



The Paris Court of Appeal adopts a strict interpretation of the *locus standi* and rejects La Poste's ancillary intervention

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**Resume:** *Following the rejection of its complaint to the French Competition Authority, Adrexo filed an appeal to the Paris Court of Appeal for the decision of the Authority to be cancelled. La Poste, which was the alleged author of the practices denounced in the complaint formed a voluntary intervention to join the ongoing litigation. The Paris Court of Appeal ruled this intervention inadmissible considering that La Poste is lacking locus standi.*

La Poste and Adrexo are two companies operating in the market for addressed mail. La Poste is the historical operator and its activities falling under the universal postal service, a service of general interest, benefit from an exemption from value added tax (VAT).

Adrexo argues that La Poste offers various addressed mail services free of VAT, and the diversity of these offers makes it possible to adapt them to particular needs and therefore no longer falls within the scope of universal postal service.

Moreover, these addressed mail services would include individually negotiated terms and conditions in contradiction with European Union law as interpreted by the European Court of Justice. Such Behaviour,

according to Adrexo, is likely to exclude or, at the very least, limit competitors’ access to the French market for addressed mail and their ability to exercise effective competition.

Accordingly, the practices of which La Poste is accused would, in Adrexo’s view, constitute an abuse of the dominant position La Poste holds on the addressed mail market.

On November 21, 2018, Adrexo filed a complaint with the French Competition Authority against practices committed by La Poste that, in Adrexo’s view, constituted an abuse of a dominant position on the market for addressed mail, pursuant to the Treaty on

the Functioning of the European Union<sup>1</sup> and the French Commercial Code<sup>2</sup>.

In its decision of the 15<sup>th</sup> of September 2021<sup>3</sup>, the French Competition Authority declared that it did not have jurisdiction to assess the practices referred to by Adrexo insofar as they concerned the catalogue of La Poste's universal postal service offers and rejected the complaint for lack of sufficient evidence.

Dissatisfied by such decision, Adrexo filed an appeal on the 23<sup>rd</sup> of November 2021 asking the Paris Court of Appeal to amend the contested decision as the Authority declared itself to lack jurisdiction and by doing so misinterpreted the ruling in the TNT Post Case<sup>4</sup>. In the alternative, Adrexo asked to refer a question to the Court of Justice for a preliminary ruling on the scope of application of the VAT exemption granted to La Poste. The appellant also asked the Paris Court of Appeal to annul the decision insofar as it rejected its referral for lack of sufficient evidence.

On the 21<sup>st</sup> of January 2022, La Poste filed an ancillary intervention to join the proceedings in the support of the Authority in order to have the appeal dismissed.

If such intervention was to be accepted it would imply that Adrexo has to forward its appeal, its written submissions, its documents and the confidential file on the proceedings before the Authority to La Poste.

On the 7<sup>th</sup> of February 2022, Adrexo requested that La Poste's ancillary intervention was ruled inadmissible.

The Paris Court of Appeal is called upon to examine the admissibility of La Poste's ancillary intervention and thus to determine whether La Poste has an interest in preserving its rights even though the Authority has not ruled on the substance of the case yet.

In its decision of the 30<sup>th</sup> June 2022<sup>5</sup>, the Paris Court of Appeal responded unambiguously by rejecting La Poste's ancillary intervention.

In this case, the Paris Court of Appeal adopted a very strict interpretation of the necessary *locus standi* to grant the right to intervene (I). Such *locus standi* could be more than "hypothetical" if the Paris Court of Appeal were to later order a referral to the instruction services of the Authority as the practices denounced by Adrexo could be constitutive of an abuse of a dominant position after a thorough investigation (II).

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<sup>1</sup> Art. 102 Treaty on the Functioning of the European Union

<sup>2</sup> Art. L. 420-2 French Commercial Code

<sup>3</sup> ADLC n° 21-D-22, 15 September 2021 on practices on the addressed mail market

<sup>4</sup> CJEU, 23 April 2009, C-357/07

<sup>5</sup> Paris Court of appeal, 30 June 2022, 21/18276 "LA POSTE S.A."

<sup>6</sup> Ibid, point. 21

## I) The strict appreciation of La Poste's *locus standi*

*“Le procès est-il encore la chose des parties ?”* by this expression former President of the Court of Cassation Laurence FLISE and Professor Emmanuel JEULAND question whether or not the trial remains the matter of the parties.

