers.<sup>2</sup> This finding is supported by the EU Study on the State of Play (Copenhagen Economics 2013, p. 58) emphasizing the importance of fashion in e-commerce. Many customers are known to order several pieces in order to select only one and return the others. In some cases traders even reported return rates up to 2/3. Therefore, the development of e-commerce requires a dense and well-coordinated returns network.<sup>3</sup>

An additional problem results from the need to calculate the cost of the returns in advance. E-traders must know the costs in order to be able to make a proper price indication as required by Art. 6 of the Consumer Rights Directive (European Union 2011). The availability of a network of return stations in residential areas throughout the EU, as well as the ability to calculate the costs of receiving and remitting

<sup>2</sup> OLG Düsseldorf, Decision of 13.08.2003, VI-Kart 52/01 (V) quoting Fraunhofer Institute Study of February 2001.

<sup>3</sup> OLG Düsseldorf, 13.08.2003, Kart 5201 (V), recital 57.

such return parcels to the e-trader's warehouse, constitute major challenges to any e-trader otherwise willing to offer his goods throughout the EU. A well-organized network of return stations able to handle returns from consumers throughout the EU is an essential element in the provision of pan-European e-commerce.

Traders looking for parcel delivery companies that can perform the delivery as well as returns logistics have few choices, particularly over the entire EU market. Commercial parcel delivery companies have historically focused on B2B transportation, which does not require deliveries in residential areas or infrastructure for return parcels. B2B-focused parcel delivery companies will have to offer additional services such as return logistics in order to be part of e-commerce trade. On the other hand, traditional Postal Operators (POs) have the advantage of a dense infrastructure of post offices and similar return facilities. They are used to deliver in residential areas. However, they are not particularly equipped to perform EU-wide deliveries. When comparing the strengths and weaknesses of POs and commercial parcel companies, it appears that the two together might make a good match to solve the new problems resulting from the special demands of e-commerce.

This paper explores the legal framework within which such cooperation may take place. It will explore, in particular, the requirements imposed by EU competition law, the Guidelines on the applicability of Art. 101 to horizontal co-operation agreements (European Commission 2010c) as well as Commission Regulation (EU) No. 1218/2010 on the application of Art. 101 (3) to certain categories of specialization agreements (Commission Regulation 2010). It will also deal with the consequences to be derived from the Commission's decision of 23 October 2003 (European Commission 2003, REIMS II). Section 2 describes the return solution created by the International Post Corporation, Sect. 3 analyses the competition law aspects of the Easy Return Solution and Sect. 4 concludes the analysis.

## 2 The IPC Easy Return Solution

In response to the demands of the e-commerce market, the International Post Corporation (IPC), an organization of national POs, has developed a solution that provides for a simple returns process for cross-border e-commerce. The IPC Easy Return Solution (ERS) was launched in 2010 and is currently being implemented by 22 POs.<sup>4</sup> The ERS is designed to enable POs to offer distance sellers a priority postage-paid international return service for their customers. According to the FaQ section on the IPC homepage, this leads to increased parcel volume, attracts e-business and avoids over-labeling costs for POs without any operational changes.

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<sup>4</sup>The description of the ERS is available at [http://www.ipc.be/en/Operational-services/Capability-visibility/ERS\\_FAQ](http://www.ipc.be/en/Operational-services/Capability-visibility/ERS_FAQ)

According to IPC, ERS provides a returns service enabling POs to collaborate on returning cross-border parcels to e-traders. It allows e-customers in country A to return goods to e-sellers in country B free of charge. Together with his parcel, the e-customer receives a return label. All he needs to do is drop the return parcel together with the return label at a local post office. ERS uses a double barcode label, one for the accepting or dispatching post and the other for the authorizing post receiving the returned parcel. The labels are generated by IPC in a direct interface with authorizing posts using the ERS system. ERS is based on the IPC-managed E-Parcel Group network of POs (“EPG”) and uses the same agreed barcode, monitoring and billing systems. IPC’s aim is to have the ERS rolled out to the current EPG operators in Europe and the United States. While ERS does not provide which prices are to be charged between the POs it does provide that the return is free.

