

The Evolution of the Regulatory Model for European Postal Services

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The views and opinions expressed in this study
are those of the authors and do not necessarily
represent the position of the European Commission.

Preface

It is rare for government to pause during preparation of a new economic measure to consider the principles of good governance. Nonetheless, the craft of governance is fundamental to successful implementation of economic and social policies. In the last several years, the European Union has launched several initiatives to improve governmental processes in the Community. Of particular relevance to this study is a pioneering report on administrative practice by a group of experts established by European ministers of public administration and chaired by an official of the French government, Dieudonné Mandelkern.

This study represents an extension of these efforts to the task of regulating postal services in Europe. It considers how, in light of the experience of several years of reform and a flowing tide of technological change, governmental policies can be implemented efficiently and effectively in the postal sector.

This study offers no conclusions as to precisely what those governmental policies should be. The ‘new regulatory model’ described in the report illustrates the application of sound regulatory principles to accomplishing the objectives of *current* Community policy. In the final chapter, we consider how this regulatory model could be modified to accommodate other policy objectives. Choosing among possible policy objectives is the task of policy makers.

What remains is the proposition—the central thesis of this study—that sound regulatory principles are fundamentally important because, over a wide range of policy objectives, attention to the principles of sound regulation can ease the burden of regulation on postal operators, protect the integrity of government, and, ultimately, enhance the quality of services delivered to the users of postal services.

Acknowledgments

Above all, we must acknowledge the vision of the European Commission in undertaking this study in the first place. ‘Sound regulatory principles’ seemed a rather abstract and academic concept at the beginning of this study. Having worked our way through the analysis, we conclude that sound regulatory principles have much useful to say about the future of postal policy, and we are grateful for the opportunity to consider these issues. We express our specific appreciation for the comments made by Jörg Reinbothe, Hughes de la Motte, and Manuel Iglesias-Roa from DG Internal Market.

In preparing this report, we have made extensive use of reports prepared by and for the European Commission. We have referred frequently to thoughtful studies submitted to the European Council by high level groups under the chairmanship of Wim Kok, Dieudonné Mandelkern, and André Sapir. We are, as well, heavily indebted to the diligent efforts of several of the national regulatory authorities for postal services. This study would have been impossible without this vast body of official insights.

This study has also drawn frequently and deeply upon the work of scholars and industry participants presented in three continuing series of rewarding seminars conducted by the Center for Research in Regulated Industries of Rutgers University, the Institut d’Economie Industrielle (IDEI), and the Wissenschaftliches Institute für Kommunikationsdienste (WIK).

In addition, in the course of this study, we have benefitted greatly from comments received in two public workshops held in Brussels, in workshops held at WIK’s offices in Bonn, and in many conversations with and written comments submitted by a wide range of postal operators, regulators, policy experts, scholars, and users. Some, indeed, were especially generous with their time, offering not merely expert advice, but patience, enthusiasm, and good will; to these colleagues, we are particularly grateful.

Needless to say, although whatever merits may be found in this study represent the fruit of many, the specific findings and conclusions, demerits and all, are ours alone.

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Terms and Abbreviations

CEN	European Committee for Standardization
Commission	European Commission (unless otherwise indicated)
Community	European Union
D+n	Delivery n days after posting
Directive	Postal Directive
Deutsche Post	Deutsche Post A.G., the public postal operator of Germany
EU	European Union
GDP	Gross Domestic Product
La Poste	Public postal operator of France
NRA	National regulatory authority (for postal services)
OJ	Official Journal of the European Communities
Poste Italiane	Public postal operator of Italy
Postal Directive	Directive 1997/67/EC as amended by Directive 2002/39/EC
Postcomm	UK national regulatory authority
PTS	Swedish national regulatory authority (Post- och telestyrelsen)
RegTP	German national regulatory authority (Regulatory Authority for Telecommunications and Posts)
Royal Mail	Public postal operator of the United Kingdom
SMP	Significant market power
TNT	TNT, N.V., the public postal operator of the Netherlands
UK	United Kingdom
UPU	Universal Postal Union
USP	Universal service provider, a postal operator designated under Article 4 of the Postal Directive
U.S.	United States
WIK	WIK-Consult

In this study, we have referred to the five largest public postal operators by their usual trading names: Deutsche Post (Germany), La Poste (France), Poste Italiane (Italy), TNT (Netherlands), and Royal Mail (United Kingdom). Otherwise, for the sake of simplicity, we have referred to the public postal operators by the name of the Member State and ‘Post’, for example ‘Sweden Post’.

Executive Summary

Overview

Public post offices have been among the great social institutions of Europe since the seventeenth century. At the beginning of the twenty-first century, public posts remain major pillars of Community life, but their role is being transformed. New technologies, governmental policies, and business practices are reshaping the infrastructure of commercial and social interaction across Europe and the world. The regulatory framework for postal services, public and private, must accommodate changing times, or the public posts may become disengaged from the evolving needs of society and the opportunities offered by changing times.

The European Union has already taken considerable steps to modernize the postal laws. The Postal Directive, adopted in 1997 and amended in 2002, establishes a Community-wide guarantee of universal postal service for all citizens. It also provides for a 'gradual and controlled opening of the letters market to competition' that will lead to 'full accomplishment of the internal market for postal services' on a Community-wide basis, perhaps as early as 2009.¹ The current Postal Directive expires on 31 December 2008. Next year (in 2006), the European Commission must submit to the European Parliament and Council a proposal for the next regulatory framework for postal services.

The purpose of this study is to envision a new approach towards regulation of the postal sector based on *sound regulatory principles*. The study identifies seven principles of sound regulatory practice after surveying a broad range of legal and policy precedents. These principles are used to evaluate the *current regulatory model*, principally as defined by the Postal Directive. We conclude the current model fails to follow sound regulatory principles in key respects. We then develop a *new regulatory model* that illustrates how sound regulatory principles could be applied to the postal sector of the future *assuming no change in current policy objectives*. Finally, we consider the practicality of using the new regulatory model as a basis for a new postal directive. We suggest that the new regulatory model would have to be modified to accommodate the transitional concerns and alternative policy objectives that must necessarily arise in consideration of a new directive.

The end product of this study is *not* a draft of a new postal directive. Different parties have very different views about the appropriate objectives for postal policy in the future. This study does not presume to say who is right. What this study offers is guidance on how regulatory measures should be used to achieve whatever objectives are ultimately agreed. The new regulatory model is an example of how to regulate well, not a proposal on what to regulate. While the new regulatory model presumes

¹ Directive 2002/39/EC, recital 14.

continuation of current Community postal policies, sound regulatory principles could be adapted to implementation of other policy objectives as well.

Sound regulatory principles

This study begins by identifying sound principles for regulating an infrastructure service like the postal sector. These principles were derived from a review of the regulatory principles articulated in the EC Treaty (e.g., free movement of services, subsidiarity, competition rules), general Community policy initiatives (e.g., Lisbon Strategy, draft services directive, services of general economic interest), sector specific directives (electronic communications, postal, energy), and scholarly reviews of Community regulation (e.g., Mandelkern, Sapir, Kok). In light of this review, we conclude that the following seven principles represent a reasonably complete and accurate summary of the key characteristics of sound sector regulation in the Community.

- 1) *Specific purpose.* The objectives of regulation should be specified clearly and precisely.
- 2) *Policy coherence.* The objectives of regulation should be consistent with and supportive of the broader and more fundamental economic, legal, and social objectives of the Community.
- 3) *Necessity and proportionality.* Regulation should introduce the least deviation from the rules of the normal commercial market necessary and proportionate to achievement of policy objectives agreed for the sector.
- 4) *Market transparency.* Regulation should foster transparency that facilitates the operation and governance of selected markets to the maximum extent consistent with sound economics and the commercial rights of operators.
- 5) *Administrative fairness.* The administration of regulation should be impartial, objective, equitable, non-discriminatory, informed, reasoned, and balanced with respect to the costs and benefits borne by affected parties.
- 6) *Competency.* Regulation should be administered by governmental bodies that are competent to address the issues presented and as close as possible to affected parties.
- 7) *Legal certainty.* Regulatory measures should be as clear, simple, and stable as possible.

The broad thrust of these seven principles is to empower the user in both an economic and a governmental sense. These principles protect the user as economic actor by insisting upon his or her right to the choices of a normal commercial market as much as possible. Where choice is unavailable, these principles protect the user as citizen by requiring more considered and transparent government regulation.

Current regulatory model – Community level

The *first* principle (specific purpose) requires that the objectives of regulation should be stated clearly and precisely, yet the Postal Directive does not identify its objectives in an explicit statement of purpose. Since application of the other regulatory principles depends in part on what regulation of the postal sector is trying to accomplish, we *infer* a statement of objectives for purposes of this study. Based upon a review of the Postal Green Paper, the Postal Directive and the 2002 amendatory directive, the Lisbon Strategy, and other sources, we surmise that the Community postal policy is aiming at two fundamental objectives:

- to protect and promote an affordable, reliable, and efficient universal postal service; and
- to promote a fully operational internal market in postal services.

Under the *second* regulatory principle (policy coherence), the objectives inferred for the current regulatory model appear to be generally, but not wholly, appropriate. Some inconsistency is suggested by the fact that the current regulatory model does not give the same emphasis to a fully operational internal market that is found in more general economic and legal policies of the Community.

Evaluation under the *third* principle (necessity and proportionality) required an extensive ‘bottom up’ review of the specific provisions of the current regulatory model. Is it necessary to accomplishment of the objectives of Community postal policy to require transparency of all universal service tariffs? Daily delivery to all addresses? Designation of universal service providers? A reserved area for the universal service provider? Quality of service standards for cross-border mail? And so forth. In sum, we find that, in some cases, rules on provision of universal services intervene in the normal commercial market more than necessary to accomplish the objectives of Community policy. We conclude, as well, that despite the necessity of some type of authorization procedure, Member States exercise more control over competition than necessary or proportionate. In particular we do not believe that continuation of the reserved area is necessary and proportionate to ensuring the basic level of universal service required by current Community postal policy. (Whether more interventionist universal service definitions adopted Member States may require, or could require, continuation of the reserved area is a more difficult question.) Finally, we conclude that provisions which draw distinctions between intra-Community and national mail are unnecessary to accomplish the objectives inferred for Community postal policy.

With respect to the *fourth* principle (market transparency), we find that the current regulatory model has made a good start on increasing appropriate market transparency in the postal sector, especially in respect to quality of service targets and performance. At the same time, we identify several ways in which transparency could be improved.

The *fifth* principle of sound regulation (administrative fairness) requires that regulatory administration should be impartial, objective, equitable, non-discriminatory, informed, reasoned, and balanced. In this respect, the Community-level

regulatory model is almost silent. The Postal Directive requires establishment of an independent national regulatory authority (NRA) in each Member State but provides no guidelines in respect to the NRA's independence, functions, or procedures. The practice of relying upon a single universal service provider, designated by the Member State, to ensure universal service is difficult to reconcile with a goal of non-discriminatory treatment of postal operators.

The *sixth* principle (competency) reflects both legal competency and subsidiarity. Overall, our analysis suggests that, while a Community definition of the concept of universal service is logically necessary, national institutions should have more authority to adjust the parameters of universal service to suit the needs, preferences, costs, and alternatives in a given Member State. At the same time, we conclude that measures controlling competition and supporting mutual confidence among NRAs are more appropriately defined and administered at Community level than at national level.

The *seventh* and last sound regulatory principle (legal certainty) demands clear, simple, and stable regulatory measures as far as possible. We find the current regulatory model creates unnecessary legal uncertainty primarily because experience has shown that definitions and other key provisions of the Postal Directive are not as clear as they could be.

In sum, we find that although the Postal Directive is aimed at protecting and promoting the rights of users, it could do a better job in many ways. The user of universal service is not assured of a choice of supplier even in a case of truly poor service. While the user's right to basic information about prices and service quality is assured, he has no right to information about the efficiency of universal service or possible alternatives. The Directive unduly limits the right of Member States to adjust universal service to local needs. The role of the NRA is indistinctly drawn, and the Directive fails to assure the user that the NRA is completely impartial and fully informed or that users will be consulted about regulatory decisions. While implementation of the Directive varies from state to state, the bottom line is that the Community regulatory model could *empower* the user more by closer adherence to sound regulatory principles.

Current regulatory model – Member States

The best regulatory practices among the Member States illustrate and affirm several of the policy implications flowing from evaluation of the Community-level regulatory model. Among Member State postal laws one can find clear statements of the objectives of regulation, limitation of service standards to market dominant products, regular publication of market statistics, and institutionally independent and powerful NRAs with well-defined authority to regulate tariffs and protect users. A survey of Member States also suggests that 'competition among NRAs' has been beneficial in at least two areas: (i) adaptation of specific universal service standards to local conditions and customer needs and (ii) development of third party access to the downstream services of market dominant postal operators.

Recent market developments

For two decades the Community postal sector has been undergoing fundamental changes. Postal administrations have become profit-oriented public companies, and a few are partially privatized. Large mailers have become more important to public postal operators and can demand services tailored to their needs. Smaller business mailers and consumers must accept public services and tariffs, but in most Member States all customers have benefited from increasing quality of service. Overall, universal service is becoming more cost-efficient, although public postal operators are modernizing at different paces. The content of letter post mail has changed dramatically. Business and direct mail have become more important, while private mail is in decline. Indeed, the letter post itself is retreating in northern Member States as use of electronic alternatives grows. In the future, correspondence and transaction mail will likely become less important while direct mail and parcels become more important, although different scenarios may be imagined depending on the pace of change. The letter post will become more a medium for the distribution of notices and parcels and less a medium for the exchange of thoughts.

In the letter post segment, competition has been evolving slowly. Even in countries with no or insubstantial reserved areas, public postal operators have retained market dominant positions despite new competition from international postal operators, notably Deutsche Post and TNT. In the future, it is possible that international postal operators will come to dominate the Community postal sector by cooperating with (or perhaps owning) smaller universal service providers or by competing directly with incumbent postal operators in their national markets.

A new regulatory model based on current policy objectives

In light of our evaluation of the current regulatory model and the direction of recent market developments, a new regulatory model is proposed that illustrates how sound regulatory principles could be implemented in the postal sector of the future. In developing this illustration, it must be kept in mind that the new regulatory model is derived from specific assumptions about the objectives of Community postal policy. In particular, we assume continuation of the basic objectives of current policy as we have inferred them.

In general, the purpose of the new regulatory model is to suggest ways to remedy discrepancies between the current regulatory model and sound regulatory principles. Hence, the major differences between the new regulatory model and the current regulatory model are as follows:

- The *objectives* of Community postal policy are defined more specifically and related in a manner more consistent with general Community policies.
- *Universal service* is defined specifically and traditionally, to include universal provision of letter post and parcel post services, but not separate commercial parcel services.
- Member States are given *more flexibility to adapt the definition of universal service* to local needs; they are permitted (but not required) to adjust the

frequency of collection and delivery where appropriate.

- Member States are not permitted to impose *uniform tariffs* on universal services; but market dominant postal operators are specifically authorized to maintain uniform or zoned tariffs where cost-justified.
- Major postal operators are afforded *more commercial flexibility* because strict regulation does not apply to universal service products offered in competitive markets (e.g., parcels, direct mail in some Member States); strict, although modified, regulation is maintained over universal services offered under circumstances of market dominance (e.g., letters).
- *All postal operators are regulated in a non-discriminatory manner*; no postal operator is singled out as the universal service provider for all purposes.
- Member States are *not permitted to establish a reserved area*. The Community postal services market is viewed as a single fully operational internal market rather than as 25 national markets separated horizontally (by country) and vertically (by product).²
- To support universal services not provided by postal operators on a commercial basis, the primary means of funding shifts from an *internal cross-subsidy* hidden within the accounts of a universal service provider to a transparent *external cross-subsidy* administered by the national regulatory authority (NRA) or to funds drawn from general revenues and dispensed by the NRA.
- Authorization of all postal operators is provided by *general authorization*; nonetheless, postal operators are subject to continuing obligations which vary according to the postal services provided (e.g., protection of users' rights, compliance with essential public interest requirements, market transparency requirements, and if providing universal services, compliance with additional requirements).
- *Market transparency* and *user protection* are enhanced with requirements extended to all providers of postal services.
- The NRA's authority, independence, and control over universal services is better defined, and the rights of parties in regulatory proceedings are better protected.
- Distinctions between intra-Community and national universal services are ended.

² In respect to this conclusion, we note again that the new regulatory model is derived from specific assumptions about the objectives of Community postal policy, i.e., continuation of current policy objectives as we have inferred them. We offer no judgement as to whether, for specific Member States, a reserved area is necessary and proportionate to accomplish the objectives of postal policy set out in national legislation and regulations. Such judgements would necessarily take into account the costs of service and the availability and practicality of alternative sources of funds to support universal service in each Member State. These specific factual issues were beyond the scope of this study.

Figure 1. Current regulatory model

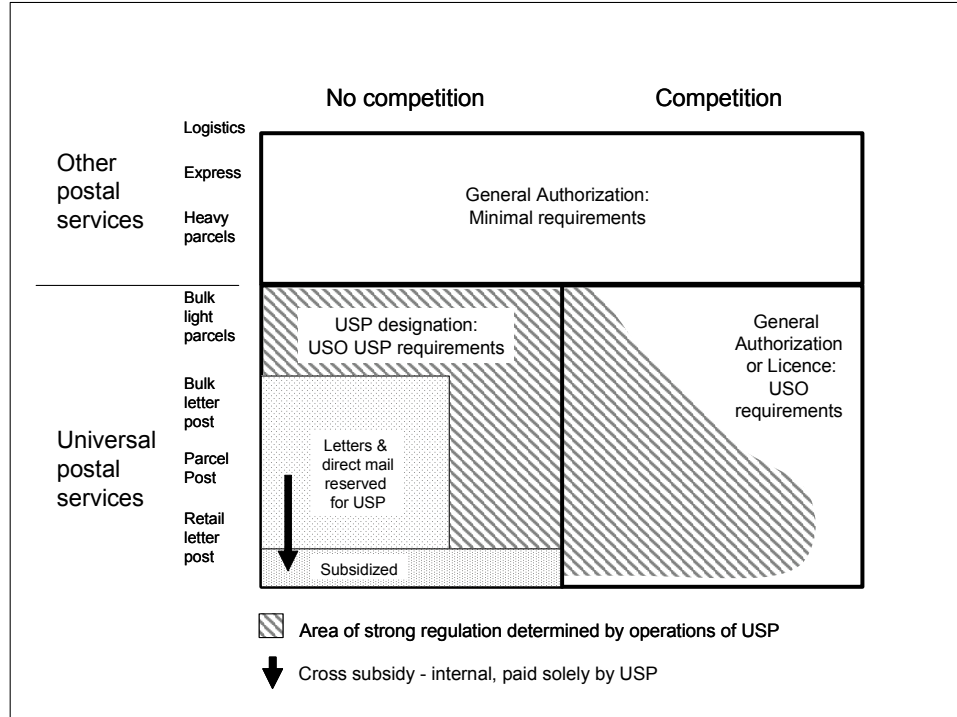
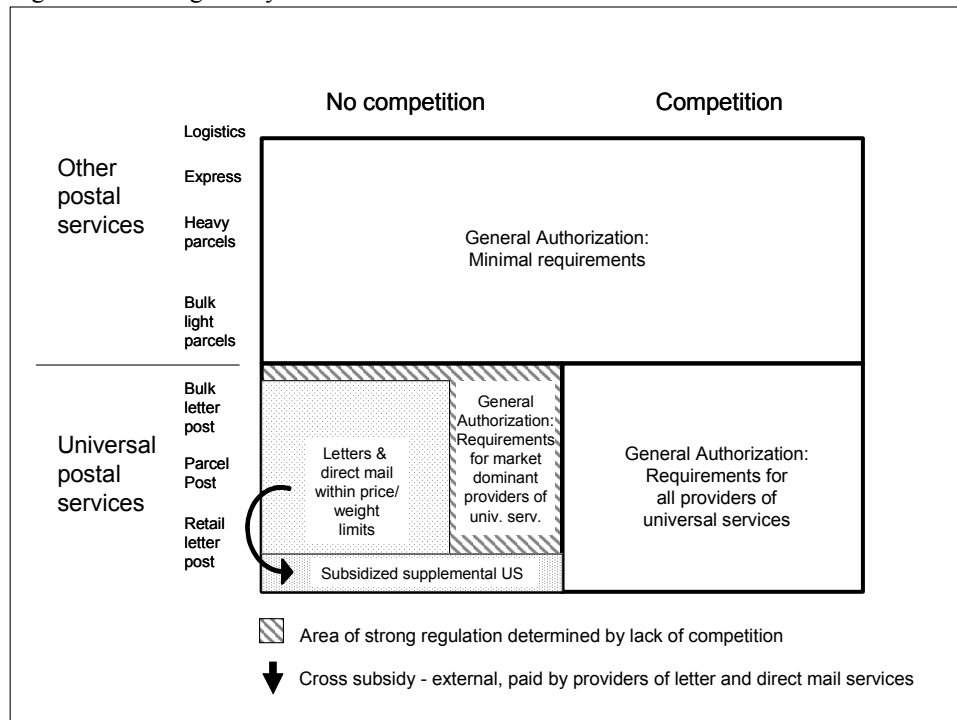


Figure 2. New regulatory model



- A Postal Regulatory Committee, composed of representatives of national regulatory authorities, is proposed to supplement the Postal Policy Committee, a continuation of the current ‘Postal Directive Committee’.

Figures 1 and 2 provide schematic representations of the current and new regulatory models, respectively (these figures summarize key features only and do not illustrate

every possibility). As these figures show, both models create four distinct regulatory areas, although they are defined differently in the two models. The four regulatory areas are:

- *Non-universal postal services.* In both models, outside the universal service area, postal operators may be subject a general authorization regime and minimal regulatory obligations. In the current model, the scope and nature of regulation is very unclear. In the new model, the scope of regulation is defined to include all postal services other than letter post services and associated parcel post service, and the obligations of postal operators are specified clearly.
- *Universal services provided competitively.* In both models, some universal services are provided under competitive conditions. In the current model, different regulatory regimes apply depending upon whether the postal operator has been designated as a universal service provider or not. In the new model, all postal operators will be subject to the same ‘light-handed’ regulation designed to ensure that universal service meets basic standards of affordability and reliability and other criteria that are common throughout the Community and that may be adapted or increased by individual Member States.
- *Universal services provided under conditions of market dominance.* In both models, some universal services are provided in non-competitive conditions, and these are subject to strict oversight by NRAs to ensure, inter alia, that tariffs are cost-based, transparent, and non-discriminatory, that market dominant products do not cross-subsidize other products, and that access and quality of service meet the needs of users.
- *Subsidized supplemental universal services.* In both models, pursuant to the guarantee of universal service, some universal services are provided that would not be provided in the normal commercial market. In the current model, the nature and cost of these services are not transparent and the NRA has no specific control over the quality of services rendered. In the new model, the nature and cost of these services are transparent, and the NRA may exercise specific control over the quality of services rendered.

The new regulatory model begins with a *statement of specific purpose* that, we suggest, better reflects the first and second of the sound regulatory principles. The draft statement would declare:

The objective of Community postal policy is to promote development of a fully operational internal market in postal services while ensuring the availability of an accessible, affordable, reliable, and efficient universal postal service that responds to the basic needs of users and society by—

- 1) establishing and relying upon a Community market without internal frontiers in which the free movement of postal services is ensured in conditions of undistorted competition;
- 2) prescribing objective, transparent, and non-discriminatory requirements for providers of postal services to the extent necessary

and appropriate to protect the rights of users and essential public interest requirements;

- 3) defining at Community level a basic universal postal service encompassing a minimum range of affordable services of specified reliability for the benefit of all users, irrespective of their geographical location in the Community, whose supply shall be further specified and ensured by Member States in a manner appropriate to their national needs;
- 4) providing objective, transparent, and non-discriminatory regulation by independent authorities of universal postal services offered under conditions of market dominance to the extent necessary and appropriate to ensure the availability of universal service of appropriate quality without distortion of competition; and
- 5) providing necessary and appropriate financial support and other means to ensure the supply of universal service in circumstances in which universal service is not otherwise satisfactorily supplied.

The new regulatory model then addresses regulation of *postal services generally*. The current Directive vaguely provides for authorizing providers of ‘services’ in order to ensure ‘essential requirements’ and promote user protection, but it fails to define what ‘services’ are covered. In the new regulatory model, we propose to define *postal service* by means of the following key definitions:

- *postal service*: a regularly scheduled service that is offered to the general public for compensation and that provides, on at least a weekly basis, collection, transport, and delivery of diverse postal items;
- *postal item*: a document, envelope, parcel, or similar thing that is wrapped and addressed in a form suitable for conveyance by a postal service and weighs not more than 30 kilograms. Postal items may consist of or contain such things as correspondence, books, catalogues, newspapers, periodicals and packages containing merchandise with or without commercial value.

The new regulatory model proposes that Member States may introduce *general authorizations* for postal operators. By complying with regulation defining the terms of a general authorization, a postal operator may begin operations without awaiting specific approval from the national regulatory authority. A general authorization may not limit the postal operator to specific areas or types of services. No reserved area or other special or exclusive rights may be established in favor of any postal operator (under our interpretation of the implications of current Community policy). As a continuing condition of authorization, postal operators may be obliged to respect the rights of users, to provide basic market statistics, and to cooperate in the maintenance of a database of valid addresses and the national post code system. Additional requirements to ensure ‘essential public interest requirements’ should be imposed only when especially appropriate to postal services.

With respect to *universal services*, the new regulatory model proposes that Member

States ensure a basic service that is defined more carefully and flexibly than in the current Directive. A guarantee of universal service would apply to *letter post* service, i.e., a postal service for the collection, transport, and delivery of letters (individualized communications) and other documents. Universal service would also include *parcel post* service, i.e., services for ‘over-the-counter’ parcels collected with letter post items. Universal service would not include separate non-letter delivery services, such as, for example, distribution services that deliver only advertisements, newspapers, or commercial parcels. Bulk mail delivered with other letter post items would not be exempt from universal service. Insurance and registration would be available for all universal service items.

The universal service must meet basic criteria which, in effect, establish *a floor for all universal services in the Community*. Universal service must provide delivery to every address in the Community. It must be accessible, reliable, affordable, secure, and free from personal discrimination. Privacy of correspondence must be guaranteed. Discrimination between intra-Community and national universal service items is prohibited. The rights of users must be protected. Of these criteria, the most significant departure from the current Directive is reliability. *Reliability* would be defined as delivery within a specified routing time of almost all postal items (i.e., in excess of a very high percentage such as 97 per cent), whether national or inbound intra-Community, tendered to a provider of universal service. In respect to most of these criteria, Member States or NRAs would be authorized to adopt specific implementing regulations.

A Member State’s manner of ensuring universal service would depend upon the structure of the market rather than the identity of the postal operator. Where universal service is provided under competitive conditions, the NRA should generally defer to the demands of users as expressed through market choices rather than determine prices and service. The NRA should treat all postal operators in a non-discriminatory manner. No postal operator should be designated as ‘universal service provider’, and no postal operator should be regulated more strictly than others. Hence, the role of the NRA would be to monitor the market to ensure there are no lapses in supply.

In order to define the scope of lightly regulated, competitive universal service markets, it is logically necessary to identify which markets are non-competitive, that is, those markets in which a postal operator exercises such market dominance that there is no effective competitive pressure on prices or services. Without drawing such market-based distinctions, it is impossible to treat all postal operators in a non-discriminatory manner. Broadly speaking, to identify non-competitive universal service markets, the new regulatory model relies upon established concepts derived from Community competition law (e.g, product definition, abuse of dominant position, etc.).

In universal service markets where a postal operator exercises market dominance, the NRA would exercise additional supervision to ensure that *an appropriate universal service* is maintained. In general, we suggest that a market dominant postal operator should be able to adjust access, quality of service, delivery, and tariffs provided the postal operator can show to the satisfaction of the NRA that changes are based on objective evidence (costs, user needs, etc.), non-discriminatory (between classes of

users or between different areas), and reasonably calculated to meet the needs of users. The NRA should be able to enforce these controls by an *ex ante* review or other suitable procedures. Where the postal operator is unwilling to propose objective and non-discriminatory services and tariffs, the NRA must have residual authority to order a solution based on the evidence.

Provision of universal service by a market dominant postal operator presents several specific issues. Briefly, the approach of the new regulatory model to several of these issues is as follows:

- *Quality of service monitoring.* The new regulatory model should require independent monitoring of the quality of service of national first class and second class (if any) services for single-piece letter post and parcel post services. Frequent reports (more than once per year) and integration of cross-border and national quality of service monitoring should be considered.
- *Cost-based tariffs.* Tariffs for market dominant products should be based on costs (as in the current Directive).
- *Accounting.* The NRA should be responsible for approving the system of accounts used to assign and allocate input costs in accordance with accounting principles set at Community level. The system of accounts and a summary of annual regulatory accounts should be published by the NRA.
- *Unassigned common costs.* The NRA should be authorized to allow a market dominant provider of universal services to allocate unassignable common costs (costs which cannot be assigned directly or indirectly to a specific product) among market dominant products within reasonable constraints.
- *Transparency of tariffs.* The prices and terms of standard, public tariffs should be fully disclosed. Instead of full transparency for all discount and individual non-standard tariffs, the market dominant provider of universal services should be required to publish periodic summaries of such tariffs in a form approved by the NRA.
- *Uniform tariffs.* The market dominant operator should be authorized to maintain uniform or zoned tariffs where cost-effective, but Member States should not require uniform tariffs.
- *Special tariffs.* Special tariffs for downstream universal service products offered by market dominant operators should be subject to the same standards as other tariffs: cost-based, objective, and non-discriminatory. The NRA should have discretion how to interpret these standards.
- *Relating tariffs to quality of service.* Tariffs for the universal service products of market dominant operators should give all users reasonable rebates for service failures.
- *Access and interconnection.* The NRA should require a market dominant operator to provide access to its network where necessary to protect universal

service. In other cases, the NRA should require access only to the extent that it considers mandatory interconnection consistent with the objectives of Community and national postal policy.

A government guarantee of universal service means that if universal service is not supplied by competing postal operators or by a regulated market dominant operator, then it must be supplied by government. In the new regulatory model, the Member State or NRA should define clearly the standards of basic universal service, and the NRA should be authorized to contract for, or if necessary to compel by order, provision of such supplemental universal services as may be necessary to ensure universal service. To cover the cost of supplemental universal services, Member States should be authorized to establish universal service funds created from assessments levied on providers of traditional (i.e., non-express) postal services for letters and direct mail. In principle, the assessment, which may vary by postal product and geographic area, should mimic the contribution to loss-making services currently provided by the internal cross-subsidy of the current universal service provider. (Prior to establishment of the universal service fund, however, it may be necessary for the current USP to rebalance its tariffs and services to reduce levels of cross-subsidy among products.) The assessment system will thus replace the current invisible, internal cross-subsidy with a transparent external cross-subsidy that is similar in scope and administered by the NRA.

In the current Directive, an independent national regulatory authority (NRA) is established in each Member State, but the Directive provides no guidance on institutional arrangements. The new regulatory model should do more to implement the principle of administrative fairness and promote mutual confidence among NRAs. The new regulatory model would include measures to ensure the independence and impartiality of NRAs, to provide NRAs with all necessary authority to obtain information and enforce orders, to require greater transparency in NRA procedures and consultation with affected parties, and to ensure interested parties a right of appeal from NRA decisions. NRAs would also be required to consult with competition authorities, with the Commission, and among themselves.

Finally, the new regulatory model proposes to establish two Community-level institutions to assist in regulation of the postal sector.

- A Postal Policy Committee, composed of representatives of Member States, to advise the Commission on the implementation of the new regulatory model and future development of Community postal policy (this committee is similar to the current ‘Postal Directive Committee’).
- A Postal Regulatory Committee, composed of representatives of NRAs, to assist the Commission and each other in the implementation of elements of Community postal policy specifically committed to NRAs and, in particular, in the harmonization of certain key measures, such as systems of accounts of market dominant operators and market statistics.

In addition, the new regulatory model, like the current model, would employ the European Committee for Standardisation (CEN) to assist in harmonization of Community postal operators’ technical standards of operation.

Towards a new postal directive

While the new regulatory model is not a proposal for a new postal directive, it could be viewed as an analytical framework for considering elements of a new directive provided several fundamental caveats are kept in mind. In this study, we consider three specific types of caveats.

First, one must consider whether or not a new directive should in fact be based on *sound regulatory principles* such as identified in this study. In our view, the current Postal Directive may be viewed in retrospect as an incomplete response to early manifestations of the Information Revolution, incomplete because the profound implications of new technologies for postal systems were not generally foreseen. Nonetheless, the Postal Directive has been notable success because it introduced into Community postal law some sound principles of regulation, such as regulatory guidelines for prices and services, limits on the reserved area, independent regulatory authorities, objective accounting practices, public quality of service standards, independent audits of service performance and USP accounts, and greater transparency. As a direct result, universal postal services in the Community have become more efficient, more transparent, and better adjusted to the Information Revolution than they otherwise would have been.

The success of good regulatory principles in the first Directive strongly suggests that, in considering a new directive, a deliberate effort to incorporate sound regulatory principles is appropriate and desirable regardless of the objectives of regulation. Indeed, we believe that sound regulatory principles are especially needed in markets undergoing rapid and fundamental change, as in the postal service sector, even though we recognize that sound principles may imply a separation of governmental and commercial functions that deviates from traditional postal arrangements in some Member States.

Second, a new directive must deal with *transitional issues* that are not addressed in the new regulatory model. After a survey of some of the major transitional problems that might be posed, we conclude that transition from the current model to the new model presents no insuperable risks or obstacles, but transitional considerations may imply significant additions to the new regulatory model.

- Current universal service providers must have been given sufficient time and resources to transform themselves into competitive organizations. If the process cannot feasibly be completed by 2009, the Commission should be empowered to grant such exceptions (including possible extension of the reserved area) as may be objectively justified and scrupulously fair to other postal operators.
- Withdrawal of designation of the universal service provider and shifting to a universal service fund or other means to fund supplemental universal services must proceed carefully and objectively. In particular, the current universal service provider must be given an opportunity to adjust services and rebalance tariffs.
- The capabilities of NRAs may have to be enhanced.

Third, we point out that it will be necessary to reconsider and determine the *objectives* of postal regulation in order to develop a new postal directive. In the new regulatory model, we assumed the continuing validity of the objectives that we have ascribed to the current regulatory model, but we do not assert that these are correct objectives for the Community. It is for the Community policymaking process to decide what are the correct objectives. Nonetheless, we believe that the new model may be modified to accommodate alternatives or additions to the objectives implied by current Community policy. In particular, we consider the following possible variations from the objectives of Community postal policy presumed in the new regulatory model:

- *More interventionist Member State definitions of universal service.* The objectives of Community postal policy could be defined so as to permit a Member State to adopt an ‘interventionist’ or restrictive definition of universal service that would require continuation of the reserved area at national level and thus limit the possibility of a fully operational internal market.
- *Rules of partial uniformity.* The objectives of Community postal policy could embrace or permit government imposition of uniformity in certain respects. For example, Member States could be authorized or required to maintain a uniform tariff for non-bulk universal services. Or Member States could be authorized or required to ensure delivery of universal services to all addresses a specified number of days per week.
- *Promotion of competition.* The objectives of Community postal policy could authorize or require Member States to promote competition in the supply of universal services through one or more strategies.
- *High quality of universal service.* The objectives of Community postal policy could require Member States to maintain universal service that meets certain quality of service standards in addition to the reliability standard incorporated in the new regulatory model.
- *Minimization of sector specific regulation.* Community postal policy could place more emphasis on minimizing sector specific regulation of markets as much as possible consistent with the public interest.