In our Case, the Paris Court of Appeal has to rule on an intervention, the procedure by which a third party to join an ongoing litigation<sup>8</sup>. Such procedure is governed by the Code of Civil Procedure which states that *“intervention is ancillary when it supports a party's claim. It is admissible when its author has interest, in order to preserve its rights, to support this party”*<sup>9</sup>.

Here, La Poste recognizes that it is a third party to the litigation but considers it has *locus standi* as the complaint filed before the French Competition Authority was filed against them<sup>10</sup>.

La Poste argues that intervening in this litigation is indeed necessary to preserve its rights as any referral of the case to the Authority by the Court of Appeal would

cause the opening of an instruction resulting in a probable notice of grievance.

Therefore, La Poste wants the appeal to be ineffective and not to result in a referral to the Authority's instruction services.

Moreover, La Poste claims that the admissibility of the intervention could be deduced from the adversarial principle which is a guiding principle of the civil trial, of the rights of the defence and widely regarded as part of the rights to a fair trial<sup>11</sup>.

Those elements could be sufficient to fulfil the requirements of the French Code of Civil Procedure. However, the Paris Court of Appeal has a strict interpretation of article 330 of this code, and is more likely to grant the intervener status when the intervention is principal rather than ancillary. The principal intervention is the intervention in which the third party brings in a new claim, the ancillary on the other hand is the case in which the third party intervenes to support an already existing party<sup>12</sup>.

The Paris Court of Appeal considered admissible a principal intervention of a third party in another competition case in which an

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<sup>7</sup> E. JEULAND, L. FLISE (2015) *Le procès est-il encore la chose des parties ?* – Actes des 5èmes rencontres de procédure civile. IRJS éditions

<sup>8</sup> S. GUINCHARD (2021) *Droit et pratique de la procédure civile : Droit interne et européen* – Dalloz – pp. 2034

<sup>9</sup> Art. 330 Code of Civil Procedure

<sup>10</sup> Paris Court of appeal, 30 June 2022, n° 21/18276 - LA POSTE S.A. point. 8

<sup>11</sup> Art. 6 European Convention on Human rights

<sup>12</sup> C. GIVERDON & P. AVRIL (1986) *Les interventions en appel* – Doctr. 121

OVS (equivalent of an interception) was to take place and cease documents directly referring to this third party<sup>13</sup>. In such case there is no debate possible on the *locus standi*, it is clear that the third party is intervening to preserve its rights.

In our case, however the Paris Court of Appeal relies on a very strict appreciation of the *locus standi*<sup>14</sup>. The Court is reluctant to consider admissible the ancillary intervention as it considers that it would grant La Poste access to the confidential file which would compromise the instruction of the Authority if the Court were to later order a referral of the case to the Authority. The Court does not fail to highlight the fact that La Poste has not been granted access to the file yet<sup>15</sup> and that La Poste is being procedurally opportunistic.

Lastly, the Court rejects the argument according to which the admissibility of the intervention could be deduced from the adversarial principle and the right to a fair trial. The *locus standi* is, in this case, considered by the Court to be “*hypothetical and insufficient*”<sup>16</sup> which is understandable as so far, no instruction proceedings have occurred and therefore La Poste has no right of defence to

invoke nor any interest to intervene to preserve its rights.

The Court considers that the requirements of article 330 of the Code of Civil Procedure are not fulfilled and therefore ruled inadmissible La Poste’s ancillary intervention.

## II) **La Poste’s real *locus standi* lies in a hypothetical abuse of a dominant position on the market for addressed mail**

To appreciate an abuse of a dominant position it is necessary to first define the relevant market. In a previous decision, the French Competition Authority identified the market for the addressed mail as a relevant market<sup>17</sup>, as La Poste was already involved in this previous case, we can consider that the relevant market is the same in the case of this study. Then, regarding to the alleged dominant position of La Poste on this market, the ARCEP (Autorité de régulation des communications électroniques, des postes et de la distribution de la presse) stated in 2015 that « *La Poste remains to this day in a*

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<sup>13</sup> Paris Court of appeal 4 November 2020, RG n° 17-20581

<sup>14</sup> C. LEMAIRE & M. FLORENT (30 June 2022), “The Paris Court of Appeal rejects the status of voluntary intervener for a company subject to a complaint that was rejected by the Competition Authority as partly inadmissible and partly rejected

for lack of sufficient evidence», Concurrences n°4-2022

<sup>15</sup> Paris Court of appeal, 4 November 2020, RG n° 17-20581, point. 20

<sup>16</sup> Ibid, point. 21

<sup>17</sup> ADLC, n°04-D-65 30 November 2004 & n°17-D-26 21 December 2017

*quasi-monopolistic position with a market share approaching 90% on the addressed mail market*". Such position is reinforced by the fact that on the French market, La Poste is the only operator benefiting the VAT exemption on the offers falling within the scope of universal postal service<sup>18</sup>.