The advantages of ERS for participating POs are described in the IPC Annual Review (2011) as giving POs the opportunity to offer a return product, “enabling posts to raise their parcel volume, attract e-business and avoid over-labeling costs.” Or, as the Royal Mail official quoted in the same publication states: “The fact that the ERS service taps into existing operational, technological and financial processes managed through IPC is a considerable benefit.”

### **3 Application of EU Competition Rules**

The ERS system could provide a model for larger-scale cooperation among POs and possibly commercial parcel delivery companies if it meets the conditions of the legal framework set by Arts. 101, 102 TFEU and the regulations and guidelines issued thereunder. Art. 101 prohibits all agreements among undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. This includes agreements directly or indirectly fixing prices or any other trading condition. Art. 102 prohibits any abuse by one or more undertakings of a dominant position within the internal market, such as imposing unfair prices or trading conditions, limiting production markets or technical development to the prejudice of consumers, or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

#### ***3.1 Agreement Among Undertakings (Art. 101)***

Under the EU Commission’s Guidelines on horizontal agreements (EU Commission 2010c, Chap. 1.2) a legal review under Art. 101 requires, firstly, a finding of a horizontal or vertical co-operation agreement between undertakings, secondly, a determination whether it affects trade between Member States and, thirdly, an assessment of whether it has an anti-competitive objective or actual or potential restrictive

effects on competition. If the answer to these first three questions is positive, the agreement may be justified under Art. 101 para. 3 if it leads to efficiency gains, the restrictions are indispensable to the attainment of such efficiency gains, consumers receive a fair share of the resulting benefits, and the agreement does not afford the parties the possibility of eliminating competition in a substantial part of the market. According to Bunte (Langen and Bunte 2011, p. 180), the requirement that competition must not be eliminated (Art. 101 para 3 lit. b) acknowledges that the agreement in question may restrict competition under the condition that it is not eliminated. Following Art. 1 (1 lit. e) of the Guidelines (EU Commission 2010c) the term “agreement” is interpreted broadly and means any agreement or decision by two undertakings or an association of undertakings or even a concerted practice.

In its Annual Review 2011 the IPC (2011) stated that the ERS system was developed, in conjunction with a working group consisting of Deutsche Post/DHL, La Poste, TNT Post and Royal Mail. The decision of the working group to establish the ERS within the IPC constitutes an agreement among the members of the working group and the IPC itself. To participate in the ERS, POs must join the system by agreement with IPC. Each agreement by which a post office joins the ERS system as well as all such agreements together constitute an agreement within the meaning of Art. 101.

The ERS agreement certainly affects trade between Member States. As its main objective it was formed in order to facilitate e-commerce throughout the EU by providing a simple returns process. The ERS agreement, therefore, affects the way its members continue doing business within the EU as well as, indirectly, the development of e-commerce in the EU. The impact on intra-EU trade is significant if the POs which are members to the ERS hold market shares exceeding the thresholds defined in Sec. II (7) lit. a, b of the Commission’s Notice on agreements of minor importance which do not appreciably restrict competition under Art. 81 (1) of the Treaty establishing the European Community (“de minimis”) (2001/C 368/07) O.J. 22.12.2001) of 10 % for agreements among competitors or 15 % for non-competitors.

### 3.1.1 Horizontal or Vertical Agreement

The agreement governing the cooperation between post offices is considered “horizontal” if the undertakings are – actually or potentially – active in the same market. If the market is defined narrowly as the local market for returns parcels it may be questionable if two different national post offices are at least potentially active in the same market. However, considering that many POs have expanded beyond their national boundaries and also offer delivery services in other countries,<sup>5</sup> one could conclude that post offices are potentially active in the same market. A PO of country A which offers B2C deliveries to country B must also provide a returns solution. Without the ERS system, such PO would have to establish their own returns solution in countries where they perform deliveries. But for the ERS, the POs offering

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<sup>5</sup>E. g. DHL, which offers express parcels throughout Europe and worldwide.