1 Sound Regulatory Principles

The purpose of this study is to envision a new approach towards regulation of the postal sector based on *sound regulatory principles*. The seven principles of sound regulatory practice which we have identified are the basis for the remainder of the study. This chapter describes how we developed these regulatory principles after reviewing a broad range of legal and policy precedents.

1.1 Context and purpose of this study

Public post offices have been among the great social institutions of Europe since the seventeenth century. Public posts helped lay the basis for national government and modern civil society. Today, at the beginning of the twenty-first century, public posts remain major pillars of Community life, but they are being eroded and sculpted by currents as inexorable as those of the Industrial Revolution. New technologies, governmental policies, and business practices are reshaping commercial and social interaction across Europe and the world. The regulatory framework for postal services, public and private, must accommodate changing times, or the public posts will become isolated from the needs of society and passed by as historical anachronisms. And the European Community will be deprived of the benefits of a truly affordable, reliable, and efficient universal postal service adapted to the needs of modern society.

The European Union has already taken considerable steps to update the postal laws. The Postal Directive, adopted in 1997 and amended in 2002, establishes a Community-wide guarantee of universal postal service for all citizens.³ It also provides for a ‘gradual and controlled opening of the letters market to competition’ that will lead to ‘full accomplishment of the internal market for postal services’ on a Community-wide basis, perhaps as early as 2009.⁴ The current Postal Directive expires on 31 December 2008. Next year (in 2006), the European Commission must submit to the European Parliament and Council a proposal for the next regulatory framework for postal services.

The present study is one of several studies the Commission has ordered in preparation for next year’s proposal. The main part of the study sets out to answer three questions:

³ Directive 1997/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21 Feb 1998, p. 14; *as amended by* Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to further opening to competition of Community postal services, OJ L176, 5 Jul 2002, p. 21.

⁴ Directive 2002/39/EC, recital 14.

- What are the principles of sound regulatory practice that should guide regulation of the postal sector?
- How well do the Postal Directive and implementing measures adopted by Member States follow sound regulatory principles?
- What would a new regulatory model look like if designed to conform with sound regulatory principles?

The end product of this study is *not* a draft of a new postal directive. Rather, it provides an analytical framework for considering elements of a new directive. Different parties have different views about the proper objectives for postal policy in the future. This study does not presume to say who is right. What the study does offer is guidance on how regulatory measures should be used to achieve whatever objectives are agreed. The new regulatory model is an example of how to regulate well, not a proposal on what to regulate. While the new regulatory model presumes continuation of current Community postal policies, sound regulatory principles could be adapted to implementation other policy objectives as well.

This study is organized into six chapters. This chapter explains how ‘sound regulatory principles’ were developed from a review of Community sources. Chapter 2 offers an evaluation of the current regulatory model, essentially the Postal Directive, in light of sound regulatory principles.⁵ Chapter 3 continues evaluating Member States’ regulatory models in the light of the principles. Chapter 4 summarizes recent market developments and their implications for the future of Community postal services. Chapter 5 presents a new regulatory model that illustrates how sound regulatory principles could be applied to the postal sector of the future. Chapter 6 considers possible implications of sound regulatory principles and the new regulatory model for a new postal directive. Throughout this study, we shall identify factual conclusions which are critical to the analysis but which may be subject to disagreement.

1.2 Sources of sound regulatory principles

By a ‘regulatory model’ for postal services, we refer to a set of principles that describe how the law controls the supply of postal services. Regulatory principles can be thought of falling into two categories, objectives and methods, although the categories are not wholly independent. An ‘objective’ is the ultimate economic and

⁵ This study deals only with elements of the regulatory model for postal services derived from the Postal Directive and implementing measures adopted by the Member States. This study does not consider (1) sector specific regulatory provisions set out in the acts of the Universal Postal Union and the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention); (2) Commission decisions relating to the several REIMS agreements (pertaining to charges for delivery of intra-Community letter post mail); or (3) implications of the General Agreement on Tariffs And Trade (GATT) and the General Agreement on Trade in Services (GATS). These regulatory measures were generally addressed in a separate study for the Commission. See T.M.C. Asser Instituut, *The Study of the Relationship Between the Constitution, Rules and Practice of the Universal Postal Union, the WTO Rules (In Particular the GATS), and the European Community Law* (2004).

social outcome that a regulatory provision is seeking to bring about. A ‘method’ refers to a legal procedure or requirement that determines how a regulatory control is applied. To identify sound principles to guide the objectives and methods of postal regulation, we have reviewed Community legislation, regulatory initiatives, and studies.

1.2.1 EC Treaty

The starting point must be the EC Treaty, the foundation of the common market of the European Union (also referred to in this study as the ‘Community’).⁶ Under the EC Treaty, Community institutions are authorized to adopt legal measures to accomplish certain purposes, including:

- *completion of a Community-wide internal market*: ‘an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’;
- *promotion of an undistorted competitive economy*: ‘a system ensuring that competition in the internal market is not distorted’;
- *harmonization of national laws*: ‘the approximation of the laws of Member States to the extent required for the functioning of the common market’;
- *promotion of social cohesion*: ‘the strengthening of economic and social cohesion’;
- *enhancement of Community competitiveness*: ‘the strengthening of the competitiveness of Community industry’; and
- *development of Community-wide infrastructure services*: ‘encouragement for the establishment and development of trans-European networks’.⁷

The competence of Community institutions to accomplish the goals of the Treaty varies because the Treaty gives Community institutions more guidance and powers in some areas than others. In respect to competition policy, the Treaty sets out specific norms that must be respected by all undertakings, public and private, and by Member States. Moreover, the Commission may, acting alone, address appropriate directives to Member States to ensure compliance with the competition rules.⁸ In contrast, the Treaty is less specific about what measures should be adopted and what national laws should be harmonized in order to bring about an internal Community market. A regulation or directive effecting harmonization of national laws is also more difficult to enact, requiring joint approval by the Council and the Parliament

⁶ Consolidated Version of the Treaty Establishing the European Community, OJ C 325, 24 Dec 2002, p. 33.

⁷ EC Treaty, Article 3(c), (g), (h), (k), (m), and (o).

⁸ EC Treaty, Article 86(3).

acting together in a complex ‘codecision’ procedure.⁹

The competence of Community institutions is also limited by the principle of subsidiarity, or (speaking informally) respect for the primacy of local institutions in dealing with local issues. Article 5 allocates authority between Community institutions, on the one hand, and Member State authorities, on the other, as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

While the basic concept is apparent enough, the implications of subsidiarity for particular regulatory structures are often unclear.

Because the Treaty places great stress on competition policy, the normative requirements of the competition rules are important to postal policy. Article 81 prohibits, with some exceptions, *agreements between undertakings* ‘which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition’. Article 82 forbids any undertaking from committing an *abuse of a dominant position*, a term which includes actions that restrict competition or take unfair advantage of non-competitive circumstances. In general, prohibitions against anti-competitive conduct apply to undertakings owned by Member States in the same manner as to private undertakings. Moreover, Article 87 of the Treaty prohibits a Member State from providing *state aid*, that is, ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market’. Article 87 does not, however, prevent social or developmental assistance in specific circumstances.

Although the EC Treaty binds Member States and citizens of the Community, it does not, under certain circumstances, bind ‘*services of a general economic interest*’—a category which includes universal postal services. Article 16 provides that, without prejudice to other provisions of the Treaty, the Community and Member States ‘shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions’. More substantively, Article 86 provides that the provisions of the Treaty, including the competition rules, shall not apply to public undertakings if application of the Treaty will ‘obstruct’ the performance of a ‘particular task’.

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in

⁹ EC Treaty, Article 95.

particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

For a service of a general economic interest to qualify for an exemption from the EC Treaty under this test, a Member State must demonstrate that any special or exclusive rights granted to the service of general economic interest are ‘necessary to enable the holder of them to perform the tasks of general economic interest assigned to it under economically acceptable conditions.’¹⁰

1.2.2 Community development of general regulatory principles

Meeting in Lisbon in 2000, the European Council agreed to an ambitious economic program for the first decade of the twenty-first century. The goal of the Lisbon Strategy was to transform the Community into ‘the most competitive and dynamic knowledge-based economy in the world’ by 2010. With respect to infrastructure services, the Lisbon Strategy called for efforts to ‘speed up liberalization in areas such as gas, electricity, postal services, and transport . . . The aim is to achieve *a fully operational internal market* in these areas.’ The Lisbon Strategy urged redoubled efforts ‘to simplify the regulatory environment, including the performance of public administration’ and ‘efforts to promote competition and reduce the general level of State aids’. At the same time, the Lisbon Strategy considered it essential that ‘full account is taken of the Treaty provisions relating to *services of general economic interest*, and to the undertakings entrusted with operating such services.’¹¹

To accomplish the economic objectives agreed in Lisbon, the Commission launched the Internal Market Strategy ‘*to allow services to move across national borders as easy [sic] as within a Member State*’.¹² Based on a report¹³ cataloguing the obstacles to establishment of an internal market for services, including postal services, the European Council resolved to press ahead with completion of an internal market for services to improve the competitiveness of the European economy and create conditions conducive to growth and employment.¹⁴

¹⁰ Case C–157/94, *Commission v. Netherlands* [1997] ECR I–5699.

¹¹ Lisbon European Council (23–24 Mar 2000), President’s Conclusions §§ 5, 14, 19 (emphasis added).

¹² An Internal Market Strategy for Services, COM/2000/0888 (29 Dec 2000) at 1. This strategy represented an extension of the Single Market Action Plan, CSE/1997/0001 (4 Jun 1997), endorsed by the Amsterdam European Council (16 Jun 1997). The Single Market Action Plan was less focused on information technologies and Community-wide services.

¹³ Report on the State of the Internal Market for Services Presented under the First Stage of the Internal Market Strategy for Services, COM/2002/0441 (30 Jul 2002).

¹⁴ Brussels European Council (16–17 Oct 2003), Presidency Conclusions at 6. In response, the Commission proposed a draft Services Directive to eliminate obstacles to the free establishment and free movement of services. The draft directive did not address sectors, like the postal sector, covered by specific regulatory measures. Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM/2004/0002 (5 Mar 2004). The draft Services Directive has proved controversial in some Member States and has not yet been agreed.

Table 1. SGEI White Paper (2004): guiding principles for regulation

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- 1) *Enabling public authorities to operate close to the citizens.* Community measures should be limited to areas that, like large network industries, have a clear Europe-wide dimension and present a strong case for defining a European concept of general interest.
 - 2) *Achieving public service objectives within competitive open markets.* The objectives of an open and competitive internal market and of developing high quality, accessible and affordable services of general interest are generally compatible.
 - 3) *Ensuring cohesion and universal access.* Access of all citizens and enterprises to affordable high-quality services of general interest throughout the territory of the Member States is essential for the promotion of social and territorial cohesion in the European Union.
 - 4) *Maintaining a high level of quality, security, and safety.* All citizens and users should be provided with services of general interest of a high quality. Also the physical safety of all consumers, employees, and the public must be guaranteed.
 - 5) *Ensuring consumer and user rights.* A high level of consumer and user rights must be ensured. These include in particular the access to services throughout the territory of the Union, affordability, physical safety, security and reliability, continuity, high quality, choice, transparency and access to information from providers and regulators. Implementation of these principles generally requires the existence of independent regulators with clearly defined powers and duties.
 - 6) *Monitoring and evaluating the performance.* Systematic evaluation and monitoring is a vital instrument for maintaining and developing high-quality, accessible, affordable, and efficient services.
 - 7) *Respecting diversity of services and situations.* The diversity that characterizes different services of general interest and the situations in which they are provided should be given due account.
 - 8) *Increasing transparency.* Transparency ensures that public authorities can exercise their responsibilities and that democratic choices can be made and are respected. The principle should apply to all aspects of the delivery process and cover the definition of public service missions, the organization, financing and regulation of services, as well as their production and evaluation, including complaint-handling mechanisms.
 - 9) *Providing legal certainty.* Improve legal certainty regarding the application of Community law to the provision of services of general interest.
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At the same time, pursuant to the Lisbon Strategy, the Commission extended previous analyses of Community policy towards *services of general economic interest*.¹⁵ The Commission identified five broadly accepted public service elements that Member States and their citizens expect to be discharged by services of a general economic interest: (1) universality, (2) continuity, (3) quality of service, (4) affordability, and (5) consumer protection.¹⁶ In a white paper issued in May 2004, the Commission concluded an extensive public consultation and articulated nine ‘guiding principles’ that it would follow in addressing regulation of services of general interest in the future and ‘orientations’ that it would adopt in implementing

¹⁵ See Services of General Interest in Europe, OJ C 17, 19 Jan 2001, p. 4; Report to the Laeken European Council: Services of General Interest, COM/2001/0598 (17 Oct 2001).

¹⁶ Green Paper on Services of General Interest, COM/2003/0270 (21 May 2003). The phrase ‘service of a general interest’ represents an extension of the phrase ‘service of a general economic interest’ to include non-economic services. It has no basis in the EC Treaty. Despite the title, the main focus of the paper was on services of a general *economic* interest.

Table 2. Mandelkern Report (2001): common principles of regulation

Necessity	Before putting a new policy into effect, public authorities should assess whether or not it is necessary to introduce new regulations in order to effect the policy.
Proportionality	A regulation must strike a balance between the benefits that it confers and the constraints it imposes. Various instruments of regulation enable public authorities to take action in different ways; in general, the instrument most proportionate to the aims of regulation should be employed.
Subsidiarity	Decisions should be taken at a level as close as possible to the citizen, whilst checking that any action to be undertaken at European level is justified compared with the options available at national level.
Transparency	All parties who are interested or involved with regulatory measures should be consulted prior to drafting regulatory measures.
Accountability	All parties involved should be able to clearly identify the authorities that originated the policies and the regulation applying to them.
Accessibility	Consistent, comprehensible regulation, which is accessible to those to whom it is addressed, is essential if it is to be implemented properly.
Simplicity	Regulation should be simple to use and to understand.

these principles.¹⁷ The nine guiding principles are summarized in Table 1.

In separate but related inquiries, Community institutions have generated thoughtful proposals for improving governance and regulatory procedures. Responding to the Lisbon Strategy's call for a 'strategy for further coordinated action to simplify the regulatory environment', Member States established a high-level advisory group consisting of regulatory experts from the Member States and the Commission and chaired by Dieudonné Mandelkern of France. The Mandelkern group's report was organized around seven 'common principles' that should characterize sound regulation.¹⁸ See Table 2.

In the last two years, the Lisbon Strategy and the Community's general regulatory program have been the subject of two additional high-level reviews. In July 2003, a group of eight eminent economists, chaired by André Sapir, an economics professor at the Free University of Brussels, concluded that recent economic performance in the Community was unsatisfactory whether measured against reasonable expectations, past performance in the EU, or current achievement in the United States. Failure to implement the Lisbon Strategy fully could threaten 'the very process of European integration', warned the Sapir report, emphasizing, 'Growth must become Europe's number one economic priority'.¹⁹ Similarly, in late 2004, a

¹⁷ White Paper on Services of General Interest, COM/2004/0374 (12 May 2004). See also Report on the Public Consultation on the Green Paper on Services of General Interest, SEC/2004/0326 (15 Mar 2004).

¹⁸ High Level Group (chaired by D. Mandelkern), *Mandelkern Group on Better Regulation: Final Report* (2001) at 9-10. The report quoted approvingly from a check list of questions drawn up by the Organization for Economic Cooperation and Development (OECD) in 1995. The common thread running through the checklist is the need to avoid unnecessary or unduly costly methods of regulation.

¹⁹ High Level Group (chaired by André Sapir), *An Agenda for a Growing Europe: Making the EU Economic System Deliver* (2003) at i-ii. After a survey of the confusing regulatory landscape, the Sapir committee also noted, 'A clear and appropriate assignment of responsibilities is crucial for the quality

Table 3. 1999 Communications Review: regulatory principles inherent in Community policy

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- 1) Regulation should be based on clearly defined policy objectives, fostering economic growth and competitiveness thereby promoting employment, and ensuring objectives of general interest where they are not satisfied by market forces.
 - 2) Regulation should be kept to the minimum necessary to meet those policy objectives.
 - 3) Regulation should further enhance legal certainty in a dynamic market.
 - 4) Regulation should aim to be technologically neutral.
 - 5) Regulation may be agreed globally, regionally or nationally, but should be enforced as closely as is practicable to the activities being regulated.
-

committee of high level political and business leaders chaired by Wim Kok, former prime minister of the Netherlands, strongly endorsed the continuing importance of the objectives of the Lisbon Strategy. In particular, the Kok report called for ‘urgent action to create a single market for services’.²⁰

1.2.3 Community development of sectoral regulatory principles

Community efforts to develop regulatory policies for services generally have been complemented by several regulatory programs for specific sectors. These provide additional source material for sound regulatory principles. In this study, we reviewed in particular the regulatory principles underlying the regulatory models for the electronic communications and energy sectors in addition to the postal sector. These two regulatory models represent the Community’s most recent and most carefully considered sector specific initiatives. Each has been thoroughly reformed at least once. The regulatory frameworks for the electronic communications and postal sectors are particularly closely related—or should be—because the two sectors are synergistic siblings being moulded by the same technological advances. For this reason, 18 of the 25 Member States have designated the same regulatory body to regulate the postal and electronic communications sectors.²¹

As it turns out, these sector specific regulatory models offer only limited assistance in identifying sound regulatory principles. Of course, the three regulatory models provide useful and contrasting examples of specific approaches to the elements of regulation, including, for example, definition of universal service, regulation of tariffs, and establishment of the national regulatory authority. But in the legislative histories of these regulatory frameworks, there appears to be only one attempt to explicitly state the general regulatory principles that should guide sound regulation: the 1999 Communications Review.

of EU governance.’ Ibid 151.

²⁰ High Level Group (chaired by Wim Kok), *Facing the Challenge: The Lisbon Strategy for Growth and Employment* (2004) at 6, 24-25. The report concludes, ‘The Lisbon strategy is even more urgent today as the growth gap with North America and Asia has widened, while Europe must meet the combined challenges of low population growth and ageing. Time is running out and there can be no room for complacency. Better implementation is needed now to make up for lost time.’ Ibid 6 (emphasis added).

²¹ WIK, *Main Developments* (2004) 88. The total reflects the recently completed French postal law.

The 1999 Communications Review²² was prompted in part by the perception that improving technology had produced two distinct types of changes in the telecommunications market: (1) a merging of national markets into regional and global markets and (2) a convergence of different types of voice, data, and image transmission technologies due in large measure to the rise of the internet. By way of objectives, the study identified promotion of an open and competitive European market for communications services, benefit to the European citizen, and consolidation of the internal market in a converging environment. To accomplish these objectives, the study set out five ‘principles inherent in Community policy’ to underpin the regulation of the electronic communications sector. See Table 3.

1.3 Sound regulatory principles for the postal sector

From our review, it appears that there is as yet no generally accepted list of sound regulatory principles for sector specific regulation in the Community even though there are several different lists of ‘principles’, ‘guidelines’, and ‘strategies’ drawn up for roughly similar purposes. For purposes of this study, we propose a synthesis of these diverse sources into seven ‘sound regulatory principles’. These principles are set out in Table 4. The first two of these principles pertain to the objectives of the regulatory model. The remaining principles address the methods of regulation. The reasoning underlying each principle is explained briefly below.

1.3.1 Specific purpose

The principle of specific purpose is: *The objectives of regulation should be specified clearly and precisely.*

A regulatory model must include a clear declaration of purpose in order to guide its implementation. Indeed, without a definite statement of purpose it is impossible to decide whether the regulation is needed in the first place. As the Mandelkern report observes,

The best way of choosing an appropriate tool from the array of instruments available for implementing public policies is *to clearly formulate the objectives*. The public authority responsible for resolving the problems that it faces effectively, must begin by studying the relevance and *the purpose of any possible action*: do the public authorities wish to intervene in the activities of the players involved? Is it a matter of guaranteeing the stability of an existing situation or on the contrary correcting it?²³

A clear statement of regulatory objective is similarly necessary to allow the Com-

²² Towards a New Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review, COM/1999/0539 (10 Nov 1999).

²³ High Level Group (chaired by D. Mandelkern), *Mandelkern Group on Better Regulation: Final Report* (2001) at 15 (emphasis added).

Table 4. A proposed list of sound regulatory principles

Specific purpose	The objectives of regulation should be specified clearly and precisely.
Policy coherence	The objectives of regulation should be consistent with and supportive of the broader and more fundamental economic, legal, and social objectives of the Community.
Necessity and proportionality	Regulation should introduce the least deviation from the rules of the normal commercial market necessary and proportionate to achievement of policy objectives agreed for the sector.
Market transparency	Regulation should foster transparency that facilitates the operation and governance of selected markets to the maximum extent consistent with sound economics and the commercial rights of operators.
Administrative fairness	The administration of regulation should be impartial, objective, equitable, non-discriminatory, informed, reasoned, and balanced with respect to the costs and benefits borne by affected parties.
Competency	Regulation should be administered by a governmental bodies that are competent to address the issues presented and as close as possible to affected parties.
Legal certainty	Regulatory measures should be as clear, simple, and stable as possible.

mission to weigh the proportionality of any particular implementing measure.²⁴ Hence, the 1999 Competition Review declares, ‘Regulators will need to have very clear objectives . . . if they are to succeed in stimulating and sustaining a market that remains vigorously competitive and meets users’ needs, while at the same time protecting consumers’ rights.’²⁵

1.3.2 Policy coherence

The principle of policy coherence is: *The objectives of regulation should be consistent with and supportive of the broader and more fundamental economic, legal, and social objectives of the Community.*

Policy coherence is matter of logical necessity. If different Community policies are pulling in different directions, they will tend to negate each other, resulting in waste and confusion and ultimately disrepute for the governing authority. To establish policy coherence, there must exist a hierarchy of policies, starting with the policies of the EC Treaty. As noted above, in 2002, the Commission completed a survey of services and the internal market, finding numerous instances in which regulatory policies relating to services were inconsistent with broader economic policies of the Community as expressed in the Lisbon Strategy. Ever since, the Commission has been engaged in a difficult task of aligning policies towards specific services with more general objectives. The task of reviewing specific policies to ensure that they

²⁴ Services of General Interest in Europe, OJ C 17, 19 Jan 2001, p. 4 at paragraphs 22 (‘The role of the Commission is to ensure that the means employed are compatible with Community law. However, in every case, for the exception provided for by Article 86(2) to apply, *the public service mission needs to be clearly defined* and must be explicitly entrusted through an act of public authority. . . . This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and *is indispensable for the Commission to carry out its proportionality assessment* [emphasis added]).

²⁵ Towards a New Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review, COM/1999/0539 (10 Nov 1999) at iv.

are consistent with general policies may be never ending, but that does not diminish its importance.

1.3.3 Necessity and proportionality

The principle of necessity and proportionality is: *Regulation should introduce the least deviation from the rules of the normal commercial market necessary and proportionate to achievement of policy objectives agreed for the sector.*

Some formulation of the principle of necessity and proportionality is included in any list of sound regulatory principles. The Mandelkern report expressed this concept as two principles: necessity (check whether regulation is necessary) and proportionality (balance benefits against constraints). We have joined the two ideas into to one principle because both reflect the regulatory equivalent of the ancient medical command, ‘First, do no harm’.²⁶ In a specific application of this principle, the 1999 Communications Review concluded electronic communications regulation should be the ‘minimum necessary to meet policy objectives’. Indeed, under the EC Treaty, proportionality is especially critical in regulatory measures which may inhibit the free give and take of competition. As the Commission has emphasized:

Proportionality under Article 86(2) [EC Treaty] implies that the means used to fulfil the general interest mission shall not create unnecessary distortions of trade. *Specifically, it has to be ensured that any restrictions to the rules of the EC Treaty, and in particular, restrictions of competition and limitations of the freedoms of the internal market do not exceed what is necessary to guarantee effective fulfilment of the mission.* The performance of the service of general economic interest must be ensured and the entrusted undertakings must be able to carry the specific burden and the net extra costs of the particular task assigned to them.²⁷

In respect to the regulation of economic activity, an absence of sector specific regulation does not leave matters up to the law of the jungle. Any commercial activity for which sector specific regulation is not ‘necessary and proportionate’ is by default regulated by the laws and regulations applicable to the *normal commercial market*, i.e., the general market for goods and services. The regulatory framework for the normal commercial market is the backdrop for sector specific regulation. Insofar as economic regulation is concerned, another way of expressing the principle of necessity and proportionality is: *to achieve policy objectives regulation should rely as much as possible upon, and introduce the least possible deviation in, the normal commercial market.*

Because of the importance of the principle of necessity and proportionality to this

²⁶ Similarly, the venerable OECD checklist for regulations urged government to address the questions: Is government action justified? Do the benefits of regulation justify the costs? See Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, OCDE/GD(95)95 (9 Mar. 1995).

²⁷ Services of General Interest in Europe, OJ C 17, 19 Jan 2001, p. 4 at paragraph 23 (emphasis added).

study, it is worth expanding briefly on the operation of the normal commercial market. The regulatory framework for the normal commercial market includes the laws of the Community and Member States relating to competition, fair trading, employment, intellectual property, business organization, customs, property rights, and so on. It includes, as well, international agreements such as the General Agreement on Trade in Services (GATS). A central feature of the normal commercial market is that the prices and supply of goods and services are determined by competition. Competition and the workings of the normal commercial market will not necessarily meet all of the objectives of Community postal policy, but some of the benefits of a normal commercial market of obvious relevance to this study should be noted:

- *A normal commercial market will tend to eliminate differences in supply among Member States and improve efficiency.* Absent governmental regulations dividing the Community into national markets, competition in a Community-wide market will tend to ‘level up’ the supply of goods and services.²⁸
- *The normal commercial market is innovative.* Many economists argue that the *primary* long term economic benefit of the competitive market is the *routinization of innovation*, especially in oligopolistic markets.²⁹
- *The normal commercial market adapts to changing technology.* Entrepreneurs have a strong incentive to make use of new technologies to gain a competitive edge. Moreover, the pressure for change is neutral between technologies in the sense that it is driven by economic opportunity not predetermined technological preferences.
- *The normal commercial market offers legal certainty with low cost of regulation.* Because they apply to all types of commerce, the legal rules of the normal commercial market are generally well understood and the cost of regulation is relatively low because there is no need for sector specific regulatory authorities and specialized legal expertise.
- *The normal commercial market offers opportunities for entrepreneurs and small and medium-sized enterprises.* The possibility of new entry is more open to an individual with a good idea than a regulated monopoly.

The principle of necessity and proportionality argues, in effect, that regulation should not impede such enormous benefits without good reason to believe that what is gained exceeds what is lost.

²⁸ See, e.g., Second Implementation Report of the Internal Market Strategy 2003-2006, COM/2005/0011 (27 Jan 2005) at 4 (‘When trade is easy, the resulting competition keeps the price of similar goods close together across the EU’); Copenhagen Economics, *Economic Assessments of the Barriers to the Internal Market for Services: Final Report* (2005).

²⁹ For a recent summary by a well known economist see W.J. Baumol, *The Free Market Innovation Machine: Analyzing the Growth Miracle of Capitalism* (2002).

1.3.4 Market transparency

The principle of market transparency is: *Regulation should foster transparency that facilitates the operation and governance of selected markets to the maximum extent consistent with sound economics and the commercial rights of operators.*

A basic premise in Community sector regulation is that the operation of selected markets can be, and should be, enhanced by requiring greater transparency of market-related information than might normally occur. As the White Paper on Services of General Interest declares,

The principle of transparency is a key concept for the development and implementation of public policies regarding services of general interest.

It ensures that public authorities can exercise their responsibilities and that democratic choices can be made and are respected. The principle should apply to all aspects of the delivery process and cover the definition of public service missions, the organisation, financing and regulation of services, as well as their production and evaluation, including complaint-handling mechanisms.³⁰

In the development of sector legislation, transparency is often embraced as a way of making the market work better by creating better informed users. For example, the 1999 Communications Review declares that ‘The full benefits of a liberalised, competitive market *can only be achieved if consumers are sufficiently well informed*’ and ‘Greater emphasis needs to be placed on an obligation for service providers to inform their customers about the quality of service they are entitled to expect’.³¹ Similarly, the Commission’s 2001 proposal to amend the energy directives refers to the role of national regulatory authorities in bringing ‘regulatory continuity and transparency to the market’ and ‘protection of final customers’ basic rights [by ensuring] a minimum set of conditions for contracts, transparency of information, and the availability of low-cost and transparent dispute settlement mechanisms’.³² The role of the regulator is not merely to ensure that universal service providers and other operators comply with transparency requirements but also to gather and distribute data about prices, quality of service, and other market conditions so that users and the general public are better informed about the effects of regulatory policy.³³

³⁰ White Paper on Services of General Interest, COM/2004/0374 (12 May 2004) at 10-11 (emphasis added).

³¹ Towards a New Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review, COM/1999/0539 (10 Nov 1999) at 43.

³² Proposal for a Directive of the European Parliament and Council Amending Directives 96/92/EC and 98/30/EC Concerning Common Rules for the Internal Market in Electricity and Natural Gas, COM/2001/0125 (13 Mar 2001) at 7 (emphasis added), 9.

³³ Transparency is such a multi-faceted concept that a word of clarification is appropriate. As used in this principle suggested, transparency refers to disclosure of information by operators for the purpose of enhancing the operation or governance of the market. This might be termed ‘market transparency’ and may be distinguished from ‘administrative transparency’ or transparency in administrative proceedings. The Mandelkern report emphasized the need for transparency in this second sense, that is, wide consultation with affected parties. In this study, we shall consider ‘administrative

1.3.5 Administrative fairness

The principle of administrative fairness is: *The administration of regulation should be impartial, objective, equitable, non-discriminatory, informed, reasoned, and balanced with respect to the costs and benefits borne by affected parties.*

In the last decade, Community directives have introduced the requirement for independent regulators in several sectors. This trend reflects a consensus that implementation of economic regulation should be impartial and objective. Although a true European code of administrative procedure is still in the future, the basic concepts of administrative fairness appear reasonably well agreed.³⁴

1.3.6 Competency

The principle of competency is: *Regulation should be administered by governmental bodies that are competent to address the issues presented and as close as possible to affected parties.*

This principle addresses the sensitive issue of the allocation of regulatory authority among governmental bodies within the Community. As we have formulated it, the principle of competency reflects both the concept of subsidiarity and the notion of legal competence.

Respect for subsidiarity is mandated by the EC Treaty. Subsidiarity is listed as one of the seven principles of regulation in the Mandelkern Report and embraced as well as by the 1999 Communications Review ('enforced as closely as practicable to the activities being regulated') and the White Paper on Services of General Interest ('enabling public authorities to operate close to the citizens'). Subsidiarity implies that regulation should be administered as much as possible by agencies of Member States or even by agencies of local governments.

On the other hand, as the Sapir Report emphasizes, a governmental body should not address regulatory issues if it lacks clear authority to resolve all questions and enforce its judgements. As the Commission said in its White Paper on Services of General Interest, Community legislation is required for large network industries which have 'a clear Europe-wide dimension and present a strong case for defining a European concept of general interest' although generally legislation should be limited to 'only a regulatory framework that can be implemented and specified by the Member States, taking into account country-specific situations'.³⁵

transparency' to be subsumed under the principle of administrative fairness. On the other hand, as used in European regulatory policy, the idea of market transparency is used in both a general and in a more narrow sense. In the general sense, transparency refers to disclosure of information to the general public. In a more narrow sense, transparency refers to disclosure of information to regulatory authorities but not to the public. The suggested principle refers to both types of market transparency as appropriate.

³⁴ For one summary of proper administrative procedure, see European Ombudsman, 'European Code of Good Administrative Behaviour' (2001).

³⁵ White Paper on Services of General Interest, COM/2004/0374 (12 May 2004) at 7.

1.3.7 Legal certainty

The principle of legal certainty is: *Regulatory measures should be as clear, simple, and stable as possible.*

Hardly anyone would question the proposition that a well-drafted regulatory measure should give reasonable persons as little to differ about as possible. Simplicity is a virtue much valued in the Mandelkern Report: ‘simplicity is aimed at preserving the existence of rules in a certain sector, while making them more effective, less burdensome, and easier to understand and to comply with.’³⁶ On the other hand, simplicity should be balanced by clarity, for excessively simple regulations can be ambiguous. A related virtue of legal certainty was highlighted in the 1999 Communications Review which urged regulations ‘sufficiently stable to allow companies to make investment decisions with confidence but flexible enough to respond to the development of the market.’³⁷ To promote stability, the 1999 Communications Review argued against detailed regulations in a dynamic market.

1.4 Summary: user empowerment

The broad thrust of these seven principles, we believe, is to empower the user in both an economic and governmental sense. These principles protect the user as an economic actor by insisting upon his right to the choices provided by a normal commercial market as much as possible. The power of the individual user is further enhanced by insisting upon market transparency. Where government seeks to curtail the choices of the normal commercial market—the market provided under the laws and regulations applicable to commerce generally—these principles protect the user by requiring a specific statement of the public purpose served by government intervention and clear legal standards. The user as citizen is protected as well by equitable and open administrative procedures and decision making located as close to the parties affected as possible.

³⁶ High Level Group (chaired by D. Mandelkern), *Mandelkern Group on Better Regulation: Final Report* (2001) at 33. See generally, *ibid* 32-40, 61-62.

³⁷ Towards a New Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review, COM/1999/0539 (10 Nov 1999) at v.

2 Current Regulatory Model – Community Level

This chapter evaluates the current Postal Directive from the perspective of each of the seven sound regulatory principles identified in Chapter 1. Our analysis begins with plausible inferences as to the objectives of Community postal policy, for the current regulatory model fails to specify objectives. In light of these inferences, we conclude that the current regulatory model falls short of sound regulatory principles in several respects. However, it should be noted that the shortcomings that we perceive in the current regulatory model derive largely from the changes in the market, and an improved understanding of the market, which the Postal Directive and the Postal Green Paper³⁸ set in motion in the 1990s.

2.1 Specific purpose

2.1.1 Failure to specify

The Postal Directive does not contain an explicit statement of policy objectives. It could do so. Other sector specific directives provide definite guidance on the policy objectives to be achieved.³⁹ Failure to set out an explicit statement of objectives for Community postal policy represents a significant omission that should be addressed.

Conclusion. The objectives of regulation in the postal sector are not specified clearly and precisely in the current regulatory model.