Lastly, when the relevant market is identified, the dominant position qualified, there has to be an abuse for La Poste to be breaching article 102 of the TFEU and article L. 420-2 of the French Commercial Code.

In a judgement of 27 March 2012, the Court of Justice stated that "*Article 102 of the TFEU prohibits, inter alia, an undertaking in a dominant position from practices which have the effect of foreclosing its competitors considered to be as efficient as itself, strengthening its dominant position by means other than competition on the merits. From this perspective, any price competition cannot therefore be considered as legitimate*"<sup>19</sup>.

In our case, La Poste is indeed in a dominant position and the VAT exemption it benefits from does foreclose the market, but this exemption is considered to have a beneficial impact as it is limited to "*public postal services*"<sup>20</sup>. The heart of our case is defining whether La Poste is abusing the VAT exemption by applying it to services that do not fall within

the general interest and public postal services or not.

Adrexo says that "*the establishment of tariff schedules or grids with a degree of finesse so adapted to the particular needs of economic operators already leads to the conclusion that we are not dealing with the provision of a postal service that meets to a "general interest" or "the essential needs of the population"*".

The Authority is being very careful in its appreciation of whether or not La Poste is strictly respecting the limitations of the VAT exemption and, in its decision of the 15<sup>th</sup> of September 2021<sup>21</sup>, lists all the control that is already applied. The minister in charge of postal services must be informed by La Poste of any change in the catalogue of offers for mailing services that falls within the VAT exemption. Also, the ARCEP exercises control over the tariffs of such offers. In our case, those two institutions, did not sanction any failure to comply with "*obligations resulting from the legislative and regulatory provisions relating to the exercise of the universal service*"<sup>22</sup>.

The complaint filed by Adrexo was rejected by the Authority which considered it to be lacking sufficient evidence of any abuse of a dominant position.

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<sup>18</sup> ADLC n° 21-D-22 15 September 2021 on practices on the addressed mail market

<sup>19</sup> CJUE 27 March 2012, C-208/10

<sup>20</sup> Art. 132, Directive 2006/112/CE 28 November 2006

<sup>21</sup> ADLC n° 21-D-22 15 September 2021 on practices on the addressed mail market

<sup>22</sup> ARCEP, Notice no. 2021-0721, April 29, 2021

But, in regard to the quasi-monopolistic position of La Poste the immense market power it has thanks to the VAT exemption, the appeal filed by Adrexo could meet a favourable outcome and the case could be referred to the instruction services of the Authority for further investigation.

The intervention of La Poste could be seen as a semi-confession of an abuse or at least that La Poste is worried by the ongoing litigation and wants to be granted access to the confidential files. Such concerns might be La Poste's real *locus standi*.

### **Conclusion:**

In this case, the Paris Court of Appeal adopts a strict approach to the *locus standi* in order to deny La Poste the status of intervener. In the absence of an investigation on the merits and notification of the grievances, the Court considers that La Poste can only rely on a hypothetical *locus standi*, which is not sufficient to satisfy the criteria of the Code of Civil Procedure<sup>23</sup>. In its practice, the Paris Court of Appeal is more inclined to grant an intervention on a principal basis rather than on an ancillary basis (as in this case).

However, this hypothetical interest could become very real if the Court issues a referral to the Authority's investigation departments.

In the light of the practices of La Poste denounced by Adrexo and in the light of the elements set out above, it may be envisaged that these practices may constitute an abuse of a dominant position if the Authority accepts that it has jurisdiction and if Adrexo succeeds in gathering the necessary evidence that was lacking in the first procedure.

The addressed mail market has been and continues to be a breeding ground for competition cases involving abuses of a dominant position. Indeed, due to the presence of incumbent players with dominant positions, the risk of abuse is frequent. It was in a Post Denmark case dealing with selective discounts that the European Court of Justice stated that in assessing the conduct of a dominant undertaking, all relevant factual circumstances of the case must be considered<sup>24</sup> including positive and pro-competition effects of such conduct.

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<sup>23</sup> Art. 330 Code of Civil Procedure

<sup>24</sup> CJEU, 27 March 2019, C-209/10