B2C deliveries in neighboring countries arguably might have entered the markets for cross-border B2C parcel delivery and return logistics.<sup>6</sup>

If, contrary to the above, the agreement is not considered “horizontal” but “vertical” because the POs are not active in the same market for return parcels, the Block Exemption on vertical agreements (European Commission 2010b) might give participating undertakings more room to shape their agreements. In the introductory notes to the Block Exemption, the Commission acknowledges that vertical agreements may improve economic efficiency within a chain of production or distribution by facilitating better coordination between undertakings. However, according to Art. 2 (4), the Block Exemption does not apply to vertical agreements between competing undertakings if they are doing business at the same level of trade where the purchase of contract services occurs.

One might argue that by purchasing returns services from a PO in country A, the PO in country B does not compete on the market for returns services. However, they are at least potential competitors and compete horizontally with one another on the market for transportation of B2C parcels. If two or more POs are active in the market for B2C deliveries or, to put it more broadly, in the market for e-commerce parcels, they are competing with each other for the same business. From the point of view of an e-trader, any B2C delivery company which is able to offer delivery services (including returns parcels) is a potential supplier. Large e-traders like Amazon choose their supplier of delivery services on a European or even global scale and do not follow national boundaries in their choice of suppliers. According to Sec. II (7) of the Commission’s Notice on the definition of relevant market for the purposes of Community competition law ((97/C 372/03) O.J. C 372, 09.12.1997) the market is defined from the consumer’s perspective. E-traders following their customers’ demand, look for a complete solution of their requirements for logistics services, including delivery and returns.

Therefore, one might conclude that the relevant market comprises both sides of the logistics services. Considering the market for e-commerce parcels all post offices offering B2C deliveries are competing with one another. Viewed that way, the Block Exemption does not apply here. But even if the market is defined more narrowly and limited to the handling of returns the application of the Block Exemption would still be excluded. Art. 101 would apply if a national post office performing deliveries or handling returns has a market share in excess of 30 %.<sup>7</sup> In their territories POs often hold a strong position in the market for B2C parcels. As part of their universal service obligation POs visit regularly every address within their country. They are, therefore, able to deliver parcels to every private address and to handle returns through their dense network of post offices. If one or more PO which is a member to the ERS agreement holds a market share in excess of 30 % the Block Exemption exempting vertical agreements from Art. 101 would not apply.

<sup>6</sup>Commission Decision of 21.03.2009, COMP M.5152 Posten AB/Post Danmark AS, recital 63.

<sup>7</sup>Block Exemption for vertical co-operation, European Commission 2010c, Art. 3; see also Guidelines On Vertical Restraints, European Commission, 2010a, 411. If one or more of the participating POs have a dominant position in their home markets the agreement would also be subject to Art. 102 (cf. sub 3.2 below).

### 3.1.2 Block Exemption for Specialization Agreements

The ERS agreement may be considered as an agreement between two or more parties which are active on the same product market by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain products and to purchase these products from the other parties who agree to produce and supply them. Such reciprocal specialization agreement might fall under the exemption of Art. 2 which declares that Art. 101 (1) shall not apply. However, the exemption provided for in Art. 2 does not apply to geographic market sharing agreements (Art. 4 (c)). In any event, this Exemption does not apply to an agreement where the combined market share of the parties exceeds 20 % on any relevant market. According to recital (4) of the Exemption, it can be presumed, that the positive effects of specialization agreements will outweigh any negative effects on competition below a certain level of market power. If the (combined) market share exceeds this level, this presumption does not apply and the agreement must be reviewed in accordance with each of the requirements of Art. 101 (3). If one or more POs which are party to the ERS-agreement hold market shares in excess of 20 % in their home markets for B2C parcels, the exemption does not apply to the ERS agreement.