2.1.2 Inferred objectives of current Community postal policy

A clear statement of the objectives of Community postal policy is, nonetheless, indispensable for this study. Without a definition of objectives, a principled evaluation of the current regulatory model is impossible. One cannot, for example, assess whether a given measure is necessary to accomplish the objectives of Community postal policy without a view as to what those objectives are. Since the Postal Directive does not supply an official statement of objectives, we must develop our own working formulation. To develop a plausible statement of objectives for the current regulatory model, we reviewed the Postal Directive and the 2002 amendatory

³⁸ Green Paper on the Development of the Single Market for Postal Services, COM/1991/0476 final (11 Jun 1992) (hereafter, ‘Postal Green Paper’). The 371-page Postal Green Paper was the product of a four-year review of the postal sector by the staff of the Commission. It served as the basis for an extensive public consultation and policy debate that ultimately led to adoption of the Postal Directive in 1997.

³⁹ Directive 2002/21/EC (electronic communications, framework directive), OJ L 108, 24 Apr 2002, p. 33.

directive as well as Commission communications leading to these directives. We have also taken into account statements on the postal sector in the Lisbon Strategy and Community studies on the role of services of general economic interest. Based on this review, we conclude that the current regulatory model for the postal sector is intended to serve two fundamental policy objectives.

The first objective might be expressed as *to protect and promote an affordable, reliable, and efficient universal postal service*. Our reasons for this conclusion are as follows. First, the Postal Green Paper states that the purpose of the proposed directive is to remedy problems by ensuring universal service.⁴⁰ Second, recitals in the 1997 Postal Directive clearly indicate concern for ensuring universal service:

it is essential to guarantee at Community level a universal postal service encompassing a minimum range of services of specified quality to be provided in all Member States at an affordable price for the benefit of all users, irrespective of their geographical location in the Community;⁴¹

Third, recitals in the 2002 amendatory directive indicate a concern for promoting both universal service and its efficiency.⁴² From such indications, it seems reasonable to infer that one fundamental aim of the current regulatory model is to protect and promote a system of postal services characterized by affordability, reliability, efficiency, and universality. This wording for the objective of universal service is not intended to be overly technical. By ‘universal’, we refer to both reasonable accessibility in substantially every area of the Community and delivery to substantially every address in the Community. By ‘affordability’, we refer to reasonable prices that are not beyond means of most persons. By ‘reliability’, we mean constant availability with reasonable, predictable routing times. By ‘efficiency’, we intend that the service provided must be good value for money spent, that is, prices should be reasonably related to reasonable costs. In describing a new regulatory model in Chapter 5, we shall provide more precise definitions for these concepts.

The second postal policy objective implied by postal directives and explanatory documents might be expressed as *to promote a fully operational internal market in postal services*. Our reasons for this conclusion are as follows. First, the Postal Green Paper explicitly aimed to address problems which derive from the absence of an internal market.⁴³ Second, recitals to the 1997 directive repeatedly declare an intent to promote a Community-wide internal market through liberalization of postal services and improving links between national postal systems. For example:

- ‘the *establishment of the internal market in the postal sector is of proven*

⁴⁰ See Postal Green Paper 182-83.

⁴¹ Directive 1997/67/EC, recital 11; see also recital 7 (‘in that the regions deprived of postal services of sufficiently high quality find themselves at a disadvantage as regards both their letter service and the distribution of goods’).

⁴² See Directive 2002/39/EC, recitals 10, 11, 22, 23.

⁴³ See, e.g., Postal Green Paper 183 (lack of harmonization), 184-85 (frontier effect, market distortions).

importance for the economic and social cohesion of the Community’;

- ‘measures seeking to ensure the *gradual and controlled liberalisation of the market* and to secure a proper balance in the application thereof are necessary in order to guarantee, throughout the Community, and subject to the obligations and rights of the universal service providers, the free provision of services in the postal sector itself’;
- ‘to allow, *on an interim basis*, for direct mail and cross-border mail to continue to be capable of reservation within the price and weight limits provided; whereas, *as a further step towards the completion of the internal market of postal services*, a decision on the further gradual controlled liberalisation of the postal market, in particular with a view to the liberalisation of cross-border and direct mail as well as on a further review of the price and weight limits, should be taken by the European Parliament and the Council not later than 1 January 2000;
- ‘performance in terms of quality of services is very unequal amongst Member States’;
- ‘cross-border postal links do not always meet the expectations of users and European citizens, and performance, in terms of quality of service with regard to Community cross-border postal services, is at the moment unsatisfactory’.⁴⁴

Third, the goal of promoting an internal market is embraced directly in the Lisbon Strategy.

Fourth, completion of the internal market by controlled liberalization is explicitly embraced in the amendatory directive of 2002 in such phrases as:

- ‘enhancing the internal market for postal services’;
- ‘to provide at Community level a timetable for a gradual and controlled opening of the letters market to competition’;
- ‘to provide for a step-by-step approach to further market-opening, consisting of intermediate steps representing significant but controlled opening of the market, followed by a review and proposal confirming, if appropriate, the date of 2009 for the full accomplishment of the internal market for postal services or determining a relevant alternative step towards it in the light of the review results’; and
- ‘setting a timetable now, aimed at further steps towards the full accomplishment of the internal market for postal services, is important for both the long-term viability of the universal service and the continued development of modern and

⁴⁴ See Directive 1997/67/EC, recitals 2, 6, 7, 8, 19.

efficient posts’.⁴⁵

From such indications, it seems reasonable to infer that a second fundamental aim of the current regulatory model is to promote, at the end of an appropriate transition process, a fully operational internal market in postal services. The phrase ‘fully operational’ market is taken from the Lisbon Strategy. We understand this phrase to refer to a liberalized market that offers essentially the same commercial freedoms for service providers and the same choices for users as would be presented in a normal commercial market operating under the laws and regulations that regulate general commerce in a Member State. The Community will achieve a ‘fully operational internal market’ if postal operators can compete for customers in all areas of the Community without distinctions between cross-border and national services. A ‘fully operational internal market’ does not, however, imply postal services will be identical in all areas; in a normal market, suppliers adjust to differences in the needs and desires of customers in different areas.⁴⁶

Our confidence in this formulation of the objectives of Community postal policy is reinforced by its similarity to the following summary of the purpose of the Postal Directive recently offered by the Commission: ‘The purpose of the Postal Directive is to *complete the internal market for postal services and to ensure, through an appropriate regulatory framework, that efficient, reliable and good-quality postal services are available throughout the European Union to all its citizens at affordable prices.*’⁴⁷

Conclusion. From the postal directives, their legislative history, and other sources two major objectives may be inferred: (1) to protect and promote an affordable, reliable, and efficient universal postal service and (2) to promote a fully operational internal market in postal services. Although this statement of objectives may be plausibly inferred, it would be preferable for the regulatory model to provide a more definitive statement.

2.1.3 Other interpretations of the objectives of current Community postal policy

Because of the central importance of the objectives inferred for current Community postal policy to this analysis, it is worthwhile to consider alternative interpretations. Some observers might argue that our interpretation suggests a more flexible definition of universal service than implied by the Community policy. For example, although the Directive requires delivery by universal service five days per week, we have not treated five-day delivery frequency as an *objective* of Community policy

⁴⁵ Directive 2002/39/EC, recitals 10, 14, 22. See also Proposal for a European Parliament and Council Directive amending Directive 97/67/EC with Regard to the Further Opening to Competition of Community Postal Services, COM/2000/0319 final (30 May 2000).

⁴⁶ We do not understand ‘fully operational market’ to imply government intervention to *promote* competition when competition does not exist, for example, when a market is controlled by a market dominant operator. In a normal commercial market, the competition rules impose extra obligations on a market dominant undertaking, but they do not imply a positive policy of promoting competition.

⁴⁷ Communication from the Commission to the Council: The Universal Postal Union Congress 2004, COM/2004/0 398 final (27 May 2004), paragraph 23.

but rather than as a secondary measure implementing a more basic goal of ‘affordable, reliable, and efficient universal postal service’. In our view, reading the Postal Green Paper and the Directive as a whole, the purpose that emerges is more one of meeting the needs of users rather than imposing a specific delivery frequency standard. There is no explicit justification for a five-day delivery frequency in the Postal Green Paper, and recitals to Directive 1997/67 do not highlight the five-day delivery frequency as a matter of specific concern. For similar reasons, we considered the cross-border quality of service standards embodied in the Directive to be secondary to a larger purpose rather than as an essential objective.⁴⁸ On the other hand, we have treated ‘promotion of a fully operational internal market’ as a primary objective of current policy for reasons mentioned above. Others, however, could point out the amended Directive does not definitively declare that all reserved areas should be ended in 2009 or at any fixed date and argue that the current Community postal policy goes no further than embracing liberalization and the internal market as measures secondary to the single, overriding objective of protecting universal service.⁴⁹

If one adopts a different interpretation of the objectives of current Community postal policy, then an evaluation under sound regulatory principles will naturally yield different conclusions. For example, in the analysis below, we conclude that a rigid five-day delivery frequency standard is *not* necessary and proportionate to ensuring affordable, reliable, and efficient universal postal service or fully operational internal market.⁵⁰ If, on the other hand, the five-day delivery frequency is considered a fundamental objective of Community postal policy, then one must necessarily come to a contrary conclusion.

The fact that reasonable persons may disagree about the specific objectives of current Community postal policy is not, however, crucial to this study. The usefulness of sound regulatory principles does not depend on the precise objectives of Community postal policy. Sound regulatory principles may be fruitfully applied to different policy objectives. In Chapter 6, we shall explicitly consider how the results of our analysis, the ‘new regulatory model’, may be modified to accommodate different policy objectives, including different interpretations of current policy objectives.

Conclusion. Alternative interpretations of the objectives of current Community postal policy are possible and would imply different results in the evaluation of the current regulatory model and development of the new regulatory model. The implications of alternative objectives for Community postal policy are considered in Chapter 6.

⁴⁸ According to the Directive, cross-border quality of service standards may be adjusted. Postal Directive, Article 16.

⁴⁹ The question of how strictly or loosely to interpret the Directive arises in other cases as well. See, for example, the scope of the exception for exceptional circumstances in the requirement for universality (section 2.3.1(d), page 41, below); the authority of the Member State to require uniform tariffs (section 2.3.1(e)(iii), page 49, below); and the relationship between the limitation on the reserved area and the right of the Member State to adopt an interventionist universal service obligation (section 2.3.2(a)(ii), page 63, below).

⁵⁰ See section 2.3.1(d), page 41, below.

2.2 Policy Coherence

The primary objective of economic and legal policy in the Community appears to be creation of a Community-wide economy characterized by undistorted competition to the maximum degree consistent with social cohesion. This is the objective enshrined in EC Treaty and confirmed by the European Council in the Lisbon Strategy. Both the Sapir and Kok committees reviewed the Lisbon Strategy and strongly endorsed its essential soundness.

At the same time, the Lisbon Strategy and subsequent declarations by the Council and Commission have emphasized the important role in the life of the Community entrusted to services of general economic interest. While there is no consensus on the ingredients of a common framework for services of general economic interest, there is broad agreement that they are needed to ensure Community cohesion and universal access to critical infrastructure facilities. Beyond this, the mission of a particular service of general economic interest must be adapted to the characteristics of its sector and to the needs of individual Member States. In every case, however, while ensuring the viability of a service of general economic interest, ‘development of trade must not be affected to such an extent as would be contrary to the interests of the Community’.⁵¹

Are the objectives inferred for postal regulation consistent with the broader, more fundamental economic, legal, and social objectives of the Community? Generally, we believe the answer is ‘yes’. Current postal policy embraces both of the main themes of general Community policy: accomplishment of the internal market and protection of key public services. On closer examination, however, we conclude that the objectives of current postal policy do not fully reflect the *relationship* between these themes that is manifest in broader Community policy. In the overall economic and legal policies of the Community, the goal of completing the internal market establishes an overarching guide for the public service objectives entrusted to services of general economic interest. This is not to say that every small step towards completion of the internal market will inevitably trump a large step towards serving a general economic interest, but only that the primacy of completing the internal market is recognized to place bounds on the means which ensure general economic interests.⁵² The objectives of current postal regulation do not appear to embody this concept.

A specific example will help to illustrate this observation. Article 7 of the Postal Directive declares that a Member State may, within certain price and weight limits, establish a reserved area for its USP ‘*to the extent necessary to ensure the maintenance of universal service*’. From the standpoint of larger Community policy, however, this provision could be considered an incomplete qualification because it takes no account of the larger Community interest in completing the internal market. It would be more consistent with general Community policy to continue the proviso

⁵¹ EC Treaty, Article 86(2).

⁵² See, e.g., the discussion of the relationship of these objectives in *Services of General Interest in Europe*, OJ C 17, 19 Jan 2001, p. 4 at paragraphs 22-23.

in Article 7 by adding a further condition that a reserved area must ‘*not affect the development of trade to such an extent as would be contrary to the interests of the Community*’.⁵³ Such a balance of objectives should, it seems, also inform other elements of the current regulatory model for postal services.

Conclusion. The two basic objectives inferred for Community postal policy are consistent with broader economic and legal policies of the Community. Nonetheless, the careful balance between internal market and public service objectives articulated in broader Community policies is not fully reflected in the current regulatory model for the postal sector.

2.3 Necessity and proportionality

The principle of necessity and proportionality implies a fundamental ‘bottom up’ review of the current regulatory model. What regulatory interventions are truly needed to ensure that the postal sector will accomplish the objectives of Community postal policy? In principle, sector specific regulation should be avoided whenever the objectives of Community postal policy can be achieved by the normal commercial market, that is, by the system of laws and regulations that governs most commercial activities.

2.3.1 Rules on provision of services

a) Postal services included in universal service

The Directive declares that ‘each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities’: (1) conveyance of *postal items* weighing up to 2 kilograms and (2) conveyance of *postal packages* weighing up to 10 kilograms (or 20 kilograms at the discretion of the Member State). *Postal items* include all types of addressed things, including items of correspondence, books, catalogues, newspapers, periodicals, and postal packages. *Postal packages* seems to refer only to addressed boxes of merchandise.⁵⁴

The Directive’s definition of the postal services included in universal service is confusing. A large envelope of documents weighing 3 kilograms is apparently not guaranteed universal service because it is neither a ‘postal item’ weighing less than 2 kilograms nor a ‘postal package’. Why ensure universal service for a 3-kilogram package of merchandise but not a 3-kilogram envelope of documents? Indeed, why is there any distinction between postal articles weighing less than 2 kilograms and those weighing more than 2 kilograms?

The root of the problem is that the Directive combines two different types of postal services to describe universal service: letter post service and parcel service. *Letter post*, a term traditionally used by postal authorities, refers to a service that was

⁵³ See also the discussion of proportionality in section 1.3.3, page 25, above.

⁵⁴ Postal Directive Articles 2, 3(4).

originally designed to provide regular transport, and later collection and delivery, of addressed *letters*, i.e., individualized written communications.⁵⁵ The letter post also conveys periodic publications (e.g., newspapers and magazines) and advertising matter (non-individualized printed matter including direct mail and catalogs).⁵⁶ For extra reliability and safety, letter post items may be registered and insured. Since some documents are fairly large, a letter post can also convey small parcels, traditionally called *small packets*. Although weight limits for letter post services vary from country to country, the international mail uses 2 kilograms for most items admitted to the letter post. Thus, the reference to postal items weighing up to 2 kilograms in the Directive's definition of universal service refers to what is more traditionally called a *letter post* service.

Reference to *postal packages* weighing up to 10 kilograms refers a distinctly different product, *parcel post service*. The original motivation for parcel post service was public demand for a means for transmitting and receiving small parcels that was as simple and convenient as the letter post. However, the operations required to collect, transport, and deliver parcels are quite different from those required for letter post items. While it is easy for providers of letter post services to collect, transport, and deliver a few parcels with the letter post, as soon as the volume of parcels grows substantial, intrinsic operational differences require separate parcel handling facilities.

In advanced economies, most parcels are collected, sorted, transported, and delivered separately from the letter post. These services, which might be termed 'commercial parcel services', are not materially different whether they are provided by a public postal operator or private parcel company; in many Member States public and private undertakings compete intensely for this business.⁵⁷ Indeed, there appears to be no operational reason why USPs could not provide such services through substantially separate subsidiaries.⁵⁸

At the same time, traditional parcel post services remain important to the public. Post

⁵⁵ Technically, the term *letter* traditionally referred only to 'current and personal correspondence', and the archaic term *commercial papers* referred to other documents. In this study, we use *letter* more loosely, and perhaps more in keeping modern usage, as equivalent to what the Postal Green Paper called 'individualized communication'. Page 201-03.

⁵⁶ The letter-post may be used to deliver unaddressed notices, although substantial quantities of unaddressed mail are delivered outside the letter post. Unaddressed mail has become a significant business in the Community. The majority of the national postal operators distribute unaddressed items. WIK, *Main Developments* (2004) at 103. In 2003, more than 70 billion items of unaddressed items were distributed in Europe, about one third by national postal operators. Nader, 'Mail Trends' (2004) at 20. A recent report in Sweden concludes that 'Almost half the number of items of mail on the Swedish postal market consist of unaddressed direct advertising.' Sweden, Ministry of Industry, Employment and Communication, *Postmarknad i förändring* [The Changing Postal Market] (25 Jan 2005) at 32.

⁵⁷ See NERA Economic Consulting, *Economics of Postal Services* (2004) at 27-29; WIK, *Main Developments* (2004) App. C, table 5.

⁵⁸ In 2001, Deutsche Post agreed to establish a separate subsidiary to provide commercial postal services to meet concerns of the European Commission relating to the competition rules. Commission Decision 2001/354/EC of 20 March 2001, OJ L 125, 5 May 2001, p. 27 (Deutsche Post mail order parcels).

offices and postal agencies collect individual ‘over-the-counter’ parcels together with letter post mail. In less developed economies, these parcels may still be transported and delivered with the letter post. In more developed economies, however, most ‘over-the-counter’ parcels are forwarded to separate parcel facilities for transport and delivery. Nonetheless, in all Member States, some parcels are delivered with the letter post in areas receiving few parcels.⁵⁹ It is thus the parcel post service that guarantees universal parcel service rather than the commercial parcel service. It is the parcel post service that ensures accessibility for all and delivery to all. The parcel post system fills in the spots not covered by commercial parcel services.

To ensure universal service for parcels, it appears unnecessary for the Community to intervene in a fully functioning competitive market in commercial parcels. To do so would be inconsistent with the principle of necessity and proportionality. It is necessary only to guarantee continuation of the parcel post, that is, to ensure that there is a universal letter post available to collect parcels at all points in the Community and to deliver parcels in all areas in the Community where separate parcel delivery services are unavailable.⁶⁰

Conclusion. The Directive defines the services encompassed by universal service in a confusing and unnecessarily broad manner. In principle, universal service should include letter post services and parcel post services for all types of postal articles weighing up to a specified weight.

b) Designation of universal service providers

Article 4 of the Directive requires Member States to designate one or more postal operators as *universal service provider(s)*. The term ‘universal service provider’ appears 28 times in the Directive. Indeed, the term *public postal network* is defined as ‘the system of organisation and resources of all kinds used by the universal service provider(s)’.⁶¹ Seemingly, postal operators not designated USPs are not considered full members of the postal infrastructure.

Designating a postal operator as a USP may severely distort the market. In 2001, a private operator (United Parcel Service) complained to the Commission that prices charged by Deutsche Post for its mail order parcel service were below cost and therefore subsidized by high prices charged customers of market dominant products. Deutsche Post had built 33 parcel sorting centers and 476 parcel reception facilities in Germany, and the mail order service accounted for more than 70 per cent of the use of these facilities. To decide whether prices for mail order parcel service were below cost it was necessary to decide what portion of the capital cost of these

⁵⁹ See, e.g., Ibid. point 11. For Deutsche Post, even parcels sent from one person to another are transported by a means of a separate parcel network.

⁶⁰ For purposes of defining the universal service, the term *parcel* should include all of the types of items admitted to the letter post. This definition should not limit the right of postal operators to provide separate letter post and parcel post tariffs for items weighing less than two kilograms.

⁶¹ Postal Directive, Article 2.

facilities should be allocated to cost of the mail order parcel services. The Commission's answer was as follows:

Even if DPAG were no longer to offer mail-order parcel services, it would still be obliged vis-à-vis every mail-order customer to provide catalogues and parcels over the counter within a specified delivery target. *This follows from the universal service obligation* whereby every potential postal user is entitled to receive from DPAG over-the-counter parcel services of the prescribed quality at uniform prices. . . .

*The legal obligation to stand ready to offer a standard parcel delivery service at a uniform tariff increases the proportion of common fixed costs that a carrier of last resort bears in comparison to companies who do not have this obligation. Costs arising from the legal obligation to maintain an option for everyone to have parcels carried at a geographically averaged tariff also arise even if commercial parcels not dealt with at the postal counter were discontinued. This means that these capacity costs are not attributable to a specific service and must be treated as DPAG's common fixed costs. Common fixed costs cease to exist only where the statutory obligation no longer applies.*⁶²

Thus, the Commission reasoned that as long as Deutsche Post was designated USP, it was required to build an elaborate parcel transportation infrastructure so that it could offer *potential* customers an over-the-counter parcel service that met legally required service-quality standards. Designation as USP thus required Deutsche Post to make a costly investment that might never be efficiently utilized. At the same time, because Deutsche Post was designated USP, it was allowed to charge the entire capital cost of 33 parcel sorting centers and 476 parcel reception facilities to customers of market dominant products. If Deutsche Post were a normal parcel company with a dominant position and not designated a USP, it seem improbable that such a cost allocation scheme could justify otherwise abusive prices.

The USP designation thus created an unlevel playing field for both the USP and its competitors. Were these distortions necessary in order to assure universal service? The apparent answer is 'no'. There is a large demand for mail order parcel service in Germany and several large parcel companies. It cannot reasonably be doubted that one or more of these companies would provide mail order parcel services in the normal commercial market even if Deutsche Post did not. Nor is there any reason to doubt that Deutsche Post could contract with companies providing mail order parcel service in order to transport over-the-counter parcels. In short, there is no reason to believe that designation of Deutsche Post as the USP is necessary to assure universal over-the-counter parcel service since the core of the service—a network of parcel sorting centers and reception facilities—would almost surely have been built by someone in the normal commercial market. As postal markets become more

⁶² Commission Decision 2001/354/EC of 20 March 2001, OJ L 125, 5 May 2001 (Deutsche Post mail order parcels) at points 8-9 (emphasis added).

competitive, the resulting distortions will consequently increase.⁶³

Conclusion. Designation of a postal operator as the ‘universal service provider’ for all purposes results in significant distortions in postal markets. Member States should not designate a postal operator as a USP unless there is no other feasible way to ensure universal service.

c) Access to universal service

Article 3(2) of the Postal Directive requires that access to universal services ‘takes account of the needs of users’. Standing alone, this provision requires no deviation from the normal commercial market since commercial operators necessarily take into account the access needs of their customers. At Community-level, this provision appears to provide reasonable assurances about the level, continuity, and transparency of access conditions without requiring unnecessary deviation from the normal commercial market.

Conclusion. The general standards on accessibility of universal service in the Directive are necessary and proportionate and should be retained.

d) Frequency of universal service

Article 3(3) of the Postal Directive requires Member States to ensure that universal service provides ‘every working day and not less than five days a week . . . save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities . . . one delivery to the home or premise of every natural or legal person [except] in circumstances or geographical conditions deemed exceptional’ by the NRA.⁶⁴ While the breadth of the exception for exceptional circumstances or geographic conditions are not entirely clear, the thrust of the rule seems to require Member States to ensure delivery of all universal services to all addresses at least five days per week in almost all circumstances.⁶⁵

⁶³ For this reason, the new regulatory model set out in Chapter 5 does not provide for designation of a postal operator as a general USP responsible for universal service throughout a Member State. Instead, the new model obliges the NRA to contract with (or if necessary, compel) a postal operator to provide specific universal services where the system of post operators fails to sustain an acceptable level of universal service voluntarily. See section 5.6, page 155, below.

⁶⁴ Postal Directive, Article 3(4), also requires one ‘clearance’ each working day, meaning one collection of postal items deposited at access points. The clearance operation is far less expensive than delivery, and hence there is less economic justification for providing less-than-daily clearance. In principle, however, the argument in the text for allowing Member States a reasonable level of flexibility for delivery, provided a basic level of reliability is maintained, could be applied as well to extraordinarily costly clearance operations if any.

⁶⁵ In one Member State, Greece, about 7 per cent of the Greek population do not have daily delivery. Some observers would argue that the practice of Greece demonstrates that the Directive, correctly interpreted, permits Member States broad latitude in creating exceptions to the requirement that universal service must provide delivery at least five days per week. In this section, however, we have assumed that the ‘exceptional circumstances’ provision in the Directive should be interpreted less broadly. Our narrower interpretation appears to be more consistent with the practice in other Member

Requiring five-day-per-week delivery at every address in the national territory may impose substantial financial burdens on some Member States, especially in the future if the nature of universal services changes. Available evidence strongly suggests that, even in the absence of the Directive's requirement, USPs will continue to provide at least five-day-per-week service in the national territory generally even in countries with relatively low mail volumes.⁶⁶ Indeed, the requirement for five-day per week delivery in the Directive may have been intended as no more than a reflection of existing practice and not as an attempt to impose a delivery frequency standard that would otherwise not be sustained.⁶⁷ Nonetheless, the cost of postal delivery (as opposed to collection and transport) can vary substantially from place to place, and delivery accounts for 50 or more per cent of the cost of end-to-end postal service. Delivery is especially expensive in areas where the number of items per delivery stop is low or delivery stops are hard to reach and far apart. Although such areas probably account for a very small percentage of all postal items, the cost of serving them daily may amount to a significant fraction of all delivery costs.⁶⁸

To visualize the effect of imposing a five-day-per-week standard, consider the case of relatively large and sparsely populated European state, Norway. In 2002, the government and Norway Post estimated that in the absence of any universal service obligation, Norway Post would likely continue to serve the national territory at a uniform retail rate for letter post items and parcels. The only exception to rate uniformity would be for letter post items and parcels sent to Spitsbergen, an extremely isolated archipelago far inside the Arctic circle. Rather than introducing a non-uniform rate in the rest of Norway, Norway Post anticipated that it would reduce the frequency of service to 15 per cent of households from six days to five days per week. For about 5 per cent of households, Norway Post would reduce service to only two days per week. Norway Post calculated that the universal service burden, amounting to about 2 per cent of total postal revenues, was caused mainly by providing these additional deliveries.⁶⁹

States. In a study last year, Slovenia reported 1 per cent of the population without daily delivery; otherwise, no other Member State reported more than 0.05 per cent. WIK, *Main Developments* (2004), Appendix B, Table 8. See section 3.2.1(d), page 85, below. If, however, one adopts a broader interpretation of 'exceptional circumstances' provision, then some of the conclusions in this section would have to be modified accordingly.

⁶⁶ USPs in Estonia (50 domestic letter post items per capita in 2002), Italy (103), Malta (132), Slovenia (187), and Spain (127) appear to provide delivery six days per week even though only five-day service is required by law; all of these Member States have mail densities less than the Community average (196). WIK, *Main Developments* (2004) Appendix B, Table 8 and Appendix C, Table 20. See section 3.2.1(d), page 85, below.

⁶⁷ See Postal Green Paper 163 ('all postal administrations in the Community deliver either five or six days per week, while some also deliver more than once per day at least in some areas').

⁶⁸ This conclusion follows from an examination of analyses of the economics of postal delivery in Italy and France, although these studies do not quantify the cost of providing delivery frequency that would not be provided in a normal commercial market. For Italy, see R. Cohen, et al, 'A Comparison of the Burden of Universal Service in Italy and the United States' (2002). For France, see S. Bernard et al., 'Delivery Cost Heterogeneity and Vulnerability to Entry' (2002).

⁶⁹ See K. Bergum, 'The Universal Service Obligation: a Strategic Perspective on Service Level and Cost Calculating the Burden of the USO—the Norwegian Experience' (2002). The author is director of regulatory affairs for Norway Post.

Like Norway, Member States might find the cost of universal service may be substantially reduced or eliminated by reducing delivery frequency below five days per week in a relatively small portion of the country. For social reasons,⁷⁰ some Member States may opt to maintain five-day-per-week delivery to even the most costly areas. On the other hand, other Member States may conclude that less-than-daily postal delivery service still meets the basic needs of society.

From the perspective of Community postal policy, the question is this: Is it necessary and proportionate to accomplishment of Community postal policy to *prohibit* Member States, in all but the most exceptional circumstances, from allowing reductions in the delivery frequency of universal service below a five-day-per-week standard? In our view, the answer is ‘no’. Our reasoning is as follows.

Reducing delivery frequency may produce benefits for overall universal service. If mailers are required to pay higher rates to cover the costs of delivery in areas that are especially expensive to serve, they may reduce their use of the mail thereby further increasing the price of mail for all.

In an area receiving reduced delivery frequency, the adverse effects may be relatively small. The principal effect of reducing delivery frequency is to increase routing time, but the net effect is difficult to predict and unlikely to be as drastic as may appear at first sight.⁷¹ The magnitude of the increase in routing time depends upon the existing routing time. For D+1 mail, changing from five days to three days per week delivery will increase routing time by about 40 per cent. (From a national perspective, however, three-day delivery in a few low volume areas is likely reduce national D+1 performance by only a few per cent.) On the other hand, for D+3 mail, the result may be to increase routing time by 10 per cent or less depending on specific transportation arrangements, and the effect on national D+3 performance may be negligible.⁷² In fact, probably less than 40 per cent of mail is actually delivered in D+1, so the overall impact of adjustments in delivery frequency in selected areas may not be substantial.⁷³ Moreover, business mailers can mitigate the effect of less-than-daily delivery on routing time by timing their mailings to avoid non-delivery

⁷⁰ The most costly areas are likely to be rural or poor since mail volume increases with the wealth of the addressees. For Germany, see W. Elsenbast, ‘Infrastrukturverpflichtung im Postbereich [Universal Service Obligation in the Postal Sector]’ (1996). In the United States, high income households send and receive close to four times the mail volume of low income households. See F. Nader, ‘Mail Trends’ (2004), p. 31. See also M. Kolin and E. Davis, ‘Mail Goes Where the Money Is’ (1999).

⁷¹ Obviously, daily delivery is required to provide D+1 service (delivery the first business day after posting).

⁷² These calculations measure routing time in business days, i.e., five days per week. For D+3 mail, it is assumed that mail is transported on Saturday and Sunday. If mail is not transported on Sunday, D+3 mail is 25 per cent slower due to the change from 5-day to 3-day delivery. The actual effects on routing time will be affected by the specifics of transportation networks.

⁷³ There are no figures on the percentage of Community letter post mail overall is delivered in D+1. The figure in the text is WIK’s best guess based on the data available from two previous studies of universal services in the Community, *Quality of Service* (2003) and *Main Developments* (2004). Of course, this estimate does not imply that 40 per cent of mailers need D+1 delivery; some mailers cannot choose a lower priority service.

days.⁷⁴ More generally, overall routing time is the result of several factors, including the amount of employee overtime, the use of sorting machines, the structure of the transportation network, etc. Money saved by reducing delivery frequency in high cost areas could be used to improve the routing time for all services, including the areas affected by reductions in delivery frequency.

In addition purely operational matters, it appears possible that some Member States might consider changes in the overall communications market and reasonably conclude that the public interest is (or will be) no longer best served by mandating the shortest possible routing times for universal service to every address in the national territory. Factors which could suggest such a conclusion include the following:

- Widespread availability of telephones, and more recently mobile telephones, has drastically reduced the role of the post as a conveyor of urgent communications.⁷⁵
- Development of express services has further reduced the role of the post as a conveyor of urgent communications.
- Proliferation of second class (non-priority) letter post services demonstrates that for a substantial percentage of the letter post, speed of delivery is not a primary concern.⁷⁶
- For many bulk business mailers, it is the timing of delivery rather than routing

⁷⁴ Postal operators could also mitigate the effects of less-than-daily delivery by offering delivery on non-delivery days for an extra fee (traditionally called *expres* or special delivery service) or telephonic notice to the addressee. Moreover, in high cost areas, it might be possible to offer addressees a delivery service option similar to the first class/second class service option presented to mailers. For example, addressees might be given less than five-day-per-week delivery for free and a full five-day-per-week delivery for an additional monthly charge. See C. Schwarz-Schilling, 'Pricing Schemes in Liberalized Postal Markets' (2001).

⁷⁵ For example, in 2000, in the Netherlands, an official advisory group told the government that daily postal delivery was no longer necessary to the public interest, pointing out 'the market offers many alternatives already for receiving and forwarding messages, such as e-mail, fax, and (mobile) phone. . . . Therefore the importance of postal services to the consumer and society decreases'. In the view of the group, three-day routing times, implying at least twice weekly delivery, would provide a sufficient 'safety net'. See Netherlands, Advisory Council for Transport, Public Works and Water Management, 'A Postal Market Without Boundaries' (2000) (English summary). The Advisory Council is a broad based committee of experts drawn from public administration, scientific community, business and community organizations. However, this recommendation seems inconsistent with a more recently published survey which concludes that Dutch consumers broadly favour D+1 postal service and at least five day per week delivery. See TNS Nipo Consult, 'Betekenis en belang van postdienstverlening.' [Meaning and Importance of the Postal Services] (2004). It should be recalled that, unlike in several Member States, consumers in the Netherlands do not have a choice between a priority service and a less expensive, nonpriority service.

⁷⁶ In countries where a second class service is offered, the mail volume of second class mail is significantly higher than of first class mail. This appears to be the case, for example, in the southern European countries (Portugal, Italy, Greece), France, Poland, and the United Kingdom. Even Sweden Post has experienced an ongoing decline in first class mail while second class mail has increased. Second class mail volume is now higher than first class mail. See Sweden, National Post and Telecomm Agency, 'Den Svenska Postmarknaden' [The Swedish Postal Market] (2004).

time that is important.⁷⁷

Of course, these factors cannot rule out the possibility that daily postal delivery may be of continuing importance to some users. Determining the public interest in respect to delivery frequency is necessarily a matter of balancing some interests against others.

If a Member State may reasonably and justifiably conclude that its national public interest is best served by a routing time standard that is less than the fastest possible, *then* there is no objective reason to *require* the Member State to keep one factor, delivery frequency, fixed at very high service levels while permitting adjustment of other factors affecting routing time.⁷⁸ By rigidly requiring daily delivery of universal service, the Directive arbitrarily constrains one factor that Member States and USPs should be able to adjust in aligning routing time with the needs of society. It also deprives Member States, NRAs, and USPs of one of the most sensible means of managing the cost of universal service.⁷⁹

The possibility of giving Member States more discretion to allow less-than-daily delivery in selected areas raises two other possible issues. First, daily newspapers require daily delivery. If the universal postal service does not provide delivery every day in a particular neighborhood, then a daily newspaper may have to contract for its own delivery services on days when the postal service does not deliver. The extent to which daily newspapers are adversely affected by less-than-daily universal service will depend upon individual circumstances. The needs of daily newspapers and the operation of a universal postal service do not mesh well under the best of circumstances.⁸⁰ Depending on specific circumstances, it may be less expensive for society to subsidize separate delivery for daily newspapers on selected days than to pay for daily delivery for universal postal service. In any case, it is impossible to declare categorically that in all cases in all Member States the needs of daily newspapers outweigh other considerations which argue for allowing Member States some flexibility in defining the delivery frequency of universal service.