### 3.1.3 Restraint of Competition

The next question is whether the ERS agreement leads to a limitation of competition between the parties (European Commission 2010c, Sect. 4.3.1). The participating POs may take the position that the agreement does not include an agreement on prices other than to offer the returns free of charge to the consumer. However, this argument overlooks the problem of lack of transparency and restraint of competition between POs. While there are no charges to the individual consumer, there still is a cost involved with handling the returns and, accordingly, a price for it. Consumers who are not interested in returning their parcels pay the price for those who make excessive use of returns. By providing free-of-charge returns, the ERS system may hinder the creation of other cost-oriented pricing models. Instead of having to buy delivery and returns services in one “package” from the PO e-traders may prefer to negotiate the price for delivery services separately from the price for returns or to buy delivery services from one company and returns from another. The ERS agreement promotes the business of POs offering the “package” of delivery and returns and does not provide for alternatives to the customer.

Apart from the pricing problem, the ERS agreement may lead to geographic market allocation, at least for returns services. A PO active in country A is unlikely to develop its own network of branch offices in country B. Considering the availability of local deliveries through the PO in country B, a PO of country A may even decide to let the PO in country B handle all of its B2C deliveries as well as the returns in country B. Even though the ERS agreement does not contain express language forcing PO in Country A to use the services of PO in country B, there is hardly any incentive on the side of PO in country A to establish a full-size local

delivery and returns service in country B, as long as the performance of the local operator in country B is satisfactory. If the ERS agreement leads to a situation where POs have no economic incentive to expand beyond their traditional national boundaries, the agreement may be considered as a geographic market allocation.

### 3.1.4 Foreclosure Effect

Apart from a geographical separation of markets between POs, the ERS agreement must be reviewed in accordance with the Guidelines (European Commission 2010c, Sect. 4.3.1) with respect to possible foreclosure effects on third parties. The possible foreclosure resulting from a potential abuse of dominant position will be discussed in Sect. 3.2. It is of particular relevance if competitors that cannot become members to the ERS system are put at a disadvantage to such a degree that they may be effectively kept out of the market of cross-border e-commerce delivery.

Membership to the ERS agreement is limited to members of the IPC. The Articles of the IPC restrict membership to postal organizations (Art. 9 (3) – with certain exceptions regulated in the general terms and conditions (Art. 3 (2))). By limiting membership to the ERS to members of the IPC, private operators are effectively kept out of the ERS system. Other operators that are not party to the ERS system must establish their own returns network. Alternatively, the end-customer must use the local postal service at the normal rate to return his parcel to the e-trader. This is not an attractive alternative for any customer. Without a similar returns system any competitor is, therefore, excluded from the market of cross-border e-commerce deliveries.

In order to establish a returns network parallel to the existing ERS system, private competitors must establish networks of branch offices not only within one country but within the entire EU. The dimension of this task is demonstrated by the number of post offices which presently serve as collection points within the ERS system. For example La Poste operates more than 17,000 postal outlets or 2.61 postal outlets per 10,000 inhabitants (ITA/WIK, pp. 40, 124). Deutsche Post provides a network of more than 26,000 postal outlets or 3.3 postal outlets per 10,000 inhabitants (Annual Report DP/DHL (2013), p. 16). Doubling these outlets and expanding the network throughout the EU would create substantial costs for any competitor. Even if it is not financially impossible for competitors to establish their own returns network it would take time to establish a reasonably dense network of branch offices throughout the EU, time which competitors might not have given the rapid development of e-commerce. The foreclosure effect on competition is, therefore, of serious concern in evaluating the ERS agreement.

It is questionable whether this concern can be eliminated if individual POs agree to accept returns on behalf of private competitors. In theory, this would put private competitors in a position to offer e-traders their own delivery service with the additional returns service provided by the PO in the country of destination, provided that the PO in the country of destination is willing to enter into such agreement. However, even if such bilateral agreements are concluded between POs on the one hand and private operators on the other, private operators would still be at a disadvantage relative to the ERS system, which provides a simple and uniform returns process including common



labeling features administered by IPC. ERS gives operators and e-traders full tracking and tracing capability, and the system is supported by a full customer service solution. Private operators entering into bilateral agreements with POs would also be excluded from participating in the steering committee, for which only IPC member POs are eligible. The IPC information as published on its homepage emphasizes the benefits of central management by referring to a management team dealing with operational questions, customer service, IT and marketing. Bilateral agreements are, therefore, no equivalent to a centrally administered system such as ERS.