In addition, some persons may object that as a matter of principle Member States should not have discretion to introduce less-than-daily delivery of universal services to any address because of the effect on mailers in other Member States. This is purely a question of principle, for actual effects will be vanishingly small. The

⁷⁷ NERA Economic Consulting, *Economics of Postal Services* (2004) at 157.

⁷⁸ In Denmark, at the end of 2004, the quality of service target for the percentage of mail in the fastest standard category of service which should be delivered in D+1 (one business day after posting) was reduced from 97 to 93 per cent. Executive Order No. 1312 (14 Dec 2004). In Finland, the corresponding target for the USP was recently reduced from 95 to 85 per cent. HE 241/2004 vp. See section 3.2.1(f), page 89, below.

⁷⁹ Nor would we propose that a new regulatory model should prohibit Member States from adopting high quality of service standards if they deem them appropriate. Rather we would propose to allow Member States greater discretion in this area. See section 5.4.2(a), page 135, below.

⁸⁰ A daily newspaper should be delivered before breakfast, yet as a practical matter it is impossible to deliver all mail before breakfast. For this reason, newspapers are often delivered separately from the mail even when daily postal delivery is available and when USPs provide delivery. For such reasons, daily newspapers form a very small portion of postal items for most public postal operators.

routing time for cross-border mail is already slower than for national mail.⁸¹ Intra-Community mail is only about 4 per cent to all mail. If a Member State permits less-than-daily delivery in a small number of areas affecting a few per cent of mail volume (the worst case likely), then routing time will be marginally increased for a small per cent of a small per cent of Community. The overall effect on the quality of service for the Community as a whole will be undetectable. While individual circumstances may possibly warrant regulatory intervention, a strict delivery frequency standard for national mail set at Community level hardly seems a necessary or proportionate means of protecting the quality of service for intra-Community mailers.

Conclusion. Requiring five-day-per-week delivery to every address in the national territory may impose substantial financial burdens on some Member States, especially in the future if the nature of universal services. It is not necessary or proportionate to *prohibit* Member States and USPs from adjusting delivery frequency in selected areas as one means of ensuring a quality of service that reflects the needs of society.

e) Prices of universal service

The Directive establishes several substantive standards for the prices of universal postal services or authorizes Member States to do so. These rules address affordable rates, cost-based tariffs, uniform tariffs, transparent and non-discriminatory pricing, special tariffs, and terminal dues.

(i) Affordable rates

Articles 3 and 12 of the Postal Directive require that prices of all universal services must be ‘*affordable for all users*’. This concept of affordability appears necessary to the objectives of Community postal policy. If access to universal postal service is essential to participation in civilized society—why else ensure universal postal service in the first place?—then it would represent a failure of the social order if the price of universal postal service were beyond the means of a significant portion of society. Society should either limit the price of postal services to levels affordable to all or supplement the means of persons unable to afford postal service.

Whether guaranteed affordability for universal postal service represents a major deviation from the operation of a normal commercial market depends on how one defines ‘affordability’. No Member State has adopted an objective standard of affordability.⁸² One does not sense, however, that standard postage rates for the fastest standard category of service are considered truly unaffordable in any Member State today. As of early 2004, the price of a 20-gram stamp for first class letter service ranged from € 0.15 in Malta to € 0.65 in Finland. Retail postage rates in the six most expensive Member States (Austria, Denmark, Italy, Finland, Germany,

⁸¹ Today, the average routing time for intra-Community mail of the fastest standard category is about 2.2 days, International Post Corporation, ‘Full Year UNEX Results 2004’ (2005).

⁸² WIK, *Main Developments* (2004), Appendix B, Table 9.

Sweden) averaged 70 per cent more than postage rates in other Member States, yet individuals in the most expensive states sent almost twice as many letters.⁸³ Even so, if individuals in the most expensive Member States posted all of their letters at the basic first class letter rate, the average annual postage bill would come to only about € 47 per capita or about 0.1 per cent of annual income (GDP per capita). In half of the Member States, an individual mailer may take advantage of a second class tariff for all letter post items, reducing his postage bill substantially. Based on such considerations, letter post services appear to be affordable for average individual mailers.⁸⁴ Indeed, they would remain affordable despite substantial price increases, at least in all but the most expensive Member States.⁸⁵

Of course, some individual mailers may still be unable to afford postal services. Since their mail forms an extremely small portion of all mail, a targeted program should be able to provide absolute assurance of the affordability of socially important mail for the poorest individuals at reasonable cost. Some observers would go further. They argue that universal service should guarantee not only the affordability of postage for items sent *by* low income persons but also the affordability of postage for items sent *to* low income persons by, for example, a mail order company. While such a proposition sounds desirable, we are unconvinced that it bears close scrutiny. Attempting to guarantee the affordability of mail sent to low income persons seems to us extremely difficult to administer and of dubious public benefit.⁸⁶

⁸³ Assuming individuals send about 20 per cent of the letter post, the average individual in these six Member States mailed 47 letters per year compared to 28 in the other Member States.

⁸⁴ This assessment is supported by the findings of a recent Eurobarometer Survey, although this survey focused on whether postal tariffs were perceived ‘fair’ rather than ‘affordable’. This survey found ‘a fairly general agreement from one Member State to another as to the fair (or very fair) price applied to ordinary letters’. See European Commission, European Consumers and Services of General Interest (Dec 2003) at 117.

⁸⁵ WIK, *Main Developments* (2004), App. C, tables 20 and 21 provide first class 20-gram letter post rates. Domestic letter post volumes were developed by WIK but not reported by individual USP. See WIK, *Main Developments* (2004) 133-39. In the Netherlands households spend on average € 22 per year on postage. Netherlands, Ministry of Postal Affairs, Supplement to the Postal Memorandum (2004). The average household in Sweden spends about € 40 to 45 per year on postage. See Sweden National Post and Telecom Agency, ‘The Liberalized Swedish Postal Market’ (2002) 8.

⁸⁶ If a business mailer sends a *letter* to a low income person, presumably the business mailer has actual or potential business with the low income person and is unlikely to be dissuaded from posting his letter by higher postage rates (even if the same business mailer might switch to email for a higher income persons). If a business mailer sends an *advertisement* to a low income person, presumably the business mailer either (A) believes the low income person is a potential customer or (B) does not know the demographic characteristics of his mailing audience. In either case, the amount of advertisements sent to the low income persons would seem especially price-sensitive. This is not to suggest that higher postage rates in selected areas will have no effect whatsoever, but it does not seem to us that the effect is likely to be significant. Moreover, it is difficult to imagine how one could establish the level of postage that is affordable *for the business* sending mail to a low income person. In the case of the low income person as mailer, the obvious reference point for affordability is the income of the person and consideration of his or her reasonable postal needs. Such analysis might justify giving a low income person lower postage rates than those generally available. In the case of a business sending advertisements to many persons, some of whom are low income persons, what standard of affordability could be used? The profitability of the business? The income of each individual addressee? Such standards would appear impossible to administer. Of course, one could arbitrarily declare all mail sent *to* low income persons must be charged the same rate as mail sent to high income persons—that is, require a uniform tariff—but this is inconsistent with the seemingly correct

The ‘affordability’ of mail for commercial enterprises is a different matter. If a normal commercial enterprise cannot pay for necessary input factors and produce a product at a price that attracts customers, this is another way of saying that there is no demand for that product, at least using the methods of production proposed by the enterprise. From this perspective, there is no reason to consider any cost-based tariff for business mailers to be ‘unaffordable’. There are exceptions in the sense that public policy has historically supported preferential postage rates for some types of commercial activities, such as newspaper publication. These policies, however, are based on public support for the activity itself rather than a judgement about the affordability of postal services for business mailers. In our view, the guarantee of affordability should logically be limited to individual mailers. It is unnecessary and undesirable to regulate the affordability of postage rates for business mailers.⁸⁷

Conclusion. The requirement that Member States ensure the affordability for universal services is necessary and proportionate to accomplishing the objectives of Community postal policy, but the concept of affordability should apply only to individuals not to commercial enterprises.

(ii) *Cost-based tariffs*

Article 12 of the Postal Directive declares that for universal services ‘*prices must be geared to costs*’. Article 14 requires that operational costs must be assigned to (1) each reserved service, (2) non-reserved universal services collectively, and (3) non-universal services to the extent that they can be assigned either directly or indirectly and that the remaining unassigned common costs must be allocated in a manner that is proportional to the assigned costs.⁸⁸

The requirement that the prices of postal services must cover costs that can be directly or indirectly assigned to them is uncontroversial.⁸⁹ For the most part, firms in a normal commercial market will likewise ensure that the price of each product covers assignable costs. For a public postal operator, however, after directly and

conclusion that lower-than-average rates may be justified, on grounds of affordability, for mail sent by low income persons.

⁸⁷ This conclusion refers only to the issue of affordability. Business mailers, particularly small business mailers, are still protected by the requirement that USPs (or in the new regulatory model described in Chapter 5, market dominant postal operators) must maintain transparent, cost-based, non-discriminatory products.

⁸⁸ By ‘assigned indirectly’, we refer to assignment according to Postal Directive Article 14(b)(3)(i) (common costs ‘allocated on the basis of direct analysis of the origin of the costs themselves’) and Article 14(b)(3)(ii) (common costs ‘allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible’). By ‘unassigned common costs’, we refer to costs assigned according to subparagraph (iii) (common costs for which ‘neither direct nor indirect measures of cost allocation can be found’).

⁸⁹ As the Postal Green Paper reported, ‘All Member States agree that tariffs should be based on costs’. Page 219.

indirectly assigning costs, up to one half of all costs may be left unassigned.⁹⁰ A major issue in postal ratemaking is how to allocate the costs that cannot be assigned by direct or indirect means or, in other words, the unassigned common costs.

Reasonable postal officials, regulators, mailers, and economists can and do disagree about the proper way to allocate the unassigned common costs of postal services.⁹¹ Key questions include: To what extent should a USP set prices to increase mail volume? To maximize revenue? To maximize consumer welfare? To meet standards of equity? To promote public interest concerns such as the wide dissemination of cultural and educational materials? To simplify the tariff structure? Article 14(b)(iii) of the Directive adopts an inflexible formula. Without attempting to parse economic theories too finely, we believe that the Directive is more restrictive than necessary to meet the objectives of Community postal policy.

In setting prices for products in which a USP is market dominant, the USP and the NRA should have a reasonable level of flexibility in the apportionment of unassigned common costs. In respect to products in which the USP is not market dominant, it should in principle be permitted to set prices freely, assuming adequate controls to prevent undue cross-subsidy and predatory pricing and to ensure that competitive products collectively bear an equitable share of overhead costs.

Conclusion. The current requirement that Member States ensure that tariffs for universal services are based on costs should apply only to tariffs for market dominant products, and the NRA and USP should have a reasonable degree of flexibility in the allocation of unassigned common costs.

(iii) *Uniform tariffs*

Although prices must be geared to costs, Article 12 of the Directive goes on to say ‘*Member States may decide that a uniform tariff should be applied throughout their national territory*’. This provision seems to mean that prices of universal services must be based on costs except in one situation: where a Member State decides that a *uniform tariff* must be charged. The term ‘uniform tariff’ is undefined in the Directive. For purposes of this study, however, we shall use the term *uniform tariff* to refer to a postage rate that, for a given class of service, does not vary according to the origin or destination even though it may vary according to the weight or size or other characteristic of the article transported.⁹² Despite multiple legal

⁹⁰ So far as we are aware there is no publicly available information on the percentage of total postal costs that are assigned directly or indirectly in the accounts of Member State USPs. In the United States, the Postal Rate Commission requires the USP to assign as much of total costs as possible to specific products. In 2003, 54 per cent of mail costs were assigned direct or indirectly to specific mail products. U.S. Postal Service, *Cost and Revenue Analysis* (2003).

⁹¹ For a discussion of the problems of gearing prices to costs, see Sweden, National Post and Telecom Agency, *Uniform Tariffs and Prices Geared to Costs? Swedish Experiences of the Incompatible Demands of the European Postal Directive* (Jul 2000).

⁹² According to this interpretation, a postal operator charges a ‘uniform tariff’ if it charges € 0.50 for transmission of a 20-gram letter by the fastest standard category from any location in Country A to any other location in Country A. On the other hand, if the postal operator charges € 0.50 for

ambiguities,⁹³ almost all USPs charge a uniform national tariff for retail letters, in some cases without regulatory requirement; many charge uniform tariffs for direct mail and parcels as well.⁹⁴

For retail customers, a uniform national tariff for letters, and perhaps parcels, would likely be maintained in most cases even without regulatory requirement, especially if the USP is allowed flexibility in service standards. As noted in the discussion of delivery frequency above, the cost of postal service, especially delivery, may vary substantially from place to place. Nonetheless, a uniform tariff is cost-justified for retail customers if differences in cost are not too great and there are not too many truly high cost areas. The reason is that a modern post office handles so many items of mail that the cost of administering a multi-tiered retail tariff can exceed the extra revenues earned. Maintenance of a uniform retail tariff appears almost certain if the USP can exercise reasonable control over the cost of delivery by, for example, reducing delivery frequency, spreading deliveries over the whole day, inducing users to sort mail to delivery sequence (allowing employment of less skilled carriers), and changing the mode of delivery (e.g., use of kerbside delivery boxes).⁹⁵ Of course, if the costs of postal service vary greatly from area to area, a USP might introduce a non-uniform tariff. But judging by the calculations of one European USP, Norway Post, unit costs would have to vary by more than they do from downtown Oslo to the outskirts of Hammerfest (which bills itself as ‘northernmost town in the world’) to justify such a step.⁹⁶ It seems unlikely that there are many such situations in the Member States.

In the bulk mail market, one would expect to see non-uniform tariffs introduced more

transmission of all letters up to 100 kilometers and € 0.60 for letters transmitted more than 100 kilometers, then the tariff varies by destination and is not a ‘uniform tariff’. Likewise, if the postal operator charges € 0.50 for all letters except that it charges € 0.40 for letters collected and delivered within the largest city, then the tariff varies by both origin and destination and is not a ‘uniform tariff’. While we believe that this definition of ‘uniform tariff’ is consistent with the most common usage, some officials use the term ‘uniform tariff’ in a different sense. The Swedish law, for example, would seem to regard the first example of a non-uniform tariff, and perhaps the second example, as consistent with the concept of a ‘uniform tariff’. See, e.g., Sweden, National Post and Telecom Agency, Implementing a Price Regulation in a Deregulated Letter Mail Market: The Swedish Experience in Brief (Aug 1999) at 8.

⁹³ Read literally, the Directive seems to forbid a postal operator from applying a geographically uniform tariff if the Member State does not so require. It also seems to prohibit a provider of universal services from establishing rate zones (e.g., local and long distance rate zones). Article 12 leaves unclear whether the Member State may order all postal operators to maintain a uniform tariff (each operator charging the same rate or perhaps each operator charging a different uniform rate) or only the USP. Moreover, the phrase does not indicate whether the uniform rate must itself be geared to costs in the sense that it must reflect the average costs of providing service to and from different points in the national territory.

⁹⁴ WIK, *Main Developments* (2004), App. C, Table 9. See section 3.2.1(e), page 86, below.

⁹⁵ See NERA Economic Consulting, *Economics of Postal Services* (2004) at 24. For a good discussion of the pros and cons of kerbside delivery, see Ireland, Comreg, *Postal Services: Universal Service Obligation, Tariff Principles and Miscellaneous Issues* (May 2003) at 32-37. Another possibility is to allow USPs to charge a monthly fee for delivery.

⁹⁶ See the discussion of Norway Post in section 2.3.1(d), page 41, above. Norway Post concludes that it would maintain a uniform tariff throughout its large and sparsely populated territory (except Spitsbergen) if it could reduce delivery frequency in selected areas.

readily. Transaction costs of a multi-tiered tariff are considerably lower for bulk mailers than for retail customers. Bulk mail accounts for roughly half or more of all letter post items in some industrialized countries.⁹⁷ Some bulk mailers, especially direct mailers, are more price-sensitive than retail mailers because they can make use of alternative non-postal communications such as internet sites, newspapers, and television. Bulk mailers necessarily have more bargaining power than individual mailers. A postal operator risks losing business if it overprices bulk mail delivery in an urban area; at the same time, underpricing rural delivery only increases a losing activity. Consequently, several major Member States have exempted bulk mail services from the uniform tariff requirement. In Germany and Sweden, the uniform tariff applies only to non-bulk letters⁹⁸. In the Netherlands, bulk mail (other than letters weighing less than 100 grams) is exempt from the universal service and therefore the uniform tariff rule.⁹⁹ In the United Kingdom, in October 2004, Royal Mail introduced a rate for bulk mail based on five geographic zones.¹⁰⁰ In other Member States, NRA oversight of special tariffs is not strict enough to rule out the possibility of geographic variations in the pricing of bulk mail.¹⁰¹ It is significant as well that in the latest version of the REIMS II agreement, public postal operators have reserved the right to charge each other non-uniform terminal dues if the ‘geographic coverage’ of the inbound cross-border mail varies too much from the average geographic distribution of domestic mail.¹⁰² Although 17 Member States report that uniform tariffs are required for all universal services,¹⁰³ the reality seems to be that the uniform tariff is increasingly limited to single-piece or retail postal services.

In sum, in a normal commercial market, it is likely that, on the one hand, a USP would maintain a uniform tariff for *retail* letters and perhaps parcels, and on the other hand, it would likely introduce non-uniform tariffs for *bulk* mail products, especially the most price sensitive ones. Persistence of the uniform retail rate in all but the most isolated areas seems virtually assured if a postal operator can adjust the delivery services in areas receiving little mail.

⁹⁷ WIK, *Main Developments* (2004), App. B, Table 22.

⁹⁸ The Deutsche Post’s bulk mail service for direct mail, Infopost, provides discounts based in part on the volume of mail sent to a given postal district. In other words, discounts are provided for service to areas with high mail density, the key determinant of delivery cost per item.

⁹⁹ WIK, *Main Developments* (2004) 36. See section 3.2.1(a), page 81, below.

¹⁰⁰ Roger Hill and R. Robinson, ‘Non-Uniform Access Prices’ (2005). This tariff is under review by Postcomm. Postcomm, Licensed Operators’ Complaint about Royal Mail’s Zonal Pricing for Downstream Access (7 Jan 2005). In the United Kingdom, national law requires that a universal service must be uniformly priced. Recently Postcomm has decided that only two bulk mail products (Mailsort 1400 and Cleanmail) need to be offered as universal services. See Postcomm, ‘The Universal Service for Bulk Mailers’ (Jun 2005).

¹⁰¹ WIK, *Main Developments* (2004) 71, 150-51. It appears possible, and seemingly acceptable from the Directive’s standpoint, that a USP may provide a lower special tariff to a mailer sending all of its mail to urban areas than to a mailer sending all of its items to rural areas. As in the case of Deutsche Post’s Infopost tariff, these distinctions might be implicit rather than explicit.

¹⁰² Commission Decision 2004/139/EC of 23 October 2003, OJ L 56, 24 Feb 2004, p. 76 (REIMS II renotification) at paragraphs 142-44.

¹⁰³ WIK, *Main Developments* (2004) App. B, table 9.

In light of such considerations, is it necessary and proportionate to accomplishing the objectives of Community postal policy to allow Member States to force the prices of universal services to achieve even greater uniformity than would naturally result?¹⁰⁴ While a uniform tariff is obviously convenient for the individual mailer as well as the USP, the broader public interest benefits of an artificially uniform tariff are not easy to identify. As one leading postal economist has put it, ‘It is difficult to provide economic justification for the requirement that incumbents charge uniform prices despite nonuniform costs’.¹⁰⁵ On its face, occasional deviations from a uniform tariff would not seem to undercut accomplishment of either of the fundamental objectives inferred for Community postal policy. Uniform rates at Member State level do not promote an undistorted internal market for the Community. If anything, the uniform tariff may inhibit the internal market by making it easier for a citizen living near a border to post a letter to a distant address within his Member State than to post the same letter to an address a few kilometers across the border. Nor are uniform tariffs necessary to achieve an affordable, reliable, and efficient universal postal service. Some might argue that uniform tariffs help sustain social cohesion, yet in a world of multiple television and radio channels and ever more common mobile phones, it is difficult to believe that this consideration carries much force today, if it ever did. The United States had different postage rates for intra-city and national letters until the 1940s, seemingly without ill effects to national unity.

Conclusion. Since the uniform tariff is potentially very costly and distortive and its contribution to accomplishing the objectives of Community postal policy are ambiguous, we conclude that Member States should not require postal operators to maintain a uniform tariff for universal services, especially if USPs are also prohibited from making reasonable adjustments in delivery services (because of the potential for greater distortions). Member States should not be authorized to require providers of universal service to charge uniform tariff for universal services.

(iv) *Transparent and non-discriminatory tariffs*

Article 12 of the current Directive requires that tariffs for universal services must be ‘transparent and non-discriminatory’. In a normal commercial market, tariffs are not always transparent and non-discriminatory. In a market with a few large suppliers, competition does not advance only, or even primarily, by posting of public tariffs. Companies compete on a customer-by-customer basis. Prices and services are tailored to the needs and negotiating skills of each major customer, and prices are often confidential. Economic research has shown that this process is desirable. Imposing transparency and non-discrimination restrictions on a normal commercial

¹⁰⁴ These comments relate only to whether or not a Member State should impose a uniform tariff requirement on one or more postal operators as a matter of regulatory policy. As owner of the public postal operator, the government may decide to manage its company in any manner it sees fit, including requiring use of uniform tariffs.

¹⁰⁵ J. Panzar, ‘Funding Universal Service Obligations: The Costs of Liberalization’ (2001) at 102. The purpose of the uniform tariff has become subverted over time. The uniform national postage tariff was introduced in 1840 in England in order bring tariffs more in line with the costs of postage service at that time. It was never intended by proponents to apply in circumstances where the costs of postal service vary substantially. R. Coase, ‘Rowland Hill and the Penny Post’ (1939).

market will likely raise the general level of prices and reduce output. It will also inhibit the competitive pressure that drives innovation.¹⁰⁶

It is therefore unnecessary and undesirable to restrict the ability of the USP to compete vigorously in competitive markets in which the USP lacks market dominance. Transparency and non-discrimination requirements should not be imposed to prevent the USP from using the commercial tools that its competitors employ to compete customer by customer. This is not to suggest, however, that USPs should be relieved of the obligation to notify users of the details and terms and conditions of all publicly available services. Indeed, such steps should be required of all postal operators (not only the USP) to protect the rights of users.

If the USP enjoys market dominance, the Directive's requirements of transparency and non-discrimination are more defensible. We believe that there is a general expectation that a service of general economic interest such as a postal service should provide non-discriminatory services to all citizens and that transparency is an appropriate means of ensuring non-discrimination.¹⁰⁷ Moreover, a prohibition against price discrimination will help prevent a market dominant postal operator from using price discrimination to extract monopoly rents. Similarly, transparency and non-discrimination may help to control anti-competitive behaviour and thus be justified as a reasonable means of implementing the principles of the competition rules in a sector characterized by a very high level of common costs like the postal sector.¹⁰⁸ Hence, while the requirements of transparency and non-discrimination may exceed what is required of a market dominant operator in a normal commercial market, we cannot conclude that the requirements are unnecessary or disproportionate in respect the market dominant universal service products of a market dominant postal operator.¹⁰⁹

Conclusion. The requirement that USPs maintain transparent and non-discriminatory tariffs for universal services is necessary and proportionate in markets where the USP is market dominant but not in markets where it is not.

¹⁰⁶ See, e.g., M. Levine, 'Price Discrimination Without Market Power' (2002).

¹⁰⁷ Compare Article 8(2) of electronic communications directive on universal service: 'Member States shall determine the most efficient and appropriate approach for ensuring the implementation of universal service, whilst respecting the principles of objectivity, transparency, non-discrimination and proportionality.' Directive 2002/22/EC.

¹⁰⁸ EC Treaty, Article 82 (abuse of dominant position).

¹⁰⁹ Limiting the requirements of transparency and non-discrimination to *market dominant* products does not imply restricting the authority of the NRA to control cross-subsidy from market dominant products to competitive products, whether universal service products or not. On the other hand, limiting the requirements of transparency and non-discrimination to *universal service* products may imply that the NRA is less able to monitor the financial interactions, if any, between universal service products which are not market dominant and non-universal service products. If the USP is able, without cross-subsidy from market dominant universal service products, to abuse a market dominant position outside the scope of universal service (e.g., financial services, unaddressed mail, express services, commercial parcel services), then it would generally be up to the national competition authority, not the NRA, to seek appropriate remedies. In most Member States, such abuses would appear to be outside the responsibility of the NRA under the current regulatory model.

(v) *Special tariffs*

Article 12 provides that special tariffs must ‘*take account of the avoided costs, as compared to the standard service*’. There is, however, substantial disagreement among postal officials, regulators, mailers, and economists about the proper interpretation of the Directive’s requirement and, indeed, about the best approach towards access pricing. If access prices are based on retail prices less avoided costs (i.e., costs not incurred by the USP because of mail preparation by the mailer), as some believe the Directive requires, the effects are to minimize discounts for downstream mail, maximize protection of mailers who do not receive a discount, maximize incentives for competitive entry into end-to-end markets, and minimize incentives for the USP to improve upstream services. This may be a sound regulatory approach, but it is not the only plausibly sound approach. Some regulators favour lower access prices as a way of promoting competition, competition which might not otherwise materialize.¹¹⁰ In our view, neither approach is so obviously correct in all circumstances that the NRA should be prohibited from applying its best judgement in individual cases. There is no reason that differences in regulatory implementation should jeopardize either of the major objectives of Community postal policy.

In addition, as with the tariff requirements generally, the Directive also fails to provide appropriate flexibility in respect to special tariffs in markets where the USP is not market dominant. If the USP is not market dominant, it should not be more restricted in setting access prices than its competitors.

Conclusion. A requirement that Member States ensure that special tariffs are based on retail prices less avoided costs (as some interpret the current Directive) is more rigid than necessary to accomplish the objectives of Community postal policy. NRAs should have reasonable discretion to set access prices for market dominant postal operators. On the other hand, postal operators without market dominance should be able to set access prices freely.

(vi) *Terminal dues*

Article 13 of the Directive implies a USP’s charge for delivery of letter post articles is one thing if the mailer is an individual or business tendering normal domestic mail (i.e., ‘postage’) and another thing if the mailer is another USP tendering cross-border mail (i.e., ‘terminal dues’). Why domestic postage rates and terminal dues should set different charges for delivery of equivalent letter post items is unclear. As the Postal Green Paper put it,

The existing systems [sic] of charging between postal administrations (called terminal dues) is not cost based, leading to significant distortions between remuneration and actual delivery costs incurred. The same

¹¹⁰ R. Moriarity and P. Smith, ‘Barriers to Entry in Post and Regulatory Responses’ (2005). See also NERA Economic Consulting, *Economics of Postal Services* (2004) at 157-58 (substantial scope of competition only if competitors have access to delivery networks).

principle of basing tariffs on costs should apply to the financial compensation system between postal administrations.¹¹¹

There is no apparent necessity for different treatment of intra-Community and domestic mail. USPs give each other roughly the same volume of mail as tendered by large domestic mailers.¹¹² Intra-Community mail may be less uniform or less well addressed than domestic mail, but there is no apparent reason why it should not be treated in the same manner as domestic mail if it meets the same standards for address quality, envelope size, presortation, amenability to machine processing, etc.¹¹³ One difference between intra-Community and domestic mail may require accommodation: domestic postage rates in different Member States are based on different weight steps. USPs may need to express delivery rates for cross-border mail using a common set of weight steps or other conversion formula. Even if USPs choose to quote domestic rates in a standard cross-border format, tariffs for delivery of intra-Community and domestic mail should be so similar that the USP receives essentially the same compensation for delivery of comparable mail.

If terminal dues for delivery of intra-Community mail become no more than a restatement of domestic postage rates, USPs can establish terminal dues unilaterally, instead of by agreement. USPs have long set delivery rates for cross-border parcels unilaterally.¹¹⁴ Likewise, terminal dues can be (and should be) as transparent and non-discriminatory as domestic tariffs. Yet the current directive only encourages, it does not require, Member States to ensure the transparency and non-discriminatory nature of terminal dues.

Differences between terminal dues and domestic tariffs are not only unnecessary, they are positively harmful. Persistent price differentials between delivery charges assessed USPs for cross-border mail and delivery charges assessed other mailers, as well as associated controls on remail,¹¹⁵ create a ‘frontier’ effect that restrains and distorts the conduct of postal services compared what would be expected in a normal

¹¹¹ Postal Green Paper 251.

¹¹² For example, for the U.K.’s Royal Mail, the 50 largest domestic customers for about 28 per cent of mail volume while the 24 EU public postal operators account for perhaps another 3 per cent. Postcomm, *The UK Letters Market 2000-2003* (Jan 2004) at 11-12. Outbound international mail is about 4 per cent of total mail. In the text we have assumed that inbound volume is about the same as outbound volume and assumed that the intra-Community mail accounts for 75% of incoming international mail. These are rough estimates only but they appear to be sufficient for the purposes of the text.

¹¹³ We do not suggest that charges for the delivery of intra-Community should be the same as full domestic postage for single postal items. The relationship between retail postage rates should be based on the cost-causative characters and may vary among Member States. See, e.g., Ireland, Comreg, *Terminal Dues Agreements* (2003) at 14-18 (analysis of the REIMS II provisions).

¹¹⁴ Universal Postal Convention (1999) § 56 (‘Bearing in mind the above guideline rates, administrations shall set their inward land rates to bring these into relation with the costs of their service’).

¹¹⁵ ‘Remail’ refers to mail that is produced in country A and transported to country B where it is tendered to the public postal operator either for delivery in country B or for forwarding by postal channels for delivery in country A or a third country, country C.

commercial market.¹¹⁶ This price differential does not appear to advance either of the objectives inferred for Community postal policy. Distortion of cross-border postal services obviously works against evolution of a fully operational internal market. While the pattern of price differentials may favour some USPs at the expense of others, there is no reason to suppose that the net effect furthers development of an affordable, reliable, and efficient universal postal service in the Community.¹¹⁷

Conclusion. Provisions in the Directive relating to terminal dues are inconsistent with the principle of necessity and proportionality insofar as they create distinctions between intra-Community letter post services and domestic letter post services.

f) Quality of service standards

Articles 16 to 18 of the Postal Directive require Member States to adopt and publish quality of service standards for national universal services. Member States are also required to arrange for independent monitoring of universal service performance and to publish the results. For cross-border universal services, the Directive itself sets quality of service standards, and the Commission ensures independent monitoring of performance.

Prior to the Directive, information about service standards and performance levels of universal services was not widely available to the public. In a normal commercial market, however, competitors often publish service standards in order to attract customers. The Directive's requirement for publication of such basic information does not require substantial deviation from the normal commercial market. At the same time, the transparency of quality of service data furthers development of an affordable, reliable, and efficient universal postal service by providing a public standard for comparing and criticizing the performance of USPs. Quality of service transparency will facilitate competitive markets as well as market dominant markets.

Whether or not it is necessary for Member States to *determine* quality of service standards is a different question. In a competitive market, users should regulate the quality of service by taking their business to operators that provide the combination of quality and price that is best suited to their needs. Competition has worked well in postal markets, such as the parcel and express sectors, impelling continuing improvements in service quality. Likewise, in universal service markets

there is no evidence that market opening has led to deterioration in the quantity or quality of universal postal service, and there are some indications that the opposite is the case. The positive impact of competition on universal service provision appears to be strongest in

¹¹⁶ See Postal Green Paper 195-200, 220-21; Commission Decision 2001/892/EC of 25 July 2001, OJ L 331, 15 Dec 2001, p. 40 (Deutsche Post remail).

¹¹⁷ For these reasons, the new regulatory model developed in Chapter 5 would prohibit discrimination between intra-Community and national postal services in the provision of universal service. See section 5.3.3, page 124, below. Although there are important differences, these considerations apply substantially to letter post mail exchanged between the Community and points outside the Community as well. Such issues, however, are outside the scope of this study.

more developed markets with corporatized USPs. Moreover, the positive effects of competition seem to derive from both physical competition by CPOs [competitive postal operators] and electronic competition from the internet.¹¹⁸

Thus, where competition exists, the quality of services available should respond the needs of the users not the directions of government.

In markets controlled by a market dominant operator, the role of quality of service standards is different. Member States must be assured that reasonable quality of service standards are in place since there is insufficient competitive pressure on the USP. Quality of service standards should reflect an appropriate service level for the tariffs charged. One regulatory approach is for the government to establish quality of service standards. We cannot conclude that government-set quality of service standards are inconsistent with the principle of necessity and proportionality in respect to market dominant products, but other regulatory procedures may be superior (see discussion of REIMS agreement below).

Quality of service standards for intra-Community mail present different issues. Intra-Community postal services are produced jointly by origin and destination USPs and are not wholly within the control of either. Although the Directive establishes end-to-end routing times for intra-Community mail, there is no way to assign responsibility for failure to meet a standard. Moreover, the Directive's use of a single standard for all cross-border mail flows fails to take into account substantial differences between large and small Member States. To collect, transport, and deliver a letter from any point in the United Kingdom to any point in Germany requires substantially more domestic transportation than to move a letter from a point in the Netherlands to a point in Denmark. The Directive's uniform cross-border standard is therefore more burdensome for USPs in large states than in small states. Another problem is that the Directive's cross-border quality of service standards do not bear a clear relationship to national quality of service standards. Since inbound cross-border mail is delivered by domestic mail services, the cross-border and national standards affect each other, yet if national standards are set by Member States to reflect national needs, there is no reason to suppose that all national standards will mesh comfortably with a single cross-border standard. Finally, quality of service standards are no more appropriate in competitive intra-Community markets than in competitive domestic markets, yet the Directive makes such distinction.

Some of the defects in the Directive's approach to intra-Community universal service standards are remedied in the approach towards quality of service standards in the REIMS II terminal dues agreement.¹¹⁹ This agreement was developed by USPs, but under the watchful eye of the Commission. According to the agreement, the

¹¹⁸ WIK, *Main Developments* (2004) 196

¹¹⁹ This discussion should not be interpreted as a general endorsement of the REIMS II agreement. The merits of the REIMS II agreement and the Commission's decisions in respect to REIMS are beyond the scope of this study. It may be noted, however, that the non-discriminatory treatment of cross-border and national mail which we propose will largely eliminate the need for a terminal dues agreement among Community USPs.

destination USP must rebate a portion of terminal dues payments if incoming intra-Community mail is not delivered in accordance with certain quality of service standards. The REIMS standards, however, apply separately to origin and destination USPs. Origin USPs are required to deliver 85 per cent of intra-Community mail into the hands of destination USP by the first day after posting (D+1).¹²⁰ Destination USPs are separately responsible for delivery of a percentage of the inbound cross-border mail by D+1. Inbound quality of service standards vary among USPs depending on their state of development and the size of their territories. The format of quality of service standards established in the REIMS II agreement is plainly superior to the format of quality of service standards established in the Directive.¹²¹

Conclusion. The Directive's requirements that Member States (1) *ensure* the transparency of quality of service standards and (2) *monitor* the performance of universal services are consistent with the principle of necessity and proportionality. The Directive's requirement that Member States *establish* quality of service standards for national universal services fails to draw appropriate distinctions between competitive and market dominant markets. In *competitive* markets, government should establish minimal quality of service standards only, thereby establishing a threshold for exceptional government intervention. In markets with *market dominant operators*, quality of service standards should reflect an appropriate quality of service for tariffs charged. While it is consistent with the principle of necessity and proportionality for governments to set such quality of service standards for market dominant products, experience with the REIMS II agreement suggests that it may be wiser to allow USPs to establish quality of service standards under the close scrutiny of NRAs. The uniform, end-to-end quality of service standards for the intra-Community letter post adopted by the Directive are unnecessary and impracticable.

g) User complaints and redress

Article 19 of the Directive requires Member States to ensure that '*transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints*'. 'Users' include both senders and addressees.¹²² These protections must be extended

¹²⁰ Commission Decision 2004/139/EC of 23 October 2003, OJ L 56, 24 Feb 2004, p. 76 (REIMS II renotification) paragraph 117. For the public postal operators of Greece, Iceland, Portugal, and Spain, the figure is 80 per cent.