In conclusion, the ERS agreement constitutes an agreement within the meaning of Art. 101 having as its object or effect the prevention, restriction or distortion of competition within the common market.

### 3.1.5 Benefits to Consumers

Without an exemption under the Block Exemptions for vertical (European Commission 2010b) or specialization (Commission Regulation 2010) agreements, the ERS agreement may still be exempt under Art. 101 (3) if the benefits to consumers outweigh the disadvantages, provided that it does not impose restrictions which are not necessary for the attainment of the objectives, and provided further that it does not afford the participating undertakings the possibility to eliminate competition in a substantial part of the market.<sup>8</sup> The ERS system establishes an effective system of making e-commerce products available to customers throughout the EU. Therefore, the benefits to the consumer may justify certain restraints of competition. On the other hand, the restraint must be limited to the absolute minimum necessary for the attainment of the objectives of the agreement. The economic disadvantages created by the restraint of competition must be weighed against possible efficiency gains, provided they are passed on to the consumer.

The fact that consumers in the EU are able to return parcels free of charge at their local post office, even if the vendor is located outside of their home country, constitutes a benefit which is likely to make EU-wide e-commerce more attractive to consumers. Nearly everywhere within the EU there are post offices in every neighborhood. The use of post offices for the return of unwanted e-commerce goods is, therefore, attractive to consumers. It is not so clear, however, if the full benefit of the system is passed on to consumer although the returns service is free of charge. There is, of course, a cost involved in returning parcels to the vendor and these costs are likely to be included in the price of goods or in the transportation charge. If national POs are the only beneficiaries of the advantages of the ERS system, and if competitors are effectively foreclosed, there is no incentive for POs to pass on the efficiency gains to their customers and, eventually, to consumers. In view of the exclusionary character of the ERS agreement, there are at least doubts as to whether the benefits resulting from lower costs are actually passed on to consumers.

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<sup>8</sup> Guidelines on the application of Article 81 (3), European Commission 2004, Chap. 3.3.

### 3.1.6 Market allocation

The exemption of Art. 101 (3) does not apply if an agreement that has as its object or effect the allocation of geographic markets. As shown before, the ERS agreement eliminates the need for its members to establish their own network of returns stations in countries other than their own. The problem of geographic market allocation would be even worse if the ERS agreement – possibly in conjunction with the functionalities of the E-Parcels Group (EPG) – eliminates the incentive for participating members to expand their deliveries as well as their returns beyond their own national borders. The geographic market allocation would run counter to the objective of creating a single market for postal services. Chances that a geographic market allocation may be the effect of the ERS agreement are particularly high, since the ERS system is available only to POs that are members of the IPC. These POs have a common history of geographically defined separate markets and, with the help of the ERS agreement, POs are able to continue to run their business as separate legal and geographic entities, with the IPC coordinating the international transactions.

### 3.1.7 Exclusion of Private Competitors

The exclusion of private competitors from membership to the ERS agreement adds to the concerns. The exclusion of private competitors cannot be based on the universal service obligation to which the POs have subscribed in their national jurisdictions. The universal service obligation does not include an obligation to provide for an international returns service free of charge to the consumer. On the contrary, the Consumer Rights Directive specifically permits charging the consumer for the returns service.<sup>9</sup> The ERS agreement is based on the expectation of its members to increase business for its members. Participating POs are not acting in their capacities as providers of universal services but as normal business undertakings.