¹²¹ On the other hand, differences between the REIMS II quality of service standards and domestic quality of service set by Member States are more difficult to justify. Why should USPs receive different quality of service standards than other mailers? Should not standards for delivery of inbound cross-border mail be consistent with standards for delivery of comparable domestic bulk mail since both are delivered by the same national mail services? If quality of service standards for domestic mail are required to be transparent, why should quality of service standards for inbound cross-border mail not be transparent as well? These questions make clear that the REIMS II quality of service standards, like the REIMS II terminal dues, create a discrimination between services rendered by USPs to other USPs and services rendered by USPs to other mailers. As in the case of terminal dues, there is no apparent reason for discrimination in quality of service standards. Discrimination runs the risk of distorting competition among different users of postal services without advancing the objectives inferred for Community postal policy.

¹²² Postal Directive, Article 2(17).

to users of the services of the USP. At the discretion of the Member State, these protections may be extended to users of other postal operators. USPs must publish an annual summary of how they have dealt with complaints.

These provisions appear necessary to induce the level of customer responsiveness expected of services of general economic interest. They represent a small deviation from the rules of a normal commercial market, since similar customer protection provisions are commonly imposed on services of a public nature. Improved customer protection should facilitate development of an affordable, reliable, and efficient universal postal service. These provisions do not appear inconsistent with the principle of necessity.

Conclusion. The user protection provisions in the Directive appear consistent with the principle of necessity and proportionality.

h) Harmonization of technical standards

Article 20 of the Directive establishes procedures for harmonization of technical aspects of universal services through the work of the European Committee for Standardization (CEN). These procedures appear to apply only to services of USPs.

Harmonization of technical standards is a necessary feature of many markets requiring interaction among different providers. Technical harmonization promotes accomplishment of the objectives of Community postal policy without imposing significant deviations from the normal commercial market.

Conclusion. Harmonization of technical standards is consistent with the principle of necessity and proportionality.

2.3.2 Control of competition

a) Reserved area for USP

(i) Community definition of universal service

Article 7 of the Directive authorizes Member States to reserve for their USPs the right to provide universal services within certain limits—defined by the type and weight of the item and price of service—but only ‘to the extent necessary to ensure the maintenance of universal service’. Under this article, most Member States have reserved a portion of their postal service markets for their USPs. Is a reserved area necessary and proportionate to accomplishing the objectives of Community postal policy?

Obviously, national reserved areas cannot be considered necessary to accomplishing the first objective of Community postal policy, *to promote a fully operational internal market*. National reserved areas obstruct development of an internal market in postal services, one of the major objectives of Community postal policy. As the Commission noted in its 2002 survey of obstacles to an internal market in services,

Monopolies in some Member States . . . have the effect of preventing the establishment of service providers from other Member States in which no such monopoly exists. The monopoly concerned may be one that is entrusted to a specific body, such as those in partially liberalised sectors (such as *postal services* or energy utilities).¹²³

The more substantial question, then, is whether national reserved areas are necessary and proportionate to accomplishing the second objective of Community postal policy, *to promote an affordable, reliable, and efficient universal postal service*? If so, then the two primary objectives of Community postal policy must be considered mutually exclusive, and Community postal policy should be revised to aim for a more compatible set of objectives. In our view, however, the reserved area is not a necessary and proportionate means of ensuring affordable, reliable, and efficient universal postal service for the following reasons.

First, in the last decade, several Member State governments have decided, after long study and debate, to repeal their reserved areas. Some (Estonia, Finland, Sweden) have completed this process, while others (Germany, United Kingdom) are still completing transition periods. A non-member European state (Norway) and a non-European industrialized state (New Zealand) have repealed the postal monopoly or decided to do so. At least two other Member States (Netherlands and Slovakia) appear very likely to adopt the same policy in the near future. Collectively, the seven Member States account for about 54 per cent of the volume of Community letter post. The fact that these Member States have separately reviewed the evidence and, despite contrary political pressure, decided to end the reserved area while retaining the guarantee of universal service strongly suggests that universal service can in fact be maintained without a reserved area.

Second, Member States that have retained the reserved area have provided no evidence that a reserved area is necessary to sustain universal service despite a legal obligation to do so. That is, according to the Directive, a Member State must make a determination that a particular scope of reserved area is necessary to sustain universal service before adopting a reserved area. No Member State, however, has produced a credible economic analysis to justify the scope of its reserved area.¹²⁴

Third, there appears to be no necessary connection between the reserved area and universal service defined with appropriate flexibility. Proponents of the reserved area invariably rest their case on the assumption that universal service must be supplied under rigid regulatory restrictions which themselves fail to satisfy the principle of necessity and proportionality. To demonstrate the need for a reserved area or justify the grim prospect of a ‘graveyard spiral’ for the USP, economists begin by postulating that universal services must be provided at uniform rates and uniform service levels, that the cost of service varies widely from place to place, and that there exists no means of financing universal service other than by internal geographic

¹²³ Report on the State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services, COM/2002/0441 (30 Jul 2002) at 16 (emphasis added).

¹²⁴ WIK, *Main Developments* 45.

cross-subsidy.¹²⁵ In our view, such rigidities are not necessary and proportionate to accomplishing the objectives of Community postal policy. A reasonable level of price and service variation is not incompatible with the internal market or destructive of affordable, reliable, and efficient universal postal service. As two leading economists, generally sympathetic to the reserved area, conceded recently after a review of the scholarly literature, ‘*Absent the obligation of the uniform price and some service uniformity, the ubiquity requirement could be satisfied without a reserved area.*’¹²⁶

Fourth, there are good reasons to believe that repeal of the reserved area will *improve* universal service. Monopoly induces inefficiency and lack of innovation in any commercial activity, public or private. With liberalization, the incumbent USP may lose some mail volume to new entrants, thus driving up unit costs due to reduction in economies of scale (and economies of density and scope). At the same time, the threat of potential competition is likely to force improvements in the entire cost structure of a USP. Of the two effects, gains from greater overall efficiency are likely to be much larger than losses in economies of scale.¹²⁷

Fifth, there seems to be no reason to rule out alternative means of funding the costs of universal service, if any. According to the Directive, the tariffs of a universal service provider must be based on costs subject to two constraints. First, tariffs must not exceed a maximum constraint of affordability. Second, Member States may require the USP to charge uniform national tariffs (although the Member State may choose not to do so). Under these constraints, we believe that losses incurred in the provision of universal services, if any, should be reasonably discrete, identifiable, and small relative to total costs.¹²⁸ There is no apparent reason why compensation for such services cannot be handled through a funding program similar to the compensation fund authorized by the Directive. A simpler and less distortive alternative would be contracts for needed services that are funded from general government revenues.

Some proponents of the reserved area argue more narrowly that the reserved area is

¹²⁵ See, e.g., G. d’Alcantara and B. Amerlynck, ‘Financial Viability of the Universal Service Provider: Under Uniform and Cost-Related Tariffs’ (2004). This article also appears to make unduly optimistic assumptions about the capabilities of new entrants.

¹²⁶ M. Crew and P. Kleindorfer, ‘Competition, Universal Service, and the Graveyard Spiral’ (2005) at 2.

¹²⁷ See Frontier Economics, ‘The Impact of Liberalisation on Efficiency: a Survey’ (2002) (report prepared for U.K.’s postal regulator); WIK, *Main Developments* 193-96. Moreover, a review of experience of Member States suggests that the relationship between mail volume per capita and the first class letter tariff is very weak. In the Community, annual mail volume per capita varies over an enormous range, from less than 50 to 350. Higher mail volume does indeed lead to lower postage rates, the data is so scattered that it appears other factors—such as efficiency and culture—also have a large effect on stamp price. Overall, declining mail volume does not seem to imply a significant increase in the basic stamp price after mail volume reaches about 50 items per person per year, a threshold that eliminates all but five Member States (Latvia, Lithuania, Poland, Greece, and Estonia), one of which has no reserved area (Estonia). See WIK, *Main Developments* (2004) 136.

¹²⁸ Again, consider the example of identification of universal service losses in Norway described in section 2.3.1(d), page 42, above.

necessary to protect universal service because only the incumbent USP can provide universal service and the reserved area is necessary to protect the financial stability of an incumbent USP. We do not believe, however, that protection of a particular postal operator, even the incumbent USP, can be reconciled with the principle of necessity and proportionality. If the incumbent USP cannot provide postal services profitably under circumstances that would allow other postal operators to make a profit, then the users and the general public would be served best by an orderly change in providers of universal service. A fully operational internal market in postal services, regulated to assure a continuous supply of universal service, can provide the mechanism for orderly transition. It also offers the possibility of reinvigorating the incumbent USP with new ownership and new management.¹²⁹

Yet, even assuming that universal service depends in some degree on the financial well being of the incumbent USP, there is no evidence that liberalization threatens the commercial viability of a reasonably efficient USP. Because postal services benefit so much from economies of scale, scope, and density, it will be very difficult for a new entrant to challenge an incumbent USP. It seems likely that only a portion of the incumbent's mail volume—mainly presorted bulk mail—is easily contestable by a new entrant because a new entrant lacks the mail collection network of the incumbent.¹³⁰ Knowledgeable observers therefore predict new entrants will likely be limited to relatively small or niche roles.¹³¹ Experience in the Community in the last decade supports these conclusions. So far in the most liberalized Member States, USPs have lost little market share to competitors.¹³² Indeed, some regulators fear that full liberalization will not produce enough competitive spur for the incumbent public postal operator¹³³ or sufficient economic promise to attract serious investors.¹³⁴

¹²⁹ We do not disagree with the position adopted in the Postal Directive that continuation of a reserved area for a temporary period may be appropriate to facilitate an orderly transition. However, because there does not appear to be any necessary operational relationship between a reserved area and protection of the basic universal service required by the Directive, it appears that whatever financial benefits are conferred by the reserved area can eventually be replaced an alternative means of funding, one that is not so disruptive to the internal market. On the possibility of continuing the reserved area as part of a possible transition to the new regulatory model, see section 6.2.2, page 174, below.

¹³⁰ One study estimated that only 16 per cent of the U.S. Postal Service's mail is 'contestable'. R. Cohen et al, 'Universal Service Without a Monopoly' (2000) at 82.

¹³¹ NERA Economic Consulting, *Economics of Postal Services* (2004) at 157-58 ('We expect entrants' volumes to remain relatively limited and that they will only be able to achieve small but significant market shares.').

¹³² WIK, *Main Developments* (2004) 94. No liberalized public postal operator has less than 90 per cent of the letter post market.

¹³³ R. Moriarity and P. Smith, 'Barriers to Entry in Post and Regulatory Responses' (2005).

¹³⁴ R. Cohen et al, 'Will Entrants into a Liberalized Delivery Market Attract Investors?' (2005). On the other hand, one economic study argues that 'The opportunities for entering the market are plentiful, both as regards customer target group and the required scale and related investment. To compete effectively, new players do not have to copy [the incumbent operator], nor would it be sufficient to do so. P. de Bijl, E. van Damme, and P. Larouche, 'Towards a liberalised postal market' (Tilburg Law and Economics Center, Aug 2003) at iii.

Conclusion. Authorizing Member States to establish national reserved areas is not necessary or proportionate to ensuring affordable, reliable, and efficient universal postal service.

(ii) *More interventionist Member State definitions of universal service*

In the foregoing discussion, we have concluded that a reserved area is unnecessary to sustain *the level of universal service required by the Postal Directive and the objectives of Community postal policy* (as we have inferred). Suppose, however, that a Member State adopts a definition of universal service that requires substantially greater intervention in the market and more restrictions on the activities of the USP than mandated by the Directive? Is it possible that a reserved area is necessary to accomplish a more interventionist definition of universal service established by a Member State?

If a Member State does establish an ‘interventionist’ or restrictive universal service obligation, then the case for a reserved area may be much stronger. Generally, whether or not a reserved area is necessary to sustain universal service depends on two interrelated factors: (A) how restrictively universal service is defined and (B) how easy it is to devise an alternative means of funding a pattern of universal service that is equivalent to that produced by a reserved area.

Consider three examples of interventionist definitions of the universal service obligation that may imply the continuing necessity of a reserved area. Suppose that a Member State defines universal service as ‘provision of basic postal service *at identical service levels and identical prices* throughout the nation’. Only a postal monopolist could fulfill such a universal service obligation, at least in a country where the costs of postal service vary substantially from place to place. In a competitive market, postal operators offer users different prices and different services to gain new customers. Or consider a definition of the universal service obligation that stresses provision of universal service *at the lowest possible cost*.¹³⁵ It might be argued that a reserved area would be necessary to accomplish such a universal service obligation since competition implies that mail volume may be divided among more than one operator and thus a reduction in economies of scale and scope. The persuasiveness of this factual claim is open to question, however, and would in any case likely vary among Member States.¹³⁶ A third, almost opposite, definition of the universal service obligation might emphasize the need to provide universal service *while employing the maximum feasible number of employees*, in the

¹³⁵ Compare Case C-157/94, *Commission v. Netherlands* [1997] ECR I-5699 at paragraph 45 (universal service obligation for public undertaking with monopoly on importation of electric power).

¹³⁶ In general, we doubt the correctness of this argument over the long run. As noted in the preceding section, liberalization appears to induce efficiency gains that outweigh losses in scale economies. Factors such as overall mail density and heterogeneity of delivery costs may imply different conclusions in different countries. For an attempt to estimate the net effect of scale economies and inefficiency in different countries, see R. Cohen and E. Chu, ‘A Measure of Scale Economies for Postal Systems’ (1997). In any case, even if perfectly efficient production could be sustained, it seems doubtful whether the conveyance of all documents and parcels (including, for example, intra-corporate mail and newspapers) should be combined in a single operation.

country as a whole or in selected areas of the country or among selected groups of citizens. In effect, the public service objective of postal policy would be to convert monopoly rents gained from users into additional jobs. Such a definition of universal service might likewise be considered to require a reserved area since competition will tend to wring out excess costs including unnecessary employment.¹³⁷

Other 'large' universal service obligations do not necessarily imply continuation of the reserved area if the consequence is merely to create a large cross-subsidy from one class of mailers to another. For example, suppose that in a certain country half of the mail is delivered in a very low cost area and half is delivered in a very high cost area. If government requires a uniform tariff, the result will be an extraordinarily large cross-subsidy going from those who send mail to the low cost area to those who send mail to the high cost area. Even so, the cost of universal service is discrete and identifiable. Losses incurred in delivery to the high cost area could be funded by an assessment on letters sent to the low cost area or by an expenditure from general government revenues. The same conclusion would follow if, for some reason, government required the USP to maintain sharply different tariff policies in respect to different products. Suppose, for example, the USP had to maintain below cost tariffs on all products except bulk commercial mail. In such case, losses incurred on all non-bulk products could be calculated and funded by a high assessment on bulk mail.

Although in principle a high level of cross-subsidy could be sustained by an appropriate assessment, a high levy may possibly present practical problems. If the cost of universal service is only 1 or 2 per cent of the total cost of letter post service, it would seem feasible to replace the cross-subsidy generated by the reserved area with funds raised by an assessment on letter post items that mimics the cross-subsidy or by an expenditure from general government revenues. If, however, the cost of universal service is, say, 25 per cent of the total cost of the letter post, then the funding problem becomes more formidable. The rate of assessment needed to sustain a universal service fund will be relatively high and the incentives for evasion correspondingly high. Depending on the culture or circumstances of a specific Member State, collection of this regulatory levy may prove difficult and unreasonably expensive (compared to the cost of funds generated by a reserved area). In addition, for one reason or other, expenditures from general government sources may be impossible. Under such circumstances it is not wholly inconceivable that a reserved area would be the only feasible means of funding universal service. It should be noted, however, that high cost of universal service in this hypothetical example is due entirely to a universal service obligation that imposes substantial distortions on the market. From the standpoint of economic efficiency, it would be far better to reduce the size of the implied cross-subsidy by allowing the USP to introduce a two-tier tariff that reflects differences in the cost of service and to rebalance tariffs so that the costs of universal service do not fall disproportionately on a small group of products.

¹³⁷ Other examples of universal service obligations that might imply a reserved area include: (1) to provide universal service under conditions that maximize national security and (2) to provide universal service under conditions that minimize impact on the environment.

To summarize, in this section we have identified circumstances in which a reserved area *might* be considered necessary to sustain universal service if a Member State adopts a definition of universal service that is substantially more interventionist than required by the objectives of Community postal policy (as we have inferred them). Depending on the definition of universal service, a case for continuation of the reserved area may also require a demonstration that alternative methods of paying for universal service are infeasible.¹³⁸ In light of such observations, whether or not a reserved area may be considered necessary and proportionate to fulfilling the objectives of Community postal policy comes down to precisely how the objectives of Community postal policy are parsed. Is Community postal policy seeking to ensure a basic level of affordable, reliable, and efficient universal postal service that is compatible with a fully operational internal market? Or is Community postal policy seeking to ensure not only affordable, reliable, and efficient universal postal service but also whatever additional level of universal service a Member State deems appropriate regardless of possibly adverse consequences for the internal market?

In our reading of the various documents addressing Community postal policy, we do not detect support for the latter interpretation of the objectives of current Community postal policy. In our view, under current Community postal policy, the minimum level of universal service that must be ensured by a Member State is that which is required by the Directive. The maximum level of universal service that may appropriately be required by a Member State is, implicitly, the most interventionist universal service obligation that the Member State can feasibly implement *consistent with the goal of a fully operational internal market*.¹³⁹ For the purpose of developing a new regulatory model—i.e., a regulatory model that accomplishes the current objectives of Community postal policy in a manner consistent with sound regulatory principles— we shall proceed on this basis.

At the same time, we acknowledge that the Directive is hardly clear in this area. Others may regard current Community postal policy as placing greater weight on Member State discretion to establish an interventionist definition of universal service and less weight on attainment of an internal market in postal services. As noted above, we do not believe that the value of analysis under sound regulatory principle depends on the precise objectives of Community postal policy. We shall therefore, in Chapter 6, suggest how the results of our analysis may be adapted to objectives that differ from those that we have posited for Community postal policy.¹⁴⁰

¹³⁸ We offer no judgement as to whether, for specific Member States, a reserved area is necessary and proportionate to accomplish the objectives of postal policy set out in national legislation and regulations. Such judgements would necessarily take into account the costs of service and the availability and practicality of alternative sources of funds to support universal service in each Member State. These specific factual issues were beyond the scope of this study.

¹³⁹ This statement is not intended as a legal conclusion. As should be apparent from the text, this paragraph seeks only to explain how we have reconciled diverse policy issues in order to maintain the focus of the study on sound regulatory principles.

¹⁴⁰ See section 6.3.1, page 182, below.

Conclusion. If a Member State introduces a universal service obligation that is substantially more interventionist than required by Postal Directive and Community postal policy (as we have inferred it), then it might be concluded that a reserved area is necessary to sustain universal service in that Member State. We believe, however, that such an interventionist universal service obligation is inconsistent with the objectives of Community postal policy taken as a whole, and our analysis proceeds on that basis. While others may interpret the objectives of current Community postal policy differently, we believe that, as considered further in Chapter 6, the results of our analysis may be modified to accommodate different objectives.

b) Authorization of postal operators

Article 9 of the Postal Directive provides that Member States may introduce two types of authorizations for postal operators: a ‘general authorization’ and an ‘individual licence’. An individual licence requires specific approval by the regulator *before* the operator can begin operations while a general authorization does not. The Directive places broad limits on the conditions and approval process associated with these two types of authorizations. Either authorization may be required for postal operators providing universal services. Only a general authorization may be required of postal operators providing non-universal services.

Authorization regimes may be inconsistent with the principle of necessity if they impose more burdensome conditions than required to accomplish the objectives of Community postal policy. The objective of a fully operational internal market, in particular, requires a strict evaluation of authorization regimes. The Commission’s 2002 survey of obstacles to an internal market for services identified the burden of securing multiple complex Member State authorizations as a significant obstacle to completion of the internal market.¹⁴¹

On the other hand, some type of authorization regime appears necessary to enable government to ensure an affordable, reliable, and efficient universal postal service. Regulators must be able to ascertain whether universal service is being provided and by whom. In addition, a Member State may wish to use an authorization regime to ensure that all operators meet legitimate public service requirements.

Measures that are not self-evidently inconsistent with the objectives of Community postal policy include requirements that postal operators—

- report basic data about the nature and scale of their services;
- maintain confidentiality of correspondence;
- guard against loss or theft of items entrusted to them;
- avoid carriage of items that pose a danger to the public security, safety, health,

¹⁴¹ Report on the State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services, COM/2002/0441 (30 Jul 2002) at 17-18, 31-32.

or morals;

- assure delivery of all items in case of cessation of business;
- disclose performance and complaint data that will allow customers to act knowledgeably;
- provide adequate response to consumer complaints;
- avoid association with persons convicted of crimes relating to dishonesty.¹⁴²

This list of plausible potential conditions implies that some Member States may consider a significant authorization regime to be appropriate, although different Member States may come to different conclusions about the set of conditions that actually need to be imposed on postal operators.

If this outline of plausible regulatory functions is compared with the authorization provisions of the Directive, the following provisions of the Directive appear to raise questions under the principle of necessity:

- Is it necessary to require individual licences for postal operators?
- Is it necessary for a NRA to have authority to attach conditions concerning quality, availability, and performance?

(i) *Individual licences*

In order to ensure that authorized postal operators comply with the public interest requirements, a NRA could adopt a general authorization regime according to which a person who files a registration in a prescribed form could begin to offer postal services immediately. Registration would necessarily involve regulations informing applicants in advance of what was expected of them. Alternatively, the NRA could adopt an individual licence regime according to which a person must file an application and wait for the NRA to approve the application before beginning to offer postal services. Regulatory requirements might be set out as conditions on each licence or they might be adopted as regulations in the general authorization regime.

Each type of authorization regime has advantages and disadvantages. The general authorization regime has the benefit of allowing competition more quickly. For a new applicant, an uncertain delay between expending the costs to get a business organized and earning revenues can create a significant barrier to entry. Thus, the general authorization appears to be best suited to a fully operational internal market. On the other hand, the individual licence regime provides greater certainty that a new postal operator will not offer universal service without complying with the general requirements, at least until discovered by the NRA.

¹⁴² For a discussion of some of these issues, see Postcomm, Licensing Framework in a Fully Open Market - Consultation (30 Nov 2004).

Does the possibility of a new entrant's offering irregular postal service make the individual licence regime necessary or proportionate to accomplishing the objectives of Community postal policy? We believe that the answer is 'no'. If the new entrant is small, breach of the general requirements would not threaten universal service per se. Users will continue to have better established postal operators as alternatives and will most likely be aware of the startup status of the new entrant.¹⁴³ If the new entrant is a large operator, it would be incredibly foolish to invest substantial sums of money in a commercial venture that could be terminated by the NRA after a routine review of its registration. On the whole, an individual licence regime appears to be a disproportionate response to the remote possibility that a general authorization regime will undermine the universal service as a whole.¹⁴⁴

Conclusion. An individual licence regime is not consistent with the principle of necessity and proportionality because its potential to discourage new entry outweighs the remote possibility that a general authorization regime will undermine the universal service as a whole.

(ii) *Quality, availability, and performance conditions*

It seems apparent that a NRA should not be authorized to attach conditions of quality, availability, and performance to authorization of individual postal operators providing services in a competitive market. It is the users who should assess the quality, availability, and performance of the postal operators. This truism should apply as well to the competitive products of a postal operator that is market dominant in other product markets.

It also appears unnecessary to attach quality, availability, and performance conditions to a new entrant that is attempting to challenge a market dominant operator. In some Member States, authorization regimes include conditions which have the effect of protecting the incumbent market dominant operator against competition.¹⁴⁵ For example, an authorization might require the new entrant to serve the entire country or a selected region of the country. For reasons explained above in discussing the reserved area, we do not believe that measures that prevent competition are consistent with the principle of necessity and proportionality. It makes no difference whether the restriction on competition is expressed in the form of a reserved area or an authorization condition.

The real question is whether it is necessary to empower NRAs to attach conditions to the authorization of a postal operator relating to the quality, availability, and

¹⁴³ One regulation could require a new entrant to notify users of its recent initiation of business.

¹⁴⁴ This conclusion is reinforced by the practice in the electronic communications sector. In that industry, the Authorization Directive provides that 'The undertaking concerned may be required to submit a notification *but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights* stemming from the authorisation'. Directive 2002/20/EC (electronic communications, authorization directive) § 3(2), OJ L 108, 24 Apr 2002, pp. 21, 25.

¹⁴⁵ WIK, *Main Developments* (2004) 53-66.

performance of products offered under conditions of market dominance. This question is similar to issues raised by NRA regulation of tariffs and quality of service of market dominant products, and we would answer the question in the same way. If the Member State is required to ensure the availability of affordable, reliable, and efficient universal postal service, then the NRA should be able to regulate the activities of postal operators that provide universal service without the discipline of a competitive market.

Conclusion. It is consistent with the principle of necessity and proportionality to empower Member States or their NRAs to attach conditions relating to quality, availability, and performance to authorizations of postal operators when they offer products under conditions of market dominance. In other cases, it is unnecessary to attach such conditions to authorizations.

2.3.3 Summary

Viewed in the harsh light of the principle of necessity and proportionality, several elements of the current Community regulatory model, or implementing measures permitted to the Member States, now appear to deviate from the operation of a normal commercial market for postal services more than necessary or proportionate to accomplishment of the objectives of Community postal policy. This conclusion follows in large measure from changes in the market, and an improved understanding of the market, which the Postal Directive and the Postal Green Paper set in motion. Although the rules regulating the provision of universal service have lifted the Community's postal sector to a higher plane in many respects, it is also true that in some cases they restrict the commercial flexibility of USPs to a greater degree than necessary or appropriate in the face of changing circumstances, especially in postal markets in which they are non-dominant. Controls on competition entrusted to the Member States have also resulted in greater distortions in and obstacles to a fully operational internal market in postal services than required to ensure an affordable, reliable, and efficient universal postal service. Finally, it should be recalled that evaluation under the principle of necessity depends in part upon the specific objectives for Community postal policy that we inferred; if different policy objectives are inferred, the analysis will differ accordingly.

2.4 Market transparency

The Postal Directive requires Member States to ensure the transparency (public disclosure) of several categories of information about universal service and universal service providers.¹⁴⁶ In addition, the Directive requires transparency, in the narrower

¹⁴⁶ The primary transparency requirements include publication of: (1) obligations and rights assigned to USPs (Article 4); (2) up-to-date information of USP access, prices, and quality (Article 6); (3) authorization procedures for postal operators (Article 9); (4) rules for establishment of a universal service fund (Article 9); (5) tariffs for universal services (Article 12); (6) a certification of the USP's compliance with accounting requirements of the Directive (Article 14); (7) periodic financial reports by the USP (Article 15); (8) quality of service standards for national universal service (Article 16); (9) procedures for dealing with user complaints by USPs and perhaps other postal operators (Article

sense of disclosure to regulatory authorities, for detailed accounting data for each reserved service, for non-reserved universal services collectively, and for non-universal postal services collectively. To what extent does the Postal Directive give effect to the ideals of the principle of market transparency, at least as we have formulated it?

In our view, the Directive made a good start on bringing transparency to the universal service portion of the postal sector even though in some areas better implementation by Member States is still required.¹⁴⁷ However, there are several apparent possibilities for improvement. A brief listing follows:

- *Distinguish between services provided under market dominant and competitive circumstances.* As discussed under the principle of necessity, economic principles suggest strongly that the case of market transparency is weaker in markets in which there is no market dominant operator.
- *Require public summaries of individual or special tariffs.* Although the Directive requires that all universal service tariffs must be transparent, this provision is impractical in respect to preferential rates that apply to one or a few users. USPs are naturally reluctant to provide public information about such rates. Moreover, such detailed information would be difficult to evaluate. Useful transparency would be enhanced if market dominant providers were required to provide periodically a standardized summary of the scope and use of individualized or special tariffs.¹⁴⁸
- *Expand quality of service monitoring for market dominant products.* Introduction of quality of service monitoring seems to have been an especially beneficial result of the Directive. It may be possible to enhance this effect by further standardizing these requirements and providing more frequent and prompt publication.¹⁴⁹
- *Require transparency for cost allocation systems.* The central problem of ensuring the requirements of cost-based tariffs is determining an equitable and objective method of allocating costs, especially common costs. Although accounting data of USPs may be considered commercially sensitive, the details of data collection systems and cost allocation methods should not be commercially sensitive.¹⁵⁰ Publication of such information would give mailers

19); and (10) an annual report by the USP on its response to user complaints (Article 19).

¹⁴⁷ See generally WIK, *Main Developments* (2004) 29-92, especially 39-44 (quality of service, complaints) and 67-85 (tariffs, accounting).

¹⁴⁸ New Zealand, Postal Services (Information Disclosure) Regulations 1998 (SR 1998/87).

¹⁴⁹ See WIK, *Main Developments* (2004) 169-76, 213.

¹⁵⁰ The precise responsibility of NRAs for scrutiny of cost allocation systems is unclear. Review of cost allocation systems by an auditor retained by market dominant operators does not appear to provide adequate transparency of cost allocation methodology. See WIK, *Main Developments* (2004) 79-85, 213.

confidence in regulatory oversight.¹⁵¹

- *Require NRAs to publish a periodic summary of regulatory accounts.* The current Directive does not require the NRA to provide mailers and citizens with an understanding of the financial and operational parameters of universal service. Is the volume of universal service products increasing or decreasing? Is the average cost and price of universal service products increasing or decreasing? For universal service products, what proportion of costs are assigned directly or indirectly and what level of costs are unassigned common costs? How are the unassigned common costs of universal service apportioned among products and user groups? What is the cost of services which a USP is obliged to provide by the universal service obligation but would not provide in a normal commercial market? What are the options for reducing these costs?¹⁵² Without such basic information, it is not possible for a mailer or citizen to meaningfully evaluate the quality or efficiency of universal service.

Conclusion. The Directive does a generally commendable job of bringing transparency to the universal service portion of the postal sector, but there are several possible areas for improvement.

2.5 Administrative fairness

Article 22 of the Postal Directive requires Member States to designate one or more NRAs for the postal sector that are ‘*legally separate from and operationally independent of the postal operators*’. The Directive does not further define the concept of independence. Nor does the Directive require Member State governments and NRAs to give specific effect to any of the elements of the principle of administrative fairness. For example, the Directive fails to address such issues as:

- specific requirements to ensure independence, impartiality, and transparent administration of the NRA;
- treatment of affected parties in a non-discriminatory manner;
- appeal from decisions of the NRA to an appellate body, such as a court, that is independent of the parties involved;
- authority of the NRA to collect information necessary to regulation; and
- NRA consultation with interested parties.¹⁵³

¹⁵¹ See WIK, *Main Developments* (2004) 82.

¹⁵² See, e.g., Article 12 of Directive 2002/22/EC (electronic communications, universal service directive), OJ L 108, 24 Mar 2002, p. 51, which requires NRAs to calculate and publish the cost of universal service.

¹⁵³ For an example of a regulatory directive addressing such issues, see Article 3 to 7 of Directive 2002/21/EC (electronic communications, framework directive), OJ L 108, 24 Apr 2002, p. 33.

Perhaps more fundamentally, the concept of a universal service provider in the current regulatory model is difficult to reconcile with the principle of administrative fairness. To impose an obligation of universal service on a designated postal operator, as opposed to other postal operators, is inequitable. To grant a USP special privileges, compared to other postal operators, is inequitable. Unless such burdens and privileges are dispensed in a wholly impartial and transparent manner, administrative fairness cannot be achieved. Indeed, if the burdens and privileges are bundled together in a single package—i.e., if designation is limited to a single universal service provider for the entire national territory—even impartial and transparent administration would seem unreasonable since in almost all cases only one operator can qualify for the designation. The principle of administrative fairness thus implies a strict separation of regulatory and operational roles. All operators, including the public postal operator, should have the same commercial freedoms and the same regulatory requirements. Where necessary to maintain universal service, the NRA should impose specific obligations in return for appropriate compensation, but this system of costs and opportunities presented by the state's guarantee of universal service should fall equally on the shoulders of all similarly situated postal operators.

Conclusion. Although the Directive requires establishment of an independent NRA for the postal sector, it otherwise fails to give effect to the principle of administrative fairness. In particular, the concept of a universal service provider designated by the Member State is inconsistent with the principle of administrative fairness.

2.6 Competency

2.6.1 Community institutions

To establish a Community-wide universal postal service, some elements of postal regulation in the Member States must be harmonized by Community legislation. In the Postal Directive the following provisions perform this function: (1) definition of the scope of universal service; (2) commitment to universal affordability; (3) requirement for transparent, non-discriminatory access to universal services; (4) requirement for transparent, non-discriminatory, cost-based tariffs for universal services; (5) a rule defining how Member States must treat intra-Community mail; (6) common accounting requirements for USPs; (7) requirement for public, monitored quality of service standards; (8) standardization of technical issues; and (9) procedures for consumer protection. Collectively, these measures define the Community concept of 'universal postal service'.¹⁵⁴

Community harmonization should also address areas where by reason of the scale

¹⁵⁴ The Community concept of universal service departs subtly from the traditional concept of public postal service. Traditionally, the national post office was expected to provide affordable and reliable delivery, but few people considered cost-based tariffs or quality of service standards an essential part of national postal service. The Community concept thus reflects a more modern, 'business-like' approach towards postal services.

or effects of the regulatory task, it can be better achieved at Community level.¹⁵⁵ In this category, we would place two elements of the Directive: (1) requirement that Member States establish an independent NRA for the postal sector and (2) limitation of the reserved area in Member States. The need for an impartial economic regulator is implied by several considerations. Cost-based tariffs and quality of service monitoring demand something more credible than self-reporting by the USP, and the objective of an internal market implies a reliable mechanism for preventing cross-subsidy from reserved and imperfectly competitive markets to competitive markets. A Community measure limiting the reserved area also follows from the objective of an internal market. In both cases, Community legislation is needed to ensure that all Member States share the disciplines as well as the benefits of a Community-wide postal sector.¹⁵⁶

Finally, in some areas, the Postal Directive applies a one-size-fits-all solution in areas better served by the exercise of national judgement and authority. Since the needs, preferences, costs, and alternatives to postal services vary substantially among Member States, Community institutions are not as well equipped as national institutions to adapt the Community concept of universal service to national conditions. So long as citizens can be assured that postal articles will be delivered affordably, reliably, and efficiently to every address in the Community within an acceptable period of time, a Member State or its NRA should be free to adjust legal standards for delivery frequency (an important factor in the cost of postal services) and to set standards for quality of service and postal prices. This conclusion seems to apply even to inbound cross-border mail which, as a matter of operational reality, forms a small segment (about 4 per cent on average) of domestic mail.

Conclusion. In terms of the principle of competence, the Postal Directive properly harmonizes the elements of national regulation necessary to establish a Community concept of universal postal service and correctly prescribes harmonized criteria for establishing NRAs and limiting reserved areas. However, the Directive deals too rigidly with some features of universal service that are better left to the judgement of national institutions.

2.6.2 National institutions

Under the current regulatory model, national institutions exercise diverse functions which define or regulate national aspects of postal services, in some cases within limits set by the Directive. These include: (1) the decision whether to extend universal service to include parcels weighing more than 10 but less than 20 kilograms; (2) the decision whether to increase the delivery frequency of universal service from 5 to 6 or 7 days per week; (3) definition of access requirements for universal service; (4) designation of USP(s); (5) definition of the reserved area; (6)

¹⁵⁵ EC Treaty, Article 5.

¹⁵⁶ In addition, market developments in the last decade suggest strongly that there is a missing piece in the Community level regulatory structure: a mechanism for coordinating the work of Community NRAs. For these reasons, the new regulatory model described in Chapter 5 envisions a Postal Regulatory Committee. See section 5.8, page 166, below.

authorization of postal operators; (7) introduction of a compensation service fund if necessary; (8) regulation of prices for universal service; (9) regulation of accounts of USPs; (10) definition and monitoring of quality of service standards; (11) definition of user complaint, redress, and appeal procedures; and (12) establishment and definition of the role of NRA.

Under the principle of competency, should any of these functions be handled at Community level instead of Member State? We believe the answer is ‘yes’. Although Community institutions should forbear from acting where objectives ‘can be sufficiently achieved by Member States’,¹⁵⁷ it is also true that, in the words of the Sapir Report, the regulatory framework must maintain a ‘clear and appropriate assignment of responsibilities’ and prevent ‘any attempts to foreclose national markets or to depart from commonly agreed principles’.¹⁵⁸ By these standards, we believe there are two categories of measures that need to be more thoroughly harmonized at Community level.

First, measures relating to the control of competition should be more carefully specified at Community level. The power to exclude competition at national level is the power to prevent an internal market at Community level. If there is to be a single market in postal services, functions which control competition must be exercised collectively at Community level. Indeed, the *raison d’être* of the EC Treaty is to provide a collective guarantee for free movement of goods and services. For this reason, the Commission is vested with special authority to implement the competition rules. For the same reason, national institutions should not individually determine the scope of the reserved area or establish authorization regimes that can thwart development of European postal operators. Indeed, as noted above, a Commission report in 2002 identified both types of measures as obstacles to evolution of an internal services market.¹⁵⁹ Therefore, Community legislation should more specifically define the limits of national authority to control competition by means of the reserved area or restrictive authorization procedures.

Second, measures relating to the establishment of NRAs should be better defined at Community level. Increasingly, NRAs will be called upon to make decisions affecting postal operators based in other Member States. NRAs should have no doubt about the independence and impartiality of their sister agencies. They should likewise be assured that decisions are well founded and based on substantial and objective evidence. In order to promote mutual confidence among NRAs,

¹⁵⁷ EC Treaty, Article 5.

¹⁵⁸ High Level Group (chaired by André Sapir), *An Agenda for a Growing Europe: Making the EU Economic System Deliver* (2003) at 151, 161.

¹⁵⁹ Similarly, in the 1999 Communications Review, the Commission concluded that a regime of individual licences similar to that permitted by the Postal Directive created an obstacle to establishment of pan-European services: ‘The current Licensing Directive gives a large degree of flexibility to Member States to require individual licences for telecommunications services. . . . Requiring an operator to seek an individual licence gives regulators a large degree of control over market entry. . . . In this context, the Commission does not believe an approach based primarily on individual licences can be justified. The variation described above can also prevent the deployment of pan-European services. Towards a New Framework for Electronic Communications Infrastructure and Associated Services: the 1999 Communications Review, COM/1999/0539 (10 Nov 1999) at 21.

Community legislation should include a specific definition of the powers, procedures, and objectives of NRAs.

Conclusion. Member States appropriately exercise the majority of regulatory decisions affecting the implementation of Community postal policy at Member State level. However, in two areas, control of competition and establishment of the NRA, the principle of competence implies that more specific harmonization should be sought at Community level.

2.7 Legal certainty

In respect to legal certainty, the major inadequacy of the Postal Directive is obscurity. With the benefit of experience, and under the pressure of a changing market, it is evident that the current regulatory model is not as clear as could be wished in important areas. Some of the principal ambiguities, highlighted in previous studies and court cases, are described below.

- *Postal services.* Although the Postal Directive regulates the supply of ‘postal services’, it is not clear what services are ‘postal services’.¹⁶⁰ Do ‘postal services’ include private delivery services? Leading private operators have argued strenuously that the Directive is unclear.¹⁶¹ Do ‘postal services’ include the collection and delivery of articles weighing 30 kg? 100 kg? There is no line between ‘postal services’ and other types of distribution services. Do ‘postal services’ include delivery of unaddressed mail? Seemingly not, even though most postal operators consider delivery of unaddressed mail to be a postal service.
- *Universal services.* There is confusion among Member States about whether ‘universal service’ in the Directive refers to all services within the universal service area or only to services provided by a USP designated by a Member State. If the latter, it is not clear why such a distinction should be made since, from a public standpoint, it is the availability of service, not the identity of the service provider, that is important.
- *Categories of postal service.* The Postal Directive establishes categories of postal service (item of correspondence, direct mail, postal package) which do not correspond precisely with categories used by the Universal Postal Union and most USPs (letter post, letters, printed matter, small packets, parcels). Since most USPs still keep statistics in UPU-based categories (in part because they provide statistics to the UPU), it is extremely difficult to obtain information about postal markets that follows the classification scheme of the current

¹⁶⁰ Under the Postal Directive, Article 2, *postal services* are services that transport *postal items*, and *postal items* are items ‘addressed in final form to be carried by the universal service provider’. No private operator is a USP.

¹⁶¹ WIK, *Main Developments* (2004) 53.

regulatory model.¹⁶²

- *Scope of reserved area.* The reserved area, a key component of the current regulatory model, is limited by the Directive ‘to the extent necessary to ensure the maintenance of universal service’.¹⁶³ It is unclear how this standard can be implemented in practice and in fact, no Member State has tried to do so.¹⁶⁴
- *Authorizations and licences.* A recent survey of the Community postal sector revealed substantial confusion over scope, conditions, and details of the authorization procedures established by the Postal Directive.¹⁶⁵
- *Special tariffs.* The Directive seeks to prescribe principles for the calculation of special tariffs using ‘avoided costs’.¹⁶⁶ In a recent case, however, the U.K. NRA, Postcomm, concluded that this important provision could be interpreted in two ways that give very different results.¹⁶⁷
- *Allocation of USP costs.* Although the Postal Directive sets out principles for the allocation of costs in the accounts of a USP, it does not prescribe a procedure for objectively applying these principles to actual accounts.¹⁶⁸ As a result, there is substantial uncertainty as to the duty or authority of the NRAs to review and approve the specifics of cost allocation systems even though cost allocation is one of the central principles of the Directive.¹⁶⁹
- *Independence of NRA.* The Directive requires Member States to establish an independent NRA, but it does not define what is meant by ‘independent’ nor specially prescribe the duties of the NRA.¹⁷⁰ As a result there is great variation among Member States.¹⁷¹

Aside from definitional problems, the major legal uncertainties created by the current regulatory model are the product of complexities whose wisdom and necessity have been already addressed in the discussion under earlier principles: distinctions between USPs and other postal operators; distinctions between domestic postal services and cross-border postal services; distinctions between universal services provided by the USP and other services within the universal service area provided by other postal operators; the multiplicity of accounting rules and authorization

¹⁶² WIK, *Main Developments* (2004) 23.

¹⁶³ Postal Directive, Article 7.

¹⁶⁴ WIK, *Main Developments* (2004) 45.

¹⁶⁵ WIK, *Main Developments* (2004) 53-54.

¹⁶⁶ Postal Directive, Article 12.

¹⁶⁷ U.K. Postcomm, *Promoting Effective Competition in UK Postal Services Through Downstream Access* (Mar 2004) 14-16.

¹⁶⁸ Postal Directive, Article 14.

¹⁶⁹ WIK, *Main Developments* (2004) 80-2.

¹⁷⁰ Postal Directive, Article 22.

¹⁷¹ WIK, *Main Developments* (2004) 30-33, 89-92.

procedures in different Member States; etc.

Conclusion. The Postal Directive creates unnecessary legal uncertainty by failing to define key terms in a clear, simple, and traditional manner.

2.8 Summary

In order to evaluate the current regulatory model under sound regulatory principles, it is necessary to derive an explicit statement of policy objectives since the Postal Directive lacks such a statement. Based on a review of various Community documents, we have inferred that the objectives of current Community postal policy are twofold: (1) to ensure affordable, reliable, and efficient universal postal service; and (2) to promote a fully operational internal market.

Others may give more or less emphasis to specific provisions and plausibly argue that these same documents imply a somewhat different statement of objectives. In our view, an evaluation of the current regulatory model under sound regulatory principle is a useful exercise regardless of the precise formulation of policy objectives to be served. At the end of the exercise, one can adjust the conclusions to accommodate different policy objectives, rejecting some remedies and modifying others. We have tried to show how this may be accomplished in Chapter 6.

In this chapter, the essential question that we have addressed is, How closely does the Postal Directive follow sound regulatory principles to advance the objectives of Community postal policy (that we have inferred)? We have concluded that in several respects the Postal Directive does not follow sound regulatory principles. Without attempting to recapitulate all of the conclusions of this analysis, the major changes that sound regulatory principles imply in the current regulatory model may be summarized as follows:

- The guarantee of universal service should be limited to letter post and parcel post services.
- Universal service should be defined somewhat more flexibly at Community level to allow Member States to better adapt the definition of universal service to their particular circumstances; in particular, Member States should be permitted (not required) to introduce appropriate adjustments in the frequency of delivery of universal services.
- Member States should not require uniform tariffs for universal services but USPs should be specifically authorized to introduce uniform or zoned tariffs where cost-justified.
- There is no need to strictly regulate universal services offered by a USP in competitive circumstances, and it is inequitable in respect to USPs to do so.
- The practice of designating a single postal operator (or possibly more than one) as the universal service provider for each national territory should be replaced

by a more selective approach that treats all postal operators in a non-discriminatory manner.

- The practice of establishing a reserved area for the USP at Member State level should be prohibited at Community level because (1) there is no evidence that a reserved area is necessary to allow a Member State to ensure universal service at levels required by a reasonable Community-wide floor for universal services and (2) a reserved area at national level wholly obstructs the accomplishment of a fully operational internal market.¹⁷²
- To accomplish the objectives of Community postal policy, it is unnecessary require postal operators to obtain individual licences prior to providing postal services even though some form of general authorization should be continued.
- The transparency of postal markets can and should be improved without inhibiting competition or infringing on legitimate expectations of commercial confidentiality.
- The powers, impartiality, and procedures of NRAs should be more carefully defined to protect the rights of operators, users, and other interested parties and to give NRAs mutual confidence in each other's decisions.
- Regulatory distinctions between national and intra-Community postal services should be eliminated.

¹⁷² For purposes of this study, we have presumed that the objectives we have inferred for current Community postal policy imply that Member States should not introduce restrictive definitions of universal service which require continuation of a reserved area. Whether Member States should in fact be permitted such discretion is ultimately for policy makers to decide. See section 6.3.1, page 182, below.

3 Current Regulatory Model – Member States

Under the terms of the Postal Directive, each Member State has adopted sector specific postal laws. Within the harmonized framework provided by the Postal Directive, these laws vary substantially in how they regulate the postal sector. Following the evaluation of postal regulation at Community level, this chapter evaluates the diverse approaches taken by Member States in the light of the sound regulatory principles identified in this report.

Evaluating the regulatory models of the Member States under sound regulatory principles presents a different problem from analysis of the Community regulatory model. Some of the principles derived for evaluation of the Community regulatory model are less applicable to the Member States. For example, in some cases it makes little sense to ask whether the objectives of postal regulation are clearly specified since the expressed objective of Member State legislature is no more than to implement the Postal Directive. For same reason, one cannot reasonably ask if Member State legislation is consistent with fundamental economic and legal policies of the Community if the legislation is consistent with the Postal Directive. Then, too, the Postal Directive binds the hands of the Member State in certain respects making further inquiry moot. For example, there is no point in asking whether a Member State has adopted a more rigid rule on delivery frequency than necessary to satisfy Community postal policy if the Member State has merely implemented the rigid rule of the Directive.

For some areas of postal regulation, the Postal Directive is very specific and thus gives relatively little room for Member States to develop alternative approaches of regulation (e.g. as regards the scope of universal services). In other areas, however, the Postal Directive leaves more discretion to member states. The latter cases are particularly interesting for the purpose of this report—and will be presented in more detail—since the comparison of alternative approaches taken by different member states can inform this report in identifying benchmark regulatory models that could be applied in other Member States or on Community level as well. The evaluation of Member State regulatory models therefore focuses on those areas where the Directive gives more freedom to Member States to develop diverse regulatory approaches.

This section is structured by the sound regulatory principles identified in Chapter 1. For reasons stated above, however, evaluation of Member State practices offers relevant insights only for four of the seven principles (since the remaining relate predominantly to Community level regulation): specific purpose (no. 1), necessity and proportionality (no. 3); market transparency (no. 4), and administrative fairness (no. 5).

Finally, this section does not attempt to comprehensively discuss all features of postal regulation in all Member States but rather aims at evaluating the basic

regulatory models underlying the diverse approaches that have developed in the Community. Rather than ranking performance of individual Member States, the main objective is to identify best practices in the light of the regulatory principles that should be considered for wider application in other Member States

3.1 Specific Purpose

While the Postal Directive does not contain an explicit statement of objectives, many Member State postal laws do. About half of all postal laws in Member States list general objectives of postal policy. Some state transposition of the Postal Directive as an objective (e. g. Cyprus and the Netherlands). The less procedural objectives generally reflect those inferred as major objectives of Community regulation in the postal sector (see section 2.1). However, it appears that the objective of ensuring and promoting the provision of universal service is mentioned more prominently in some postal laws than the objective of promoting a competitive postal market.

The term "promoting a competitive market" in this context summarizes various formulations in national postal laws. For example, the German post law states 'The purpose of this Act is, through regulation of the postal sector, to promote competition and to guarantee appropriate and adequate services throughout the Federal Republic of Germany.' (§1 PostG). In Hungary the post law defines the objectives in the following way: 'The objectives of the Act are [...] to promote [...] free trade in postal services [...]; market entry for new service providers ...'(Article 1(bc) and (bf) Act CI of 2003 on the Post). In Spain the post law defines that 'regulation of the postal sector in Spain is hereby established with a decisive will to clarify the liberalised sphere' (Law 24/1998 on the Universal Postal Service and on the Liberalisation of Postal Services, Statement of purposes). Although these are objectives for national rather than Community postal policies, they broadly corresponds to the objective of promoting a 'fully operational internal market in postal services' inferred for Community policy in section 2.1 above.

In a few Member States, promotion of competition is mentioned explicitly as an objective of postal legislation, e.g. objectives to 'promote competition' in Germany, 'promote liberalization' in the Netherlands 'to further the interests of users of postal services, wherever appropriate by promoting effective competition between postal operators' in the U.K. In remarkable clarity, the Hungarian postal law lists a number of specific objectives including, inter alia, promotion of efficiency, free trade, consumer interest, market development, market entry for new operators, and the integration of the Hungarian postal market into the Community single market.

The practices from several Member States illustrate the importance of the principle of purpose in furthering a transparent discussion about postal regulation. In particular, the formulation of policy objectives allow evaluation of the effectiveness of legislation against its own ambitions more easily. In the majority of Member States however, as in the Postal Directive, objectives of regulation could be specified more precisely.

3.2 Necessity and proportionality

As noted in section 2.3, page 49 above, evaluation of current regulatory practice against the principle of necessity and proportionality requires a fundamental ‘bottom-up’ review of the various elements of current regulation of postal services in order to evaluate whether they imply the least deviation from the normal commercial market necessary and proportionate to achieve the Community’s policy objectives. This section therefore summarizes the basic national approach for each element of postal regulation and—departing from the conclusions of the section 2.3 (evaluation of Community model)—identifies national practices that are most consistent with the principle of necessity and proportionality.

3.2.1 Rules on provision of services

a) Postal services included in universal service

The scope of universal service in the Member States appears very homogenous—as one would expect given the little discretion allowable under Article 3 of the Postal Directive. Domestically, the universal service in all Member States includes postal items weighing up to 10, 15 or 20 kilograms according to national legislation—but USPs generally deliver parcels weighing up to 20 kilograms or more in practice even where the universal service obligation legally stretches only to 10 kilograms. In addition, the universal service includes incoming cross border parcels weighing up to 20 kilograms (or more) in all but two countries: The postal laws in Latvia and Spain apply a weight limit of 10 kilograms to incoming cross border parcels.¹⁷³

Two member states—the Netherlands and the United Kingdom—have taken an especially innovative approach towards the definition of universal service.

- In the Netherlands, bulk mail outside the reserved area (in 2005: bulk mail above 100 gram) is considered to be outside the definition of universal service. Furthermore, the universal service applies only to items carried at the single piece tariff outside the reserved area. Only the reserved part of bulk mail is therefore part of the universal service, but plans are to exclude bulk mail from the universal service entirely after liberalization (and possibly a transition period of few years). As the Dutch authorities argue, competitive pressures have effected that bulk mailers are served adequately by the market and governmental intervention has therefore become superfluous in the liberalized part of the bulk mail market.¹⁷⁴
- In the United Kingdom, the NRA, Postcomm, is reviewing the universal service definition based on an extensive public consultation process about the needs of postal users. This appears to be the first time that universal service has been defined by actually assessing the needs of postal users. Postcomm's general

¹⁷³ See WIK, *Main Developments* (2004) 34 ff.

¹⁷⁴ See Netherlands, Ministry of Economic Affairs, *Postal Services Policy Memorandum* (22 Jan 2004) (English version).

conclusion was that, ‘as competition develops in the UK postal market, the universal service will fulfil the role of a guarantee of a minimum, rather than a comprehensive, range of services.’ On this basis, Postcomm intends to exempt all but one bulk mail service from the universal service as well as services for priority domestic parcels and all outbound international parcels. While these services would no longer be regarded as universal services they would still fall within the scope of universal service. The USP would continue to be obliged to provide both sets of services, the main difference between the two concepts Postcomm uses is that uniform tariffs are required only for universal services—in contrast, geographically non-uniform prices may be applied for services within the scope of the universal service.¹⁷⁵ Recently, Postcomm decided that Royal Mail shall continue providing two bulk mail services as universal postal services (Mailsort 1400 and Cleanmail). Correspondingly, about one quarter of all bulk mail would be assigned to universal postal services. Downstream access products for competitors and customers are not considered as universal postal service. Consequently, prices for these services could be geographically averaged.¹⁷⁶ The current proposal on the future price control is broadly that prices for all non-universal services continue to be geographically averaged, until Royal Mail obtains Postcomm’s prior approval to de-average prices.¹⁷⁷

The Dutch and British examples appear to exhibit the view that regulatory intervention—by means of a universal service obligation—is necessary only for those services that (i) are not adequately provided to customers, or specific types of customers, by a competitive market and (ii) are considered 'generic universal services' in the view of customers. In a changing postal market, adapting the scope of universal services may therefore become necessary as the customer needs as well as a competition evolves.

A similar reflection is included in the German postal law that requires universal services to include only ‘such services as are generally deemed indispensable’ and stipulates that the ‘definition of universal services shall be adapted to technical and social developments in line with demand.’¹⁷⁸ As the current universal service obligation expires by the end of 2007, the NRA, RegTP, will make recommendations concerning the future scope of universal service in a report due by the end of 2005.¹⁷⁹

By contrast, in Sweden all letters and parcels weighing less than 20 kg are included in the universal service even though the market is completely liberalized for more than a decade. However, regulation of universal services is comparably light-handed in Sweden – for example price cap regulation is limited to retail tariffs – such that

¹⁷⁵ See U.K., Postcomm, ‘The UK’s Universal Postal Service’ (2004) and ‘Giving Customers Choice: A Fully Open Postal Services Market’ (2005). See also the recent inquiry in Ireland: Comreg, *The Universal Postal Service: Formulating a Working Definition* (2005).

¹⁷⁶ See U.K., Postcomm, ‘The Universal Service for Bulk Mailers’ (2005).

¹⁷⁷ See U.K., Postcomm, ‘2006 Royal Mail Price and Service Quality Review’ (2005).

¹⁷⁸ Germany, Post Law, Article 11.

¹⁷⁹ See Germany, RegTP, *Jahresbericht 2004* [Annual Report 2004].

the de facto situation is not too different from the policies discussed in the U.K. and the Netherlands.¹⁸⁰

The examples from the Netherlands and the U.K. raise the question whether or not universal services should be limited to services not provided adequately by the market, such that the most competitive products could be released from the universal service at some point. In our view, these proposals to reduce the scope of postal universal services (in particular, exempting bulk mail services) need to be understood in the context of extensive regulation imposed on all universal services by the current Postal Directive. Consequently, we would argue that a more practical approach is to maintain all letter post services—whether bulk or not—within the universal service but limit rigid regulatory intervention strictly to those market segments where market failure has to be expected, i.e. to segments where an operator enjoys market dominant position. This corresponds largely to the practice in Sweden, where all letter post items are included in the universal service but regulation is de facto limited to few products. Moreover, this argument refers mainly to letter post services included in the universal service. For parcel service, however, it appears useful to limit the universal service to basic parcel post.¹⁸¹

b) Universal service providers

Although Article 4 of the Postal Directive specifically mentions the possibility that universal service may be provided by several universal service providers in one country, there is no evidence that such a joint responsibility of several operators exists in any Member State.¹⁸² In practice, universal service is provided by the incumbent postal operators, i.e. by the public postal operators—or the formerly public postal operators—in all Member States. The fact that the theoretical possibility of multiple USPs in one country has proved not to be practically relevant in the European Union (and elsewhere) is also reflected by the fact that the terms ‘universal service provider’ and (formerly) ‘public postal operator’ are widely used equivalently.

With respect to the issue of designating universal service providers, no alternative approaches to the stipulations of Article 4 have developed in the Member States. The major reason appears to be that such policies would have been perceived as inconsistent with the current Postal Directive.

¹⁸⁰ Introduction of a similar approach is underway in Norway: Plans are to fully liberalize the postal market by January 2007 while basically maintaining the current universal service obligation.

¹⁸¹ See section 2.3.1(a) above and chapter 5 (new regulatory model) below.

¹⁸² In a questionnaire related to the Main Developments study one question asked whether a ‘government-designated universal service provider’ existed in the years from 1998 to 2003. In the answers to that question, there was apparent confusion among respondents whether the question related to those operators notified as USPs in accordance with Article 4 of the Postal Directive or whether it related to the imposition of a universal service obligation on a particular operator. In the light of this confusion, no clear picture about the formal nature of the designation of USPs could be derived. However, a separate question asked for the number of operators designated as USPs for each year—answers to this question clearly showed that in no Member State multiple operators had been designated as universal service providers.

c) Access to universal services

Article 3 of the Postal Directive—requiring Member States to ensure that the density of access points (postal outlets and collection letter boxes) takes account of the needs of users—contains relatively general requirements relating to access to universal services. Consequently, Member States have taken very different approaches in defining minimum standards concerning the density of access points. The most important types of requirements that are imposed on universal service providers are listed below.

- *Minimum number.* The USP must maintain at least X postal outlets (or collection letter boxes).
- *Maximum distance.* A postal outlet (or letter box) must not be further away than X kilometres from any home or business location. Usually this requirement applies does not apply to isolated houses in rural areas but only within ‘populated areas’ (or similarly defined geographic areas).
- *Town size.* A postal outlet (or letter box) is mandatory in each municipality exceeding a population of X. In addition, some countries require the USP to maintain one postal outlet per X inhabitants in towns of a certain size, e.g. one outlet for a town of 20,000 inhabitants and 2 outlets for a town of 40,000 inhabitants.
- *One outlet per municipality.* At least one postal outlet (or letter box) must be operated in each municipality.

In many Member States, legislative provisions combine several of these access requirements: In the Czech Republic, for example, the USP is required to maintain a collection letter box in 750 metres reach from every building in municipalities of more than 10,000 inhabitants. In smaller municipalities (1,000 to 10,000 inhabitants), the USP is required to have at least one letter box per 1,000 inhabitants.

In addition, legislation in some Member States specifically requires that a certain minimum share of outlets be operated by staff directly employed by the USP—thus restricting the flexibility of the USP to replace traditional post offices with ‘postal agencies’ run by contracted merchants. In the majority of the Member States (20), however, there is no formal rule that prevents the USP from replacing a post office with a postal agency.

In the Community, there is a wide range of regulatory requirements relating to the density of access points. They range from none to extremely detailed guidelines relating the location of access points to density, distance, population, or community-related criteria.¹⁸³ Even in Member States where no specific requirements regarding the density of postal outlets exist, it appears that politics—often locally—strongly oppose USPs that plan to close postal outlets, thus adding a ‘soft

¹⁸³ See WIK, *Main Developments* (2004), Appendix B, Table 10.

component' to the universal service obligation.

Experience from Member States suggests that subsidiarity in determining appropriate standards for access to universal services has worked well. As public needs for access as well as the cost of providing access to universal services can most usefully be balanced at a local level, there appear to be no reason for further harmonization in this area.

d) Frequency of universal service delivery

The frequency of delivery is an area where, at first glance, Member States have relatively little discretion in adopting autonomous policies since under the Postal Directive they may only choose to require universal services to be delivered either five or six days a week. Having regard to the particular importance of delivery operation for postal costs, however, the number of weekly deliveries has an important impact on the cost of universal service operations.¹⁸⁴

Only in five Member States postal legislation requires that universal service be delivered six times a week while 20 Member States apparently deem a minimum of five weekly deliveries to be sufficient to meet the basic needs of postal users. It is interesting to note, however, that six Community USPs voluntarily provide six-day delivery although they are not required to do so by law.

In the majority of Member States, collection and delivery is provided every working day at all points in the country. However, providing postal service on less than five days a week appears reasonable under exceptional geographic circumstances, e.g. on islands that do not have daily ferry service. Almost half of all Member States (eleven) allow for a reduced frequency of universal service in certain geographic areas—as provided by Article 3(3) of the Postal Directive. While less than one per cent of the population is affected in most of these countries, in Greece more than seven per cent of the population receive universal service less than five days per week.¹⁸⁵

Up to the present no Member State has reduced the delivery frequency required by law. Even in countries already discussing the evolution of the postal universal service like Netherlands, Norway, Sweden, and U.K. reductions in the delivery frequency have still not been envisaged.¹⁸⁶

¹⁸⁴ For example, assume delivery operations accounted for 50 per cent of the cost of universal service operations and delivery costs were completely variable with respect to the number of weekly deliveries (i.e. delivery costs were entirely fixed costs with respect to mail volume). Abolishing one weekly delivery would then reduce fixed labor costs by 1/12, i.e. by 8.3 per cent. In practice, delivery costs are not be completely variable (with respect to the number of deliveries) since more mail will have to be delivered on each of the remaining five days. However, it appears reasonable to assume that abolishing one weekly delivery can reduce the cost of universal service operations by at least, say, 5 per cent.

¹⁸⁵ See WIK, *Main Developments* (2004), Appendix B, Table 8.

¹⁸⁶ Netherlands, Ministry of Economic Affairs, Supplemental Information on the Postal Services Memorandum, (2004); Norway, Ministry of Transport and Communications 'Liberalisation of the Norwegian Postal Market: Proposal to the Parliament St. prp. Nr. 34 (2004-2005) – Summary' (2004);

In contrast to letter post—where daily universal delivery is ensured throughout the Community save in few exceptional circumstances—Member States have adopted somewhat different approaches concerning the delivery of parcels: While the majority of Member States requires parcel delivery free of charge to the premises of the recipient, home delivery for parcels is only provided at an extra charge in eight member states.¹⁸⁷ As a default, recipients have to collect their universal service parcels from the nearest postal outlet after receiving a notification. Finally, in Spain universal service does not include home delivery of parcels at all: the USP is not required to—and does not—deliver universal service parcels to the home of the recipient.

Whereas the current Postal Directive set relatively rigid standards with respect to delivery frequency, there appears to be little evidence that such rigid harmonization measures are needed. In fact, actual performance exceeds the minimum requirements in many cases. In addition, Member States appear to have made reasonable (and little) use of the exemptions permitted under Article 3(3) suggesting that achievement of the Community’s objectives could be maintained if Member States were allowed to adjust delivery frequency to local circumstances.

e) Prices of universal services

With respect to the regulation of universal service tariffs, the Postal Directive sets out relatively detailed rules (Articles 12 and 14) and thus, at first glance, gives Member States comparably little opportunity to implement diverse approaches of tariff regulation. However, it appears that harmonization of regulatory control of universal service tariffs, in practice, has been achieved only to a limited extent: in early 2004, formal investigations into universal service tariffs had been undertaken only by half of all Member States. In some cases, cost standards and procedures for tariff regulation remain intransparent to the public even where tariffs had been reviewed.¹⁸⁸

In particular, diverging national regulatory policies can be observed in the following areas: (1) scope of services regulated; (2) methods used for price regulation; (3) competent authorities for price regulation; and the concepts used to implement the Directive’s requirements with respect to (4) affordability, (5) cost-based tariffs, and (6) uniform tariffs.

(i) Scope of services regulated. In the majority of Member States, all universal services—at least *de jure*—are subject to price regulation. Some Member States have limited price regulation to reserved services (e.g. Austria) or to single piece items (e.g. Czech Republic, Spain, Lithuania, Luxemburg, Latvia, and Sweden).¹⁸⁹ In practice, however, there are serious doubts that the legal standards established for

Sweden, Ministry of Industry, Employment and Communication, ‘Postmarknad i Förändring’ [The changing postal market] (2005); U.K., Postcomm, ‘The UK’s Universal Postal Service’ (2004).

¹⁸⁷ In addition, in one country (the U.K.) home delivery of parcels is free of charge in most but not all locations.

¹⁸⁸ See WIK, *Main Developments* (2004) 67-77.

¹⁸⁹ See WIK, *Main Developments* (2004) 68.

tariff regulation are enforced adequately in all Member States.¹⁹⁰ The fact that price regulation is limited to public single piece tariffs in many countries suggests that ensuring affordable tariffs is seen as the major objective of price regulation in many Member States. Indeed, for the purpose of ensuring affordability, a limitation to public tariffs (i.e. to products offered to individual customers rather than businesses) appears consistent with the principle of necessity and proportionality. The second purpose of price regulation in a competitive market, however, must be to prevent dominant operators from distorting competition by discrimination between customers and possible offering predatory prices to prevent market entry. This purpose of price control is supposedly addressed by those countries that limit price control to reserved services. In the presence of severe risks of market failure due to continuing market dominance, this limitation should relate to products that are provided under market dominant conditions rather than merely distinguish between reserved and unreserved services.

(ii) Method of price regulation. In controlling USP tariffs, Member States apply a variety of methods of price regulation including ex-ante approval of tariffs, ex post review or price cap regimes.

In Sweden, the Postal Market Committee has recently proposed an end to the regulation of tariffs of universal services for the purpose of ensuring that retail rates are based on costs. The Committee argues that the costs of the administrative burden exceed the public interest benefits since “postage costs for households and small companies, both in absolute figures and in relation to other costs, are so small that they do not justify the imposition of a price ceiling”. The Committee concludes that parties demanding price regulation are in fact concerned about ‘cross-subsidization’ between universal service products and not the absolute level of tariffs. To control cross-subsidy, the Swedish Postal Market Committee proposes to improve transparency of universal service prices including special tariffs and to improve protection against undue price discrimination.¹⁹¹

Due to a general lack of transparency of the practical application of these mechanisms as well as the diverse scopes of tariffs regulated in different Member States, no conclusions can be drawn from a comparison of the different methods at this stage.

(iii) Authority responsible for price review. Authority to review USP tariffs is vested with the national regulatory authorities in about half of all Member States.¹⁹² In thirteen Member states, price control is exercised by other authorities such as a Ministry (e.g. in Hungary) or prices are determined by secondary legislation (either

¹⁹⁰ In annex to the 2005 application report, the Commission staff note that ‘as far as the practical effects are concerned, Member States have at best made a start towards achieving the Directive’s goal of affordable transparent prices geared to costs.’ Annex to the Report on the Application of the Postal Directive, SEC/2005/0388 (23 Mar 2005) at 22.

¹⁹¹ Sweden, Ministry of Industry, Employment and Communication, *Postmarknad i förändring* [The Changing Postal Market] (25 Jan 2005) 41-42.

¹⁹² Only twelve of 25 Member States reported that the NRA as the power to either cancel USP rates ex post or approve rates before they take effect. See WIK, *Main Developments* (2004) 91.

directly, e.g. in Spain,¹⁹³ or by setting out maximum tariff increases, e.g. in the Netherlands¹⁹⁴). While these institutional designs were mainly developed before liberalization took effect, the current practice seems to overlook the practical complexities of tariff regulation in competitive markets as well as the significant relations of tariff regulation and control of USP accounts. Since responsibility for the latter is with the NRAs under the current Directive—and should continue to be—it appears that NRAs should as well be responsible for price regulation.

(iv) *Affordable rates.* Although the requirement that universal services be affordable is an essential element of postal legislation in all Member States, there is a surprising lack of a workable definition of the concept of ‘affordability’. Only two Member States have defined this term, but even those definitions relate affordability to the existing price level rather than to a more abstract concept (e.g. average household spending for a postal service as share of total spending or minimum wage level).¹⁹⁵ An obvious explanation for this lack of precise definitions appears to be that postal services are generally considered affordable and there was therefore no need to specify ‘affordability’. Although no recent quantitative analysis of household spending is available, rough estimation suggests that average household expenses for postal services are well below € 50 per year even in the Member State with the highest public tariffs for postal services.¹⁹⁶

(v) *Cost-based tariffs.* While there is little information available on how the requirement that tariffs be cost-based is actually ensured in practice, it appears that two distinct cost standards are used by Member State legislation:

- Most Member States require that the tariffs reflect the costs actually incurred to the regulated operator. (And, supposedly, tariffs must for each product reflect the costs allocated to them in the manner prescribed by Article 14.)
- In two Member States (Germany and Slovenia), legislation requires tariffs to reflect the cost of services provided efficiently. The theoretical difference is that, in this concept, the regulated firm is not entitled to be compensated for all costs actually incurred by—if the firm could have avoided some of the cost by operating more efficiently. This concept in turn relates to the concept of long run incremental cost (LRIC), i.e. the cost of a service provided in a perfectly competitive market. There are, however, substantial practical problems in determining LRIC for the purpose of price regulation.

Since compensating for all cost actually incurred by market dominant operators will not create sufficient incentives to operate in a cost-efficient manner, LRIC in theory

¹⁹³ Spain, Orden FOM/4262/2004, de 22 de diciembre, por la que se autorizan los precios de los servicios postales reservados al operador responsable de la prestación del servicio postal universal, Correos y Telégrafos, S. A.

¹⁹⁴ See Netherlands, Besluit algemene richtlijnen post, § 5 (4).

¹⁹⁵ See WIK, *Main Developments* (2004), Appendix B, Table 9.

¹⁹⁶ For such a rough estimation, see section 2.3.1.(e) above. In addition, interviews with consumer associations confirmed the presumption that postal services account for a relatively negligible part in total household spending.

appears to be the more appropriate standard for price regulation. At the same time, this issue may not have to be regarded a matter of highest priority at Community level since—at present—it appears that NRAs are not in many cases effectively relating tariffs to actual costs (which are far easier to determine).

(vi) Uniform tariffs. In most Member States, tariffs are required to be uniform for all universal services. In two Member States, uniformity is required only for reserved services by the USP (France and Germany), while in Finland only first class tariffs need to be uniform and there are no uniformity requirements in four additional Member States (Hungary, Ireland, Malta, and Slovakia).¹⁹⁷ As stated in section 2.3.1(e) above, it appears very unlikely that postal operators would introduce geographically non-uniform public tariffs even in the absence of this requirement.¹⁹⁸ Indeed, no USP has introduced non-uniform public tariffs in the seven Member States that do not require uniform tariffs (at least not for all universal services).¹⁹⁹ By contrast, some operators apply geographically non-uniform tariffs for non-public tariffs or discounted bulk products: e.g. French La Poste charges different tariffs depending on the destination (urban/rural) for non reserved catalogues and direct mail products. As explained in section 2.3.1(e) above, uniform tariff requirements imply a major deviation from the normal commercial market that is inconsistent with the principle of necessity and proportionality. Against this background, experience from those Member States that do not require uniform tariffs appears to confirm the surmise that withdrawing the uniform tariff requirement does not endanger the fundamental objectives of universal service.

f) Quality of service standards

While the Postal Directive sets out quality of service targets (i.e. targets for routing time) at Community level, Member States are responsible for setting similar standards at national level. Under the Directive, quality of service targets are apparently required for all universal services. At the same time, particular attention is given to service targets for items of the fastest standard category since the Directive—with respect to cross-border mail—sets out specific targets only for this service category.

In defining quality of service targets, the Member States have adopted quite different policies. Particular differences exist with respect to: (i) the services for which quality targets are set; (ii) the targets themselves; (iii) monitoring of quality of service and publication of performance.

Services for which quality of targets are set. While all Member States have set

¹⁹⁷ See WIK, *Main Developments* (2004), Appendix B, Table 9.

¹⁹⁸ Nor is it clear how geographically non-uniform tariffs would endanger universal service provided they remain affordable in every destination and every origin. In fact, universal service is provided in the internal market today at non-uniform tariffs (different tariffs for mail to different Member States).

¹⁹⁹ Except for Hungary, where the USP traditionally charges different tariffs for local and national mail. However, concerns related to non-uniform tariffs typically do not relate to such zonal pricing but there is a fear that users in rural areas could be discriminated compared to inhabitants of urban areas. In addition, French La Poste could be considered to provide domestic universal service at non-uniform rates since it surcharge for mail to/from its overseas territories.

quality of service targets for letter post items of the fastest standard category, only about half of all Member States did so for parcels. Even less Member States had set targets for other universal service categories such as direct mail products or non-priority items (second fastest standard category).²⁰⁰ Overall there is a wide range between Member States where quality of service targets are set for only one service (letter post items of the fastest standard category) and others that specify service targets for more services.²⁰¹

Quality of service targets. Regulatory routing time targets vary greatly among Member States. In 2004, thirteen Member States required their USPs to deliver at least 90 per cent of all first class letters (or more) in D+1 while nine Member States required D+1 for less than 90 per cent of all items of the fastest standard category.²⁰² Recently, some Member States have reduced their routing time targets down from previously very high standards.²⁰³ For other services, e.g. parcels, quality of service targets vary even more.²⁰⁴ While it is obvious that higher quality of service targets may be achieved by USPs in smaller and more densely populated countries, it appears less obvious that the social need for a given quality of service level differs that much among the Community. In addition, many Member States have set their quality of service targets according to the performance the USP is able to deliver and have adopted the targets as performance improved. There is some doubt, however, that quality of service targets have been defined following close investigation of the needs of postal users in all cases—as a result, current quality targets may in some countries reflect supply factors more than actual demand for (very) high quality universal services.

Monitoring of quality of service. For letter post items of the fastest standard category, regular monitoring of quality of service had been introduced in 2004 in almost all Member States (four of the smaller new Member States had not yet set up monitoring systems).²⁰⁵ By contrast, routing time performance for parcels is monitored only in about half of those Member States that have set quality of service targets for parcels at all—i.e. routing time performance for parcels is monitored only in about one out of three Member States.²⁰⁶ Moreover, performance results were not made public in

²⁰⁰ See WIK, *Main Developments* (2004) 40. Malta was the only Member State without a quality of service target in mid 2004. In June 2005, Malta Communications Authority (MCA) has set quality of service targets for ordinary mail and registered mail and parcel post delivered by Maltapost plc (89 resp. 95% D+1 for the financial year 2004/05). See MCA, 'Quality of Service Requirements' (2005).

²⁰¹ In the UK, Postcomm has set out 15 quality of service targets on the USP, see Postcomm, 'Amended Licence Granted to Royal Mail' (2003).

²⁰² See WIK, *Main Developments* (2004) 172.

²⁰³ For example, in Denmark the D+1 routing time target has been reduced from 97 to 93 per cent at the end of 2004. Denmark, Executive Order No. 1312 of 14 December 2004. In Finland the standard was reduced from 95 to 85 per cent D+1 in late 2004. Finland, HE 241/2004.

²⁰⁴ WIK, *Quality of Service* (2003), Appendix, 12f.

²⁰⁵ WIK, *Main Developments* (2004) 42.

²⁰⁶ However, regulatory targets may be becoming less important a regulatory issue as many USPs (and their competitors) are introducing tracking and tracing systems to prove the quality of their service to customers. WIK, *Quality of Service* (2003) 38.

four countries even though monitoring systems were in place.²⁰⁷

Overall, it appears that serious efforts towards monitoring and publication of service performance were taken predominantly in those areas where the Postal Directive required it most specifically. Only in very few Member States, most importantly in the U.K., NRAs have been engaged in measuring quality of service and publishing performance results in more detail.

The current practice in most Member States appears to fall short of the strict requirements of the current Directive (that require standards and performance measurements for all universal services). While in some cases this may be merely due to a delay in implementation, an alternative explanation may confirm the conclusions of section 2.3.1(f) above. The fact that most Member States have introduced quality of service standards and measurement systems only for the most important letter services—and few measure quality of service for parcels effectively—may be due to an underlying belief that the requirement to set standards and measure performance for all universal services is not proportionate. In particular, the less extensive quality regulation of parcel services, that are generally provided in a much more competitive market, could be interpreted to support the conclusion that such regulation is necessary and proportionate only for services provided under market dominance.

g) User complaints and redress

While the USP is generally the first point of contact for user complaints, dealing with user complaints and resolving conflicts between USPs and users of postal services has become a major activity of postal national regulatory authorities. However, some Member States have attributed responsibility for appeals concerning user complaints to other organizations than postal NRAs: in five Member States an ombudsman attends to complaints and related appeals. In Cyprus customers may appeal either to the NRA or an ombudsman. In Sweden, a national (multi-sector) board for consumer complaints is responsible for handling and resolving complaints. In Italy customers can appeal to a ‘conciliation committee’ staffed by representatives of consumer associations and the Italian USP. Only in one Member State, Poland, no specific appeals board has been created and customers have to go to court in order to appeal against the USP. In the United Kingdom, finally, Postwatch was created as a dedicated ‘consumer watchdog’ to protect and advance consumer rights. Postwatch, among other functions, is responsible for dealing with complaints of postal users.

Publication of statistics concerning complaints by postal users, however, appears not have been treated as an issue of major importance by all Member States and universal service providers. By mid 2004, USPs were not legally required to publish complaints statistics in seven Member States and ten USPs did not publish such information.²⁰⁸

Member State experience illustrates several positive examples of creating the

²⁰⁷ WIK, *Main Developments* (2004) 40f.

²⁰⁸ See WIK, *Main Developments* (2004) 43f.

possibility for users to appeal to specific bodies where complaints are not treated satisfactorily by postal operators. Those institutional settings include the allocation of appeal authority to NRAs, ombudsmen or dedicated consumer watchdogs. Since not all Member States have introduced adequate mechanisms to deal with user complaints,²⁰⁹ however, further harmonization—or clarification and enforcement of current harmonization measures—appears necessary and proportionate to further the interests of postal users.

3.2.2 Control of competition

a) Reserved area for USP

One of the most significant features of the Postal Directive is the set of limitations placed on the scope of services which may be reserved for universal service providers. As a general rule, Member States are required to maintain reserved areas only ‘to the extent necessary to ensure the maintenance of universal service’ (Article 7). More specifically, the reserved area may include only items of domestic and incoming cross-border correspondence which weigh less than 100 grams and for which the price is less than three times the public tariff for an item in the lowest weight step of the fastest standard category of service. After January 1 2006, these limits will be reduced to 50 grams and 2.5 times the basic tariff, respectively. In addition, Member States may—under certain circumstances—extend the reserved area to include direct mail and outgoing cross-border mail.

By June 2005, all but one Member State have reduced their reserved areas to abide by the upper boundaries prescribed by the Postal Directive. Poland, having negotiated a transitory derogation to the accession treaty, continues to reserve all letter post items weighing up to 350 gram but applies the same price limit as other Member States until end of 2005. Within the room for manoeuvre permitted under the Directive, however, the national regulatory frameworks have developed in two basic directions: (i) Some Member States have used the stipulations of Article 7 to maintain monopolies that exceed the default set out by the Directive—domestic and incoming correspondence with the weight and price limits -; but (ii) a significant number of Member States has sought to either fully liberalize their postal markets or liberalize substantial portions of the market in excess of the minimum liberalization mandated by the Directive. The following paragraphs outline the different approaches taken by Member States (some Member States have combined several of the approaches listed below).²¹⁰

Reservation of direct mail. About half of all Member States—including France and Germany—have maintained a reserved area over direct mail. Some countries, however, apply a lower weight limit to reserved direct mail (e.g. Germany: 100 gram for correspondence but 50 gram for direct mail). In particular in the more developed

²⁰⁹ Report from the Commission to the Council and the European Parliament on the Application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), COM/2005/0102 (23 Mar 2005), Annex at 34.

²¹⁰ For a more detailed overview of reserved areas in each Member State, see WIK, *Main Developments* (2004) 45-49.

postal markets of the Community, direct mail accounts for a substantial share of total mail volume and including this segment to the reserved area means a significant hindrance to competition.

Reservation of outgoing cross-border mail. Again, about half of all Member States have continued to reserve outgoing cross border mail after the 2002 Directive. With respect to reservation of outgoing mail, the amended Postal Directive requires a member state to base a reservation on a specific rationale and offers two examples: liberalization of other postal services and specific circumstances. In 2004, four of the 13 Member States that reserved outgoing mail cited liberalization of other postal services;²¹¹ seven cited specific circumstances in their country; and two cited other considerations.²¹²

Liberalization of incoming cross border mail. Two Member States, the Czech and Slovak Republics, have specifically liberalized incoming cross-border mail. At the same time, however, both countries continued to reserve outgoing cross-border mail for their USPs.

Liberalization of special services distinct from universal services. While obviously non-universal services cannot be reserved under the Postal Directive, postal legislation in some Member States clarifies this issue by specifically mentioning services that do not fall under the postal monopoly. For example, private operators in Cyprus are allowed to convey postal items at higher service standards than those offered by the USP.²¹³ In Germany, most of the competition the USP faces is from ‘D-licensees’ that, amongst others, are allowed to carry letters below 100 gram if can they guarantee same-day delivery or tracking and tracing.²¹⁴

Liberalization of bulk mail. In terms of practical impact on competition, liberalizing bulk mail may be particularly effective because it allows competitive operators to handle all their mail. In 2003 the British NRA, Postcomm, opened the bulk mail segment to competition by allowing licensed operators to accept mailings of more than 4,000 items whatever the weight of these items. However, Postcomm recently decided to fully open the postal market having noted that ‘[s]ince 2002, it has become clear that effective, sustainable competition will take time to develop.’²¹⁵

Liberalizing intra-city mail. This approach towards market opening is particular to Spain, where the postal reservation has never included intra-city postal service—the largest part of a modern postal system. In fact, private operators in Spain deliver a substantially higher percentage of letter post items than in Member States which

²¹¹ However, for three of these four USPs (from Hungary, Latvia, and Lithuania), it is unclear what those liberalized services we could not identify any special moves towards liberalization other than those mandated by the Postal Directive.

²¹² See WIK, *Main Developments* (2004) 45f.

²¹³ See WIK, *EU Adhesion Candidate Countries* (2002), Part II, 26f.

²¹⁴ See, for example, Germany, RegTP, Jahresbericht 2004 [Annual Report 2004] 107.

²¹⁵ See U.K., Postcomm, ‘Giving customers choice’ (2005) 9.

have repealed the reserved area entirely.²¹⁶

Full liberalization. Three Member States have entirely abolished the reserved area: Estonia, Finland and Sweden. Looking towards the future, several Member States have already planned to entirely open their postal markets even before 2009—the year envisaged by the Postal Directive for ‘the full accomplishment of the postal internal market’: In the U.K., the NRA has decided to fully open the postal market by 1 January 2006.²¹⁷ In Germany, the exclusive licence of the USP expires at end of 2007. The Netherlands has also indicated that it will likely terminate its reserved area at the same time that the United Kingdom and Germany do so (which now appears unlikely to happen at the same time).

Retaining reserved areas obviously implies a major deviation from the normal commercial market and therefore—under the principle of necessity and proportionality—requires convincing justification. Under the current Directive, the only permissible justification is that the reservation is strictly needed to preserve universal service. In no Member State, however, credible economic analysis was produced to design a reserved area carefully balanced to such a cost of providing universal service. By contrast, the only countries that undertook such analysis consequently abolished existing reservations (Sweden and U.K.).²¹⁸ It thus appears that most Member States implemented reserved areas—many to the maximum permissible extent—without further investigating the possible benefits of further liberalization. In the case of Germany, that had previously decided to fully liberalize its postal market by end of 2002, Community legislation has positively obstructed the development of an internal market: While the 1997 postal law did not consider any reservation necessary after 2002, the reserved area was prolonged until end of 2007 with the single objective of harmonizing with European legislation.²¹⁹ In the light of this impact of the Postal Directive—that Member States may abide by the minimum schedule rather than unilaterally liberalize their postal markets—the various moves from Member States to open additional market segments to competition confirm the general presumption that maintaining a reserved area is neither necessary nor proportionate to achieve the objectives of Community policy.

b) Third party access / Liberalization of upstream services

Liberalization of upstream services is facilitated by requiring the USP to grant access (‘downstream access’) to its network. This third-party access allows competitors (or consolidators) to pre-sort mail collected from sender and transport it for final delivery to a USP facility close to the recipient. For their work related to pre-sorting and transportation, competitors receive discounts. Third-party access can basically be useful to competitors for two reasons: First, a company can focus on merely performing pre-sorting on transportation services thus leaving final delivery to the USP, e.g. consolidators. Second, postal operators that start their operations in one

²¹⁶ See WIK, *Main Developments* (2004) 94.

²¹⁷ See U.K., ‘Postcomm, Giving Customers Choice’ (2005).

²¹⁸ See WIK, *Main Developments* (2004) 45.

²¹⁹ See statement by the German government in parliamentary filings (Bundesrat Drucksache 251/01).

region or choose to provide local services only, will reasonably want to handle all the mail received from their customers. Since they are not in a position to deliver all of this mail, they need to have access to the USP's network for delivery of these items.

In a few Member States, postal legislation requires the USP to grant network access to its competitors: In the U.K., Royal Mail is required to grant access to its competitors by licence.²²⁰ While Royal Mail has formally negotiated access agreements with several other operators on a voluntary basis, these agreements were reached only after subtle intervention of the NRA. Similar legal provisions that require USPs to grant network access to third parties exist in German and Slovenian postal laws. In Germany, until recently, the rights for competitors to obtain access was being interpreted only to refer to services outside the scope of the reserved area. Although the European Commission has ordered Germany to ensure non-discriminatory access to its network for both customers and consolidators²²¹—and the German cartel office has recently ruled Deutsche Post AG should immediately grant access²²²—the case is still pending. After an additional judicial decision which confirmed the requirement for immediately executing the decision of the cartel office Deutsche Post has made first access agreements to consolidators end of April.²²³

Should market dominant operators be obliged to provide access to third parties? Is such regulatory intervention truly needed to accomplish the objectives of Community postal policy or does it create undue distortions for the competitive market?

In a normal commercial market, one would expect postal operators to voluntarily provide any profitable service—including to its competitors. That is, if the access charges exceed the cost of the operator to perform the remaining sorting and delivery activities, he would provide network access. In an imperfectly competitive market, however, the dominant operator may reasonably refuse to provide such profitable service. Since consolidators, for example, will be able to offer mail preparation services (including sorting and possibly some transportation) only when having access to the dominant operator's network, the dominant operator may choose not to grant access and keep the entire business including the mail preparation services. Under such circumstances, mandating network access appears proportionate since regulation would create the market outcome that could be expected from a normal commercial market. Consolidators would be able to enter the market only if they are more efficient in providing upstream services—either because they incur lower cost in performing the upstream activity and/or because they are more efficient in selling

²²⁰ See U.K., Postcomm (2003): Amended Licence Granted to Royal Mail Group Plc. (formerly Consignia Plc.), condition 9.

²²¹ See Draft Commission Decision in Case COMP/38.745, 20 Oct 2004 (Deutsche Post restrictions on mail preparation).

²²² See Germany, Federal Cartel Office, Beschluss B 9 - 55/03 (2005), from www.bundeskartellamt.de.

²²³ The case is still pending. The final judicial decision is expected after the date of full liberalization of the German letter market (end of 2007). After this date the question whether these services are part of the reserved area or not will lose the relevance, anyway. Currently, the parties are still disputing on the detailed contract conditions which might create additional entry barriers.

the service to customers.

In addition, in order to serve all mail of their customers, operators that deliver locally, may need to be granted access to the incumbent's network. Otherwise their customers would have to separate their mail to different operators—an uneasy and costly undertaking likely to be performed only by very large mailers. A lack of network access would thus create a barrier to entry. In this case, mandating network access would be a regulatory strategy to actively promote market entry of local operators. Whether or not promoting such local market entry is efficient and socially desirable may depend on a variety of factors. For example, setting up a nationwide network from scratch—and thus competing with the incumbent for end-to-end services—may be possible in relatively small Member States.²²⁴ In larger Member States, NRAs may conclude that end-to-end competition can reasonably develop only by an entrant offering local services in a first step. In this case, the absence of network access offered by the incumbent would create an undue barrier to entry and mandatory third party access would be a necessary pre-requisite for competition to develop.

Finally, whether or not requiring third party access can be considered proportionate depends on the cost incurred to the incumbent operator by facilitating access. Where the benefits of increased competition and customer choice outweigh the cost, NRAs should choose to require access. However, in other situations cost for the incumbent (and for the regulatory process) may be created that are not justified by the benefits of a tiny demand for network access. Since the possible desirability of mandatory network access depends on the number of local or national factors, it does not appear proportionate to recommend mandatory access for all Member States. NRAs should have the authority to develop specific solutions according to their national postal policy objectives, to the situation in their markets, to the demand for access and ultimately to the benefit for business customers and consumers.

What is clear, however, is that dominant operators—once they offer network access to one party—should be required to offer it to all users—customers, consolidators and competitive operators—in a non-discriminatory manner. Where a dominant operator refuses to provide equal service under similar conditions, this provides evidence for abuse of its market position.

3.3 Market transparency

As noted in chapter 2.4, the Postal Directive has stimulated Member States to take first steps towards enhanced transparency in the postal sector by requiring publication of various market (and regulatory) information. The most important requirements with respect to increased market transparency demand that USPs publish annual reports, up-to-date information about access to and prices of universal services, quality of service targets and regular performance reports, complaints statistics, and

²²⁴ For example, several markets entrants in the Netherlands, including Deutsche Post subsidiary SelectMail, have established significant—virtually nationwide—networks for the delivery of direct mail in the recent years.

that a certification of the USP's compliance with accounting requirements be published.

While more transparency has generally been achieved, more appears desirable in certain areas (and certain Member States)—most importantly in the area of accounting separation. As noted by the Commission in February 2005, the goal 'of an open and transparent cost allocation system has yet to be fully reached and this will require greater attention from the Member States together with the Commission'.²²⁵ In addition, information about various aspects of quality of service could be enhanced—this is particularly important to protect the interests of individual consumers with little bargaining power. For example, routing time performances are not published in a few, mostly new, Member States. More severely, no information on customer complaints is publicly available in some Member States and additional information on the ways complaints have been dealt with is available only in half (12) of all Member States.²²⁶

There are several positive examples where Member States have facilitated market transparency beyond the requirements of the Postal Directive. In the area of accounts, the British example is noteworthy where the NRA Postcomm publishes not only a statement of the USP's compliance with accounting requirements but requires Royal Mail to publish a summary of its actual regulatory accounts.²²⁷ In addition, a number of NRAs provide detailed information on market development (volumes, revenues, market shares of different operators ...) in public reports, e.g. the NRAs from Estonia, Germany, Sweden, and U.K.²²⁸ In both areas—regulatory accounts and market statistics—national practice provides good examples how market transparency can be enhanced and thus offer suggestions for extending and improving the transparency requirements in Community legislation.

3.4 Administrative fairness

With respect to regulatory controls, national postal laws have created a mosaic of environments. Among Member States, national postal regulators vary significantly in their degree of independence from political ministers, their resources, and regulatory powers. The detail and rigor of accounting controls imposed on universal postal services also appears to vary substantially. Moreover, the range of postal services subject to price controls varies among Member States as do the methods of

²²⁵ See annex to the Report on the Application of the Postal Directive, SEC/2005/0388 (23 Mar 2005) at 27.

²²⁶ See WIK, *Main Developments* (2004) 43.

²²⁷ See Royal Mail, *Regulatory Financial Statements* 2003.

²²⁸ E.g., the German regulatory authority, RegTP, annually publishes a report which describes in detail the development of volumes, revenues, market shares, prices and employment within the licensed area (letters up to 1.000 g). The development of universal service provision (post offices, quality of service, complaints) is published as part of the annual report of the German regulatory authority. A similar but less detailed report about the development of market structure, mail volumes and universal service provision is yearly published by the Swedish regulatory authority.

setting the controls.²²⁹

As regards the responsibilities and powers of NRAs, an evaluation among the 25 Member States is hardly possible: What responsibilities a Member State allocates to its NRA is intimately related to its policy objectives that may (and do) deviate among Member States and do not necessarily coincide fully with those of the Community as a whole. Moreover, the objectives themselves sometimes remain obscure (see sections 2.1 and 2.6.2). The general impression is that many NRAs to date appear to focus on ‘universal service regulation’ rather than ‘economic regulation’ of the USP (i.e. restraint of anti-competitive conduct—e.g. via control over USP accounts and price control). For example, only in nine of 25 Member States, NRAs are vested with the crucial regulatory power to set rates for basic USP services.²³⁰ It is, however, particularly in the areas of price regulation and control of USP accounts where administrative fairness and independent regulation are most needed in order to prevent abuse of market power. In order to extend the significance of the principle of administrative fairness to the area of ‘economic regulation’, NRA responsibilities as regards control of accounts and prices should therefore be strengthened.

As a result of different administrative traditions in the Member States and the relatively ambiguous requirement for NRAs to be independent in Article 22 of the Postal Directive, there is great variance between institutional set-ups of NRAs in the Member States. As the Commission notes in its 2005 application report, ‘it would be appropriate to give consideration how to ensure greater institutional independence across all Member States’ even though most NRAs ‘appear to enjoy a reasonable level of independence’.²³¹ A comparison of the institutional differences among NRAs suggests²³² that more specific requirements would enhance administrative fairness, most in the following areas: (i) independence of NRA heads (fixed terms, no dismissal but for objective reasons), and (ii) independent budgets (approved by Parliament or, at least, a Ministry other than the one responsible for postal policy), and (iii) authority to appeal NRA decision only by courts, not by political institutions.

3.5 Summary

Best practices from Member States illustrate and confirm several of the policy implications derived during the evaluation of Community postal policy in this chapter. Specific examples to consider for a wider application in the Community include clear statements of the objectives of regulation, limitation of service standards to market dominant products, regular publication of market statistics, and institutionally independent and powerful NRAs with clear responsibilities for—amongst others—price regulation and dealing with users complaints.

²²⁹ See WIK, *Main Developments* (2004) 67-91.

²³⁰ See WIK, *Main Developments* (2004) 91.

²³¹ See annex to the Report on the Application of the Postal Directive, SEC/2005/0388 (23 Mar 2005) 28.

²³² See WIK, *Main Developments* (2004) 90.

Evaluation of Member State practices also reveals that diversity of regulatory approaches and ‘competition among NRAs’ may be particularly beneficial in the following areas: (i) specific universal service standards adapted to local conditions and customer needs (further elaborating more general Community requirements); and (ii) unbundled third party access to delivery by operators with a market dominant position.

4 Recent Market Developments

This chapter briefly summarizes developments in the postal market taken place since 1998. We focus on the development of competition, the USPs, demand, and mail volumes. Additionally, we envisage potential future developments with regard to demand and mail volumes as well as market structure especially at Community level.

4.1 Competition

The main challenges of the public postal operators have been increasing competitive pressure in all market segments—letter post, parcels and express services. While the parcel and express markets have been open for competition for decades, in the letter post segment legal monopolies have strongly impeded development of competition. In the perception of national regulatory authorities and public postal operators, competition in the parcel and express segments has been substantial at national as well as at international levels while in the letter post segment competition is still emerging.²³³

Thus, development of competition in the letter post market has been extremely gradual even in the most liberalized markets. Sweden repealed the postal monopoly a decade ago, but Sweden Post retains about 93 per cent of the letter post market.²³⁴ In the United Kingdom, Postcomm (the NRA) has made substantial efforts to introduce competition in the last two years, but Royal Mail retains more than 99.5 per cent of the mail volume within the licensed area.²³⁵ In Germany about one-third of the licensed area has been open for competition since 2003.²³⁶ Deutsche Post still has a market share of about 95 per cent within the licensed area. In the segment opened to competition its market share is still about 85 per cent.²³⁷ In the Netherlands, direct mail has been liberalized since years. The market share of TNT in the letter post segment (including direct mail) is still above 95 per cent.²³⁸ All in all, the success of the different market opening strategies has still been very limited.

²³³ WIK, *Main Developments* (2004), Section 5.1.1

²³⁴ Sweden, National post and telecom agency, 'Service och Konkurrens 2004' [Universal service and competition 2004] (2005) at 14.

²³⁵ United Kingdom, Postcomm, 'Competitive Market Review' (2004) 9.

²³⁶ Germany, RegTP, Jahresbericht 2004 [Annual Report 2004] (2005) 105.

²³⁷ Germany, RegTP, Jahresbericht 2004 [Annual Report 2004] (2005) 108.

²³⁸ Netherlands, Ministry of Economic Affairs, Postal Services Policy Memorandum (22 Jan 2004) 9. Sandd and Selektmail, the main competitors in the Dutch letter post market expect to deliver about 200 million items in 2004. They have a market share of about 2 per cent. Netherlands, Ministry of Economic Affairs, Supplemental Information to the Postal Services Policy Memorandum (27 Sep 2004) 16.

The incumbents are still market-dominant in the domestic letter post segments.²³⁹

Market entry has been observed in the following segments:

- Service providers are active in mail preparation on behalf of large mailers or in case of consolidators on behalf of medium-sized mailers. Specialized mailing houses collect mail from business customers' premises and consolidate it. Alternatively, if mail can be transmitted electronically and printed on the premises of the mailing house, physical collection can be eliminated completely.²⁴⁰ In addition to collection and sorting, third parties (mailing houses or transport companies on behalf of senders) can transport mail to the postal operator for final delivery.²⁴¹
- Service providers are active in end-to-end service provision in the direct mail and industrial mail segment (day certain delivery, less than five time delivery per week, like Sandd, Selektmail and CityMail).
- Postal service providers offer value-added services compared to universal services at a local level (e.g. D-licensees in Germany).

When looking in detail where the competitors have been coming from, it is quite obvious that the most important market players are related to existing distribution networks, such as the delivery of newspapers and magazines and the distribution of unaddressed items (e.g. Redmail in Austria) or even the distribution of milk (e.g. Express Dairies in UK). Additionally, important competing postal operators are owned by foreign universal service providers, notably Deutsche Post and TNT who have entered foreign letter post markets mainly by acquisition of or by joint ventures with competitors. Deutsche Post is still active in UK, Spain, and Netherlands. Recently, they acquired a French direct mail specialist, KOBA.²⁴² Furthermore, they plan to enter the Austrian letter post market after failing to get a substantial share of the Austria Post. TNT has already entered the mail markets in Austria, Belgium, Czech Republic, Germany, Italy, Slovakia, and United Kingdom.²⁴³ Another example is CityMail in Sweden which is currently owned by Norway Post.

Generally, the probability of market entry of competitive postal operators depends on institutional and economic factors.²⁴⁴ Institutional factors usually result from political decisions. They mainly refer to the regulatory framework of the postal

²³⁹ A more comprehensive picture on developments in competition has been provided by Ecorys, *Competition in the Postal Sector* (2005).

²⁴⁰ NERA Economic Consulting, *Economics of Postal Services* (2004) 156.

²⁴¹ In Germany and the United Kingdom, for example, mail can be dropped at sorting facilities near to the addressee. The sender or the service provider acting on behalf of the sender pre-sort and transport the mail and is compensated by discounts offered by the USP.

²⁴² Deutsche Post, Annual Report 2004.

²⁴³ TNT, Annual Report 2004 at 28.

²⁴⁴ The purpose of this study is not to assess the development of competition in the Member States. See for a more elaborated assessment Ecorys, *Development of Competition in the European Postal Sector* (2005).

sector concerning the scope of the reserved area, the design of authorization and licensing regimes, the universal service obligation and its financing and all regulations dealing with the legal conditions faced by potential competitors and the postal incumbents. Besides the regulatory framework and competition rules special privileges of USPs concerning VAT, operational privileges like exemptions from traffic regulation and special powers and rights granted to the USP (e.g. placing of public pillar boxes) could also have an impact on potential market entry. Economic factors are strongly related to the economics of postal services. Incumbent postal operators experience considerable economies of scale and scope in collection and especially delivery of postal items. Due to the ubiquity of their services they are well-known and mostly enjoy a good reputation. In addition, the "postal cost function" depends on country-specific factors like population density and distribution, size and geography of a country, wealth and income distribution, cultural aspects (e.g. degree of literacy) as well as the economic structure and development of a country. Furthermore, the likeliness of market entry depends on the starting position and the expected behaviour of the incumbent postal operator regarding e.g., cost efficiency, customer orientation and the related product, price, and quality strategies.

Due to the existence of legal monopolies in most Member States the market entry strategies of competitive postal operators have strongly been influenced by the regulatory framework, like the definition of the reserved services, the licensing regime, the way prices are regulated, and the effectiveness in preventing the incumbent postal operator from abusing its market dominant position. While the definition of the reserved area defines the potential for competition, the other measures determine whether and where market entry will occur given other country specific factors outlined in the previous paragraph. For example in U. K. bulk mail and mail consolidation is free for competition. Correspondingly, market entry could be observed in these areas. In the Netherlands direct mail services are free for competition. The main competitors of TNT provide direct mail services by delivering items nationwide twice a week.²⁴⁵ In Germany the so-called D-licence allows to provide postal services within the weight and price limits of the reserved area that are 'distinct from universal services, having special features and higher quality'. Due to the quality requirements D-licensees can only provide high quality postal services at local level.²⁴⁶ The benefits to customers might be more limited compared with the potential scope of services provided under conditions of a normal commercial market. Especially, not customers but the law maker decide which kind of competition will arise and implicitly what customer group will benefit from the selected market opening strategy.

NERA concludes that the scope for competition in postal services would be substantial provided access to delivery networks would be granted when necessary. Nonetheless, NERA expects that entrants' volumes will remain relatively limited and that competitors will only be able to achieve small but significant market shares.²⁴⁷ In other words, the market dominant position of the USPs in the letter post segments

²⁴⁵ SandD, Selektmail (owned by Deutsche Post)

²⁴⁶ WIK, *Main Developments* (2004), case study 4.6.

²⁴⁷ NERA Economic Consulting, *Economics of Postal Services* (2004), section 10.4.4.

will likely persist even in the medium and long term. Nonetheless, competition—even at a small scale—will force the USPs to respond by adjusting their pricing and service portfolios. This has happened for example in the Netherlands and Sweden—both USPs have introduced a postal service guaranteeing delivery at a specified day (a service which is important for direct mailers). Sweden Post additionally introduced non-uniform prices for bulk mail (delivery in the main cities is cheaper than delivery in rural areas). Additionally, in Sweden prices for business customers and large mailers have considerably decreased while prices for consumers and small mailers have strongly increased.²⁴⁸

Conclusion. While competition in parcel and express markets is already substantial, the letter post segment only faces a low degree of competition even in Member States with more or completely open markets. While in a normal commercial market mainly economic factors decide on the success of market entry, the likeliness of market entry in letter markets is mainly influenced by the regulatory framework. In contrast, customers needs and sovereignty do play a minor role for the development of competition under current conditions.

4.2 Public postal operators

In the last 15 years, public postal operators in Europe have undergone a remarkable transformation from government ministries into entities approaching normal commercial enterprises. Among public postal operators of Europe, corporatization has become the rule rather than the exception, and privatization appears likely to follow. Fifteen Member States have reorganized their public postal operators under normal company law and two (Poland, Slovakia) are planning to take this step in the near future. Four Member States (Denmark, Germany, Malta, and Netherlands) have at least partially privatized their USPs. The majority of the shares of TNT, and recently Deutsche Post, is already in private ownership. Furthermore, four USPs (Austria, Belgium, Italy, Poland) are expected to begin privatization in the next years.

In 2003 most USPs were profitable while a minority had losses.²⁴⁹ Besides La Poste and Royal Mail, the USPs of Belgium, Ireland, Hungary (2002) and Sweden faced operating losses. In 2004 their situation considerably improved. Most of these operators have returned to operating profits.²⁵⁰ Especially Royal Mail generated a profitability of nearly 6 per cent of revenues in the business year 2004/2005. The market opening, whether firmly fixed as in the United Kingdom or only envisioned by the Postal Directive, has strongly motivated the USPs to improve efficiency and

²⁴⁸ Sweden, National post and telecom agency, 'Den Svenska Postmarknaden' [The Swedish Postal Market] (2004).

²⁴⁹ WIK, *Main Developments* (2004) 118-26.

²⁵⁰ The Belgium and the Hungary posts have still not published their 2004 results.

profitability.²⁵¹ The most important initiatives include the following:

- Restructuring postal transportation and mail processing networks to facilitate use of sorting technology and reduce the number of transportation links. This process results in considerably fewer sorting facilities and delivery offices. USPs with high mail volume have started introducing machines for sorting mail into the sequence the mail will be delivered by the letter carrier. Delivery sequence sorting allows letter carriers to operate longer routes and therefore reduction in the total number of routes.
- Optimizing collection, transport, and delivery by using sophisticated operation research techniques based on geographical information systems.
- Outsourcing non-core and even core postal activities like collection services and transport.
- Making better use of operational synergies (e.g. delivery of unaddressed and addressed items, delivery of letters and parcels²⁵²).
- Restructuring of the retail network by adding new activities (e.g. governmental services, financial services, retail services), substitution of post offices by postal agencies, and overall reduction in the number of retail points.

Modernization is not proceeding evenly in all Member States. Public postal operators in several new Member States are coming to this process much later than the public postal operators in the EU-15 states, a delay that may imply a considerable technological and organizational gap. A similar risk might be implied by the fact that some public postal operators are still state enterprises or even government departments rather than more flexible, corporatized organizations.²⁵³

Conclusion. Fifteen Member States have corporatized their public postal operators. Four have partly privatized them, and the majority of TNT and Deutsche Post is owned by private shareholders. Other Member States will most likely follow. Additionally, most USPs have accepted the challenge of market opening and changed business strategies to achieve more efficiency and profitability.

²⁵¹ E.g. STAR program of Deutsche Post AG, cost reduction program of TNT, reorganization of La Poste (France). Recently Austria and Ireland finished restructuring their logistical network. See WIK, *Main Developments* (2004). Poland Post has recently started talks about reorganization of their company.

²⁵² Economies of scope exist in the delivery of letters and parcels in low-populated areas. When parcel volumes are high, delivery networks tend to be separate. NERA Economic Consulting, *Economics of Postal Services* (2004) 31.

²⁵³ WIK, *Main Developments* (2004) 109. The varying degree of commercial flexibility is also influencing the acquisition activities of the national postal operators.

4.3 Universal service provision

In all Member States the public postal operator is obliged to provide universal postal services. Nationwide access to universal service and delivery of postal items is ensured with some minor exceptions, which are allowed by the current regulatory model. Most Member States do not make use of this possibility. One prominent exception is Greece; about seven per cent of the population does not have daily delivery. Additionally some USPs voluntarily provide more than five-day delivery in practice.²⁵⁴ Furthermore, in more liberalized countries like the United Kingdom or Sweden, the reduction of the delivery frequency is not a point of discussion. In both countries the regulatory authorities have come to the conclusion that the delivery frequency does not imply significant net costs to the USPs.²⁵⁵ This empirical evidence also shows that areas with less than five-day delivery would most probably account for only a small percentage of all postal items.

Access to universal service is gradually declining. Post offices were closed at an average rate of 2.4 per cent per year from 1998 to 2002 while postal agencies increased by average 1.7 per cent. The development and the density of the network varies substantially between the Member States partly reflecting country specific differences in population density and degree of urbanization.²⁵⁶ Varying requirements in the density of access points between Member States and additional political or public constraints also influence the appearance of the national post office networks.

Cross-border transit times, at least between the ‘old’ Member States, have also considerably improved. This improvement should be judged against the background of national transit time performances. The transit time performance of domestic postal services is rather stable in most of the ‘old’ Member States, achieving a performance above 90 per cent. In countries starting from a lower level considerable improvements have been achieved since 2000. However, some Member States faced a deterioration of performance—especially Hungary and France.²⁵⁷ According to publications of La Poste the company has considerably improved the transit time performance in 2004 while being still below 80 per cent.²⁵⁸ It should be noted that the modernization of postal services (use of modern sorting technology and reduction of sorting facilities in order to achieve the critical mass for automated sorting) and the level of transit time performance are strongly correlated. The earlier the process of modernization has been started, the better the transit time performance of D+1 letters in Member States.²⁵⁹ Modern postal logistics are therefore necessary to guarantee reliable postal services. Against this background it also appears quite

²⁵⁴ WIK, *Main Developments* (2004) Appendix B, Table 8.

²⁵⁵ U.K., Postcomm, Decision Document: The Universal Postal Service (2004) 5; Sweden, Ministry of Industry, Employment and Communication, Postmarknad i förändring [The changing postal market] (2005) 39.

²⁵⁶ WIK, *Main Developments* (2004) 162-68.

²⁵⁷ WIK, *Main Developments* (2004) 162-176.

²⁵⁸ La Poste, Résultats 2004 (2005).

²⁵⁹ WIK, *Main Developments* (2004) 186-187.

unlikely that countries which have already achieved high performances will reduce their quality when transit time targets would be relaxed in future. As long as customers wish to have speedy letter post services the operator will provide it. In Sweden for example the transit time target is quite low (85 per cent) while the performance of Sweden Post achieves values considerably above 90 per cent.

Conclusion. In all Member States, public postal operators are obliged to provide universal postal service. These services are offered nationwide and every working day with small exceptions. Access to universal services is still safeguarded while the number of access points is slowly declining. In most Member States the use of postal agencies instead of post offices is becoming more and more important. Quality of service has commonly improved due to modernization of postal logistics. Most postal operators of the new Member States and some in the old Member States are still at the beginning of this process.

4.4 Demand for postal services

Like most other aspects of the postal sector, demand for postal services is undergoing fundamental changes. A detailed knowledge of customers' expectations and needs is becoming crucial not only for operators developing their business plans but also for policy makers seeking to create a market environment that will facilitate better services for users.

Customers of postal services can be divided into two basic categories, '*business mailers*', who buy postal services wholesale, and individuals or '*consumers*' who buy postal services at the retail level. Consumers usually send a low number of postal items: considerably less than 10 per cent in most Member States.²⁶⁰ In more developed postal markets, consumers' share of mail is even lower. In Sweden, the consumers' share of mail volume is only 6 per cent.²⁶¹ In the Netherlands, this group accounts for 8 per cent of mail.²⁶² Accordingly, postal expenses play a minor (and decreasing) role in the budget of consumers when compared to their expenses for electronic communication services. A Dutch household for example spends on average 22 Euros on postal services per year.²⁶³ A British household spends about 26 GBP per year on average.²⁶⁴ On the other hand consumers are very important as receivers for mail. About 70 per cent of postal items was sent to consumers in the EU-15 in 2003.²⁶⁵ Due to the growth of direct mail this share will most likely increase in future.

²⁶⁰ WIK, *Main Developments* (2004) 112.

²⁶¹ P. Jonsson, 'Regulatory Challenges in the Liberalized Postal Market' (2004).

²⁶² Netherlands, Ministry of Economic Affairs, Supplemental Information to the Postal Services Policy Memorandum (27 Sep 2004) 14.

²⁶³ Netherlands, Ministry of Economic Affairs, Supplemental Information to the Postal Services Policy Memorandum (27 Sep 2004) 14.

²⁶⁴ Burns et al., 'The Distributional Impact of Tariff Re-balancing' (2003) 4.

²⁶⁵ F. Nader, 'Mail Trends' (2004) 28.

Business mailers account for 80 to 90 per cent of total letter post mail delivered by USPs.²⁶⁶ This trend—decreasing mail sent by consumers while increasing mail sent by businesses—seems to be still ongoing. The USPs expect direct mail volumes will grow while correspondence and transaction mail are expected to decrease in the next years.²⁶⁷ For public postal operators, the most important customers are the largest business mailers. More than half of the annual letter post volume is generated by the largest 3,000 mailers in countries like France, Germany or United Kingdom.²⁶⁸ Generally, discounts for large mailers who hand over well-prepared mailings have become common.

Incumbent postal operators have started to invest in customer retention and customer-tailored services by vertically expanding their standard postal services. One example is the co-operation between Deutsche Telekom and Deutsche Post. Deutsche Post is responsible for all mailing activities of Deutsche Telekom. Acquisition activities of public postal operators also support this trend. Even medium-sized and small public postal operators have started to invest in mail preparation activities, mail room management, printing facilities (hybrid mail).²⁶⁹ Integrated logistical solutions may offer large mailers the ability to even outsource mail production and document management. Postal operators like Finland Post provide this type of hybrid mail services. Documents (e.g. bills, advertisements) are sent electronically to printing facilities where they are printed, individualized, enveloped, sorted, franked and finally transported to a postal operator for final delivery.

WIK conducted interviews with consumer associations and business mailers (associations as well as single business mailers). Even if the outcome is far from representative, it provides interesting insights. Generally, the desire for more choice in postal services with different transit times options (guaranteed or not) has been expressed several times. The demand is also reflected in different needs with respect to transit time options. While some mailers favour D+1 for organizational reasons others would prefer slower but reliable postal services if provided at a lower rate. Representative consumer surveys from Netherlands and Germany provide evidence that at least in these countries consumers prefer D+1 services.²⁷⁰ In the view of

²⁶⁶ WIK, *Main Developments* (2004), section 5.1.3; F. Nader, 'Mail Trends' (2004) 26 ff. Some companies (e.g., financial and insurance companies) as well as non-profit organizations and public administrations are not able to deduct value-added taxes (VAT). This is of relevance because in most Member States universal service provision is free from VAT while competitors (who do not provide universal services by definition) have to charge VAT. Additionally, wholesale customers can be separated in those mailing nation wide and those mailing predominantly at a local level (like local public administrations and companies).

²⁶⁷ WIK, *Main Developments* (2004) 115-116.

²⁶⁸ F. Nader, 'Mail Trends' (2004).22.

²⁶⁹ WIK, *Main Developments* (2004) 105-106.

²⁷⁰ For Germany, see W. Elsenbast, 'Infrastrukturverpflichtung im Postbereich [Universal Service Obligation in the Postal Sector]' (1996); for the Netherlands, see TNS Nipo Consult, 'Betekenis en belang van postdienstverlening.' [Meaning and importance of the postal services] (2004). It has to be taken into account that in both countries the USPs have never offered second class services for consumers. In countries where consumers have the choice between first and second class services consumer surveys might have a different result.

medium-sized and large business mailers, non-uniform tariffs would be acceptable, while consumers and small business mailers seem to prefer uniform tariffs. Access to services is important for both groups. While consumers and small business mailers use post offices for tendering their mail, large business mailers need special access points and a competent key account manager. In particular, one business mailer sending mail all over Europe complained about incompetent key account management and in some cases the bureaucratic behavior of postal operators.

Generally, representative information on customers' and especially on consumers' needs is very limited. Studies like the representative market survey commissioned by Postcomm²⁷¹ or the Dutch survey on meaning and significance of postal services in the view of consumers²⁷² are a necessary source of information for the future evolution of the postal universal service at national and at European level.

In the last years business mailers—whether small, medium-sized or large—have become more and more cost-conscious with respect to postal services. Large mailers increasingly demand solutions tailored to their individual needs. While large mailers are often benefit from discounts and value-added services provided by the operator or by third parties, small and medium-sized customers are still looking for ways to save costs. But in most Member States small and medium-sized customers are completely dependent on the public service portfolio of the USP. As outlined in section 4.1, different market opening strategies strongly influence which customer groups enjoy benefits from more competition and which do not. Additional pressure from competitive entry might help even this group to get cheaper services. In Germany, for example, access to sorting centers (outgoing and ingoing) was required by a competitor first. After the decision of the German NRA, mailers more than competitors benefitted from this cheaper access possibility. Recently, the same has happened in the United Kingdom. After first allowing downstream access for competitors, Royal Mail now offers similar contracts to mailers as well. In Germany, third-party access has been extended to all letter post items, recently. In future, German medium-sized and small mailers will also be able to benefit from lower tariffs by using consolidators.

Additionally, the challenge of mail substitution by means of electronic communications—even if still not visible in every Member State—has to be taken into account. Large mailers may be able to use electronic mail or the internet to replace some types of mail. Use of the internet to replace transaction mail is feasible in some cases,²⁷³ although this possibility varies among Member States depending on the diffusion and acceptance of the internet and email. Substitution of direct mail by electronic mailings appears to be less likely. Although direct marketers are free

²⁷¹ Roland Berger Strategy Consultants, 'Monitoring developments in the postal market' (2004).

²⁷² TNS Nipo Consult, 'Betekenis en belang van postdienstverlening.' [Meaning and importance of the postal services] (2004)

²⁷³ It appears that only a minority of recipients are willing to accept electronic bills. In the view of experts, no more than 20 per cent of persons are ready to accept electronic billing in Germany. Electronic billing is further inhibited by the fact that electronic bills do not include the advertisements usually attached to bills. If the advertisements are still sent by post, there may be no net savings from electronic billing.

to use different marketing channels, such as television or newspapers, in at least some cases advertising campaigns make use of different media in a complementary manner.²⁷⁴ More competition in the postal market with more customer-oriented and innovative services might impede or at least slow down mail substitution since direct mailers will no longer be forced to rely on a monopolist providing an inflexible set of postal services.

We believe that this is essentially the case with most forms of peer-to-peer correspondence, or personal letter writing. For example, falling long distance telephone rates since the early 1950s seem to account for the reduced use of person-to-person correspondence. In the 1960s, household-to-household mail accounted for over 15% of domestic mail volume; by 1987, the share of HH-to-HH mail had declined to 5% of domestic mail.

Conclusion. The share of business mail (correspondence and direct mail) is increasing. Consumer mail continues to lose importance. Postal operators focus on the needs of large mailers and have invested in customer retention by offering more and more customer-tailored solutions. Small and medium-sized mailers have considerably less bargaining power to get lower postal tariffs or a greater choice of services. There is a strong need for more representative surveys on customers' and especially consumers' needs in order to further develop the postal regulatory framework and the postal universal service.

4.5 Mail volume development

Changes in market structure are being driven at least in part by changes in market demand. The volume of domestic letter post grew from 1998 to 2000, but it remained essentially flat after that. The historically strong link between growth in economic activity and growth in letter post volume seems to be waning in the most advanced economies and in the EU as a whole, although economic growth is still stimulating increases in letter post volumes in less advanced economies.²⁷⁵ It is widely expected that the letter post will become more a medium for distribution of direct mail and less a medium for exchange of correspondence. Recent developments in the Scandinavian countries support these expectations. Nonetheless, it seems that direct mail growth partly compensates for the loss of correspondence and transaction mail.²⁷⁶ Respondents generally expect the net effect of declining correspondence (due to electronic substitution) and increasing direct mail (due to a growing economy) will be a modest decrease in the volume of letter post over the next decade.²⁷⁷ In general,

²⁷⁴ Experts Workshop, 15 Mar 2005.

²⁷⁵ WIK, *Main Developments* (2004). The British experience presents an interesting exemption. Letter post volumes strongly increased the last two years while the forecasts of Royal Mail and even Postcomm were much more pessimistic. United Kingdom, Postcomm, 2006 Royal Mail Price and Service Quality Review: Initial Proposals (2005) 185.

²⁷⁶ Sweden Post, Annual Report 2004; Norway Post, Annual Report 2004; Denmark Post, Annual Report 2004; Finland Post, Annual Report 2004.

²⁷⁷ WIK, *Main Developments* (2004) 113-115.

the impact of electronic substitution on mail volumes has been less strong than estimated by USPs.²⁷⁸

Existing forecasts were not able to predict the USP's mail volume development.²⁷⁹ The forecasts in several European countries have been more pessimistic than actual experience. The major weakness in these forecasts has been failure to take into account changes in customer preferences, price policy, and the development of innovative, more customer-tailored services (partly due to competitive pressure and competition). Additionally, in most cases only the USP's mail volume is the subject of a forecast. The future development of the mail volumes of the entire market must be taken into account in order to get a clear picture about the importance of postal services in a country. Only in Scandinavian countries have overall mail volumes been decreasing, while other countries have experienced growing mail volumes (e.g., Germany and U.K.). Thus, it is very questionable whether the Scandinavian development is transferable to other Member States. Especially in countries with relatively low mail volumes per capita (notably the new Member States) increasing mail volumes seem to be more likely than decreasing. In these countries the relationship between economic growth and mail volume is much stronger than in countries with high mail volumes per capita.²⁸⁰

Conclusion. Forecasts do not consider the impact of competition on market mail volumes but focus on mail volume development of USPs. It appears likely that correspondence and transaction mail will decrease in the next decade while direct mail and parcels are expected to increase. Currently, the picture is quite mixed. While in some countries mail volumes are decreasing, in other countries volumes are still growing.

4.6 Likely changes in market structure

In a recent review of the economics of postal service, NERA concluded that the public postal operators of the Community are pursuing three distinctly different business strategies.²⁸¹ Only the 'Big Four'—Deutsche Post, La Poste, TNT, and Royal Mail—have global ambitions.²⁸² Since 1998, the Big Four have taken over more than 70 parcel and express companies and about 50 companies engaged in other types of postal and other activities. Two, Deutsche Post and TNT, have acquired two of the four largest global express services (DHL, TNT). Lately the Big Four have used acquisitions to increase their upstream and downstream activities and to expand into letter post related services in other Member States. Some

²⁷⁸ F. Nader, 'Mail Trends' (2004) 2.

²⁷⁹ F. Nader, 'Forecasts' (2005).

²⁸⁰ WIK, *Main Developments* (2004), section 6.

²⁸¹ The public postal operators of Austria, Denmark, Estonia, Finland, Latvia, Lithuania, Poland, Portugal, Spain, and Sweden.

²⁸² NERA Economic Consulting, *Economics of Postal Services* (2004), section 4.4.

medium-sized public postal operators have been pursuing similar, although smaller-scale, expansion strategies; other small and medium-sized USPs are increasingly adopting the role of commercial partners with larger, regional postal operators while not being active in foreign acquisitions.²⁸³ Altogether, NERA views eleven public postal operators as concentrating on consolidating their existing positions,²⁸⁴ while ten others are seen as having begun cautious expansion.

NERA summarized its view of the future towards which economic logic is driving the Community postal sector as follows:

[U]niversal service providers will be able to continue to command high market shares even in a fully liberalised market. . . .

The current internationalisation of the industry, primarily driven by demand synergies, may in the future lead to consolidation. ‘Economies of skill’ could be a factor favouring structural links between operators. Initially, these links are likely to be in the form of alliances but eventually they could lead to mergers between operators. . . .

Due to the continuing trend towards globalisation of the economy, the most important customers of postal operators will increasingly be organised at a supranational level. . . .

In NERA’s view, these factors point to an industry structure where:

In any given country, there will be: a universal service provider with a large market share, as well as a number of competitors (the most significant of which will be controlled by international groups) with small but significant market shares; a presence by a number of major international postal operators; and structural separation between mails services and retail services.

Each major international postal operator will: have a presence in all of the main countries, either by controlling the universal service provider or a significant competitor; and consist of a number of operating units, some of which are universal service provider in particular countries, others are competing operators in other countries.

[W]hile we believe this structure is the logical outcome of current trends and the underlying economics of postal services, it may be quite a long time before it actually materialises.²⁸⁵

²⁸³ WIK, *Main Developments* (2004), p. 105.

²⁸⁴ The public postal operators of Belgium, Cyprus, Czech Republic, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Slovenia, and Slovakia.

²⁸⁵ NERA Economic Consulting, *Economics of Postal Services* (2004) 161-62.

Conclusion. In the future the Community postal sector might be dominated by international postal operators providing express, parcel, and letter post services. National letter post markets will most likely be dominated by the universal service provider while competitors might have small but significant market shares. Some competitors might be controlled by international postal operators.

4.7 Summary

For two decades the Community postal sector has been facing fundamental changes. Postal administrations have become profit-oriented public companies while a handful have been privatized. Simultaneously, universal service operations have been becoming more cost-efficient even if public postal operators have been developing at different paces.

Competition in the letter post segment has been evolving rather slowly mainly due to regulatory restrictions. But even in countries which have completely opened the market public postal operators are still market dominant. Market entry strategies of competitive postal operators strongly depend on the regulatory framework, especially on the definition of the reserved area, the licensing regime, the way prices are regulated, and the effectiveness of the NRA in preventing the incumbent postal operator from abusing his market dominant position. Market entry in the letter post market has mainly been driven by regulation and less by customer needs.

In Member States where segments of the market have already been opened international postal operators, notably Deutsche Post and TNT, have entered by acquisition of or by joint ventures with competitors. In the future, it appears conceivable that international postal operators might dominate the Community postal sector by cooperating with or even owning smaller universal service provider or by directly competing with incumbent postal operators in their national markets.

Public postal operators are becoming more customer-oriented with a main focus on large mailers. This is resulting in more customer-tailored services which have even included provision of document management and mail production services. In contrast, small and medium-sized customers mostly depend on publicly offered postal services and tariffs. This group of customers has also been affected by the ongoing restructuring of the USP's retail networks. However, they have also benefitted from increasing quality of service in most Member States.

Postal customers—especially those whose postal expenses form a considerable part of their total budget—have become more and more cost conscious. By looking for ways to save costs they have made use of cheaper alternatives to standard first class mail. Additionally, there is an ongoing trend to outsource mail production, mailroom management and even document management. In contrast, consumers are more reluctant with respect to changes in universal service—most notably changes in the post office network have often been opposed in some Member States. Information on the use of mail by consumers is limited. There is a general trend that the share of mail sent by consumers is declining. Altogether, there is still a strong need for more surveys on customers' and especially consumers' needs in order to further develop

the postal regulatory framework and the postal universal service. Some Member States have recently started to fill this gap by carrying out representative consumer surveys.

The changing attitude with regard to postal services is also reflected by changes in the structure of mail volume. The importance of business and direct mail has been increasing, while the share of private mail continues to decrease. Advertising mail is more and more predominant in the mail delivered to households. The letter post is even declining in the northern Member States. Mail substitution by electronic communications remains an ongoing threat for physical mail. For the future we expect a decline in correspondence and transaction mail while direct mail and parcels will become more important.

5 A New Regulatory Model For Current Policy Objectives

This chapter describes a new regulatory model for the Community postal sector that illustrates how the sound regulatory principles identified in Chapter 1 could be implemented in the postal sector. The new model relies substantially on the evaluation of the current Community-level regulatory model presented in Chapter 2. It draws on regulatory concepts pioneered in Member States (see Chapter 3) and an appreciation of the recent developments in the market (see Chapter 4). The policy objectives of the new model are the same as those we inferred for *current* Community policy in Chapter 2. For this reason, there is much in common between the new model and the current model.

The new regulatory model is *not* a proposal for a new postal directive. Rather, the new model offers an *analytical framework* for considering how sector specific regulation can achieve *current* policy objectives in a manner more consistent with sound regulatory principles. Of necessity, we use examples written in legislative language to show how a particular regulatory concept may be expressed. By this expository device, we are *not* endorsing current policy objectives or implying that they should serve as the basis of a new postal directive. The new regulatory model does *not* take into account factors, such as recent market developments and political considerations, which may imply the need to revise or amend the objectives of Community postal policy. Nor does the new regulatory model consider transitional problems. In Chapter 6, we shall consider some of these issues and explain possible relationships between the new regulatory model and a new postal directive.

5.1 Overview of the new model

In general, the purpose of the new regulatory model is to suggest ways to remedy the discrepancies between the current regulatory model and sound regulatory principles, summarized at the end of Chapter 2.²⁸⁶ Hence, the major differences between the new regulatory model and the current regulatory model are as follows:²⁸⁷

- The *objectives* of Community postal policy are defined more specifically and related in a manner more consistent with general Community policies.

²⁸⁶ See section 2.8, page , above.

²⁸⁷ In addition, the Appendix provides a detailed comparison of the current regulatory model and the new regulatory model. In addition, the Appendix provides illustrative examples of how each of the concepts of the new regulatory model could be translated into legislative language. While some of these examples are also included in the main text, the reader may find the Appendix offers a more complete picture of the features of the new regulatory model presented in this chapter.

Figure 3. Current regulatory model

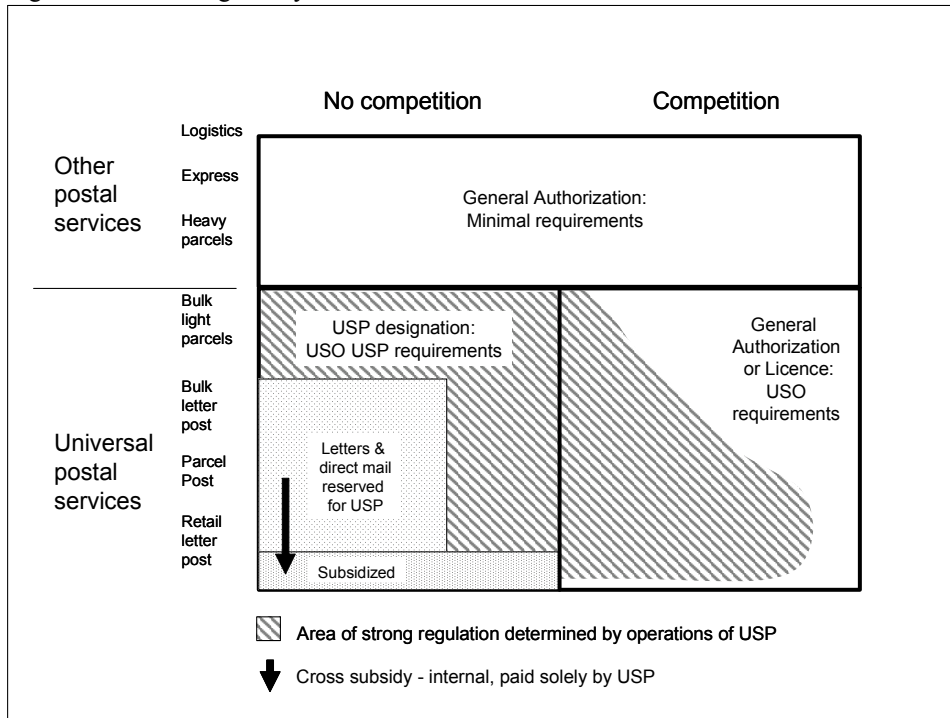
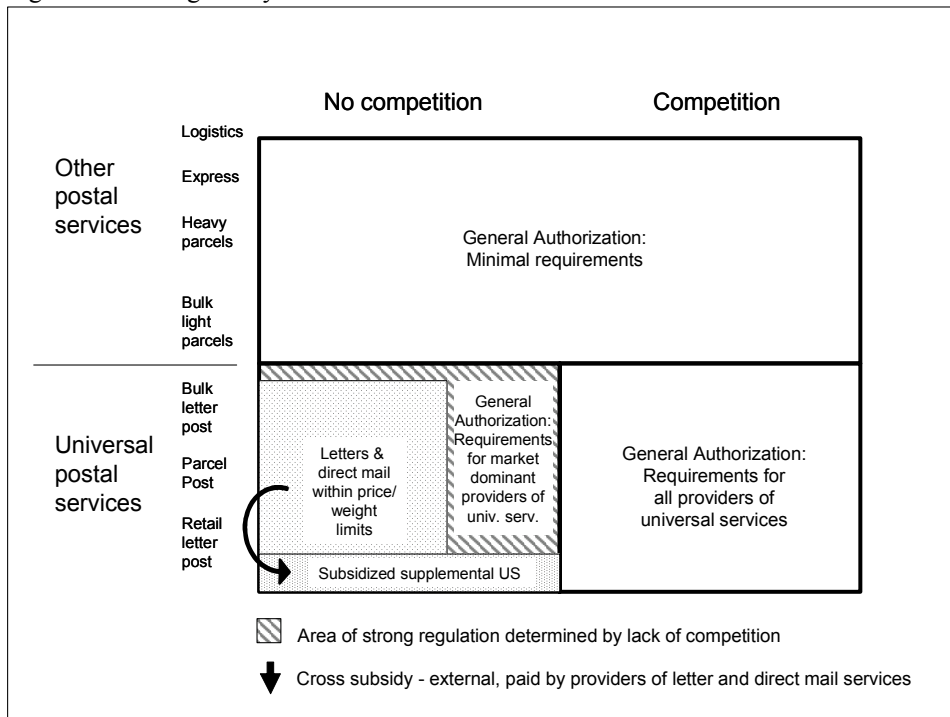


Figure 4. New regulatory model



- Universal service* is defined specifically and traditionally, to include universal provision of ‘letter post services’ (i.e., postal services which provide regular conveyance of letters and may also transmit newspapers, magazines, and printed matter (such as direct mail and catalogs) and ‘parcel post services’ (i.e., over-the-counter parcel services provided in conjunction with a letter post), but not separate commercial parcel services.

- Member States are given *more flexibility to adapt the definition of universal service* to local needs; they are permitted (but not required) to adjust the frequency of collection and delivery where appropriate.
- Member States are not permitted to impose *uniform tariffs* on universal services; but market dominant postal operators are specifically authorized to maintain uniform or zoned tariffs where cost-justified.
- Major postal operators are afforded *more commercial flexibility* because strict regulation does not apply to universal service products offered in competitive markets; strict, although modified, regulation is maintained over universal services offered under circumstances of market dominance.
- *All postal operators are regulated in a non-discriminatory manner*; no postal operator is singled out as the universal service provider for all purposes.
- Member States are *not permitted to establish a reserved area*. The Community postal services market is viewed as a single fully operational internal market rather than as 25 national markets separated horizontally (i.e., by country) and vertically (i.e., by type of postal service).²⁸⁸
- The primary means of funding universal services not voluntarily provided by postal operators shifts from an *internal cross-subsidy* hidden within the accounts of a USP to a transparent *external cross-subsidy* administered by the NRA or to funds drawn from general revenues and dispensed by the NRA.
- Authorization of all postal operators is provided by *general authorization*; nonetheless, postal operators are subject to continuing obligations which vary according to the postal services provided.
- *Market transparency* and *user protection* are enhanced with requirements extended to all postal operators.
- The NRA's authority, independence, and control over universal services is better defined, and the rights of parties in regulatory proceedings are better protected.
- Distinctions between intra-Community and national universal services are ended.
- Distinctions between intra-Community and national universal services are ended.

²⁸⁸ As explained in Chapter 2, We offer no judgement as to whether, for specific Member States, a reserved area is necessary and proportionate to accomplish the objectives of postal policy set out in national legislation and regulations. Such judgements would necessarily take into account the costs of service and the availability and practicality of alternative sources of funds to support universal service in each Member State. These specific factual issues were beyond the scope of this study. See section 2.3.2(a)(ii), page 63 , above.

- A Postal Regulatory Committee, composed of representatives of NRAs, is proposed to supplement the Postal Policy Committee, a continuation of the current committee.²⁸⁹

Figures 3 and 4 provide schematic representations of the current and new regulatory models, respectively.²⁹⁰ As these figures show, both models create four distinct regulatory areas, although they are defined differently in the two models. The four regulatory areas are

- *Non-universal postal services.* In both models, outside the universal service area, postal operators may be subject a general authorization regime and minimal regulatory obligations. In the current model, the scope and nature of regulation is very unclear. In the new model, the scope of regulation is defined to include all postal services other than letter post services and associated parcel post service, and the obligations of postal operators are specified clearly.
- *Universal services provided competitively.* In both models, some universal services are provided under competitive conditions. In the current model, different regulatory regimes apply depending upon whether the postal operator has been designated as a universal service provider or not. In the new model, all postal operators will be subject to the same ‘light-handed’ regulation designed to ensure that universal service meets basic standards of affordability and reliability and other criteria that are common throughout the Community and that may be adapted or raised by individual Member States.
- *Universal services provided under conditions of market dominance.* In both models, some universal services are provided in non-competitive conditions, and these are subject to strict oversight by NRAs to ensure, inter alia, that tariffs are cost-based, transparent, and non-discriminatory, that market dominant products do not cross-subsidize other products, and that access and quality of service meet the needs of users.
- *Subsidized supplemental universal services.* In both models, pursuant to the guarantee of universal service, some universal services are provided that would not be provided in the normal commercial market. In the current model, the nature and cost of these services are not transparent and the NRA has no specific control over the quality of services rendered. In the new model, the nature and cost of these services are transparent, and the NRA may exercise specific control over the quality of services rendered.

²⁸⁹ The current Directive creates a committee of representatives of Member States that is not given an explicit name but is usually called the ‘Postal Directive Committee’. Postal Directive, Article 21.

²⁹⁰ These figures only summarize key features of the current and new regulatory models; they do not illustrate every variation permitted by the Postal Directive and implemented in the Member States. For example, the current Directive permits cross-subsidy from the reserved area to competitive universal services under certain limited circumstances, but this relatively minor element of the current regulatory model is not illustrated. Likewise, the figures do not show that a USP may use profits earned from competitive universal services to cross-subsidize the subsidized supplemental universal services. Using profits in this manner is a business decision of the USP which is unaffected by the legal provisions of either of the current or new regulatory model.

5.2 Objectives of the new regulatory model

The objectives of postal policy must ultimately be determined by the political process. Since the primary purpose of this study is to explore the implications of sound regulatory principles and not to reconsider the objectives of postal policy, we shall assume that the fundamental objectives inferred for the current regulatory model in Chapter 2 should guide the new regulatory model as well.²⁹¹ In accordance with sound principles, however, the new regulatory model should declare the objectives of Community postal policy clearly and precisely. Moreover, consistent with the principle of policy coherence, these objectives should be related in such a way as to more clearly reflect the priorities of general Community policy.

By way of illustration, a possible formulation of the objectives of the new regulatory model follows:

The objective of Community postal policy is to promote development of a fully operational internal market in postal services while ensuring the availability of an accessible, affordable, reliable, and efficient universal postal service that responds to the basic needs of users and society by—

- 1) establishing and relying upon a Community market without internal frontiers in which the free movement of postal services is ensured in conditions of undistorted competition;
- 2) prescribing objective, transparent, and non-discriminatory requirements for providers of postal services to the extent necessary and appropriate to protect the rights of users and essential public interest requirements;
- 3) defining at Community level a basic universal postal service encompassing a minimum range of affordable services of specified reliability for the benefit of all users, irrespective of their geographical location in the Community, whose supply shall be further specified and ensured by Member States in a manner appropriate to their national needs;
- 4) providing objective, transparent, and non-discriminatory regulation by independent authorities of universal postal services offered under conditions of market dominance to the extent necessary and appropriate to ensure the availability of universal service of appropriate quality without distortion of competition; and
- 5) providing necessary and appropriate financial support and other means to ensure the supply of universal service in circumstances in which universal service is not otherwise satisfactorily supplied.

²⁹¹ See section 2.1, page 31, above.

The illustrative statement embraces the two fundamental objectives of Community postal policy identified in Chapter 2. The statement goes on to identify five regulatory strategies which will be enlisted to accomplish these objectives. The list of regulatory strategies is intended to provide a more specific definition of the two major objectives and the relationship between them.

- The first strategy expands upon the objective of a ‘fully operational internal market’ by declaring an intention to *establish* and *rely upon* a Community market without internal frontiers in which the free movement of postal services is ensured in conditions of undistorted competition.