By excluding private competitors from ERS, the benefits to consumers are decreased rather than increased. Rather than being able to operate a simple and generally available returns service for all parcel companies the ERS agreement limits the choice for e-traders and, consequently, the variety of services offered to the end customer. In its *REIMS II* decision (European Commission 2003), the Commission objected to a similar exclusion of private operators in an agreement on terminal dues among POs. Although the *REIMS II* decision deals with the cross-border delivery of letters, it is comparable with respect to the exclusion of private operators. The Commission found that by excluding private operators, the agreement negated the pro-competitive impact of the market opening for outgoing cross-border mail.<sup>10</sup>

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<sup>9</sup>Art. 18 of the Consumer Rights Directive (European Union 2011).

<sup>10</sup>REIMS II, text no. 149.

### 3.2 Abuse of Dominant Position (Art. 102)

It is questionable whether an obligation to grant access to the ERS system would also result from the application of Art. 102, which prohibits the abuse of a dominant position. Although many POs hold high market shares in their national postal markets, they are not necessarily dominant providers on the relevant market for B2C parcels. A dominant position will generally be assumed if an undertaking holds a market share in excess of 50 %.<sup>11</sup> The Commission in its Guidance on Enforcement (European Commission, 2009) describes a more flexible threshold and mentions 40 % as an indicative number. To the extent that the POs involved in the ERS system hold market shares in excess of 40 % or even 50 % in the market for B2C-parcels, they are bound by the restrictions of Art. 102 and, in particular, by the prohibition of applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.<sup>12</sup>

Apart from market share, other elements contributing to a position of dominance must be evaluated. If other elements contribute to a position of dominance, the level of market share is not the only decisive factor. One consideration is whether the network of post offices controlled by a PO constitutes an “essential facility” access to which is necessary in order to compete in the B2C market. If so, control over an essential facility may contribute to a position of dominance obligating the respective POs to make the essential facility available to other interested parties.

In its *Bronner* decision, the ECJ denied the access claim of a newspaper to the nation-wide delivery service of its competitor.<sup>13</sup> The competitor argued that the defendant held a dominant position in the market of newspaper distribution and should therefore be obliged to grant access to its distribution system. The ECJ denied the competitor’s access claim arguing that it was not impossible for the competitor to sell and distribute its newspapers by other means even though they may be more costly than the defendant’s distribution network.

In light of its *Bronner* decision, it is not clear if the ECJ would consider the availability of an international returns service operated by European POs as an essential facility. The cost of establishing a private network of returns stations is, by itself, probably not a sufficient argument. In some countries private parcel companies have established or are about to establish their own system of branch offices. Furthermore, individual POs have declared their willingness to enter into bilateral agreements with private operators.

However, the ERS agreement differs from *Bronner* in two important aspects. The *Bronner* case did not involve an agreement among several undertakings but the alleged abuse of a dominant position. The *Bronner* case can, therefore, not be compared to the case of the ERS agreement which, as shown before, conflicts with the rules on horizontal agreements. In addition, the objective of developing

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<sup>11</sup> ECJ decision of 06.12.2012 – case 457/10 P “AstraZeneca”.

<sup>12</sup> Art. 102 lit. c.

<sup>13</sup> ECJ Decision of 26 November 1998, C-7/97.

competition as stated in the Postal Directive (European Union 2008) must be considered when applying Art. 101 and 102. The provision of access for the return of postal shipments is specifically mentioned in Art. 11 a as a matter of concern to be addressed by the Member States. Therefore, a system which runs contrary to these objectives must be viewed extremely critically

## 4 Conclusions

The returns solution for e-commerce parcels developed by the International Post Corporation is a feasible model for cooperation among parcel operators in order to provide cost-effective returns services. Although the Agreement constitutes a restraint of competition within the meaning of Art. 101 (1) TFEU the benefits resulting from the agreement may outweigh its disadvantages, provided that the Agreement does not lead to geographic market allocation and, further, that private operators are allowed to participate in the ERS system on a non-discriminatory basis.

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Postal and Delivery Innovation in the Digital Economy

Crew, M.A.; Brennan, T.J. (Eds.)

2015, XI, 336 p. 28 illus., 11 illus. in color., Hardcover

ISBN: 978-3-319-12873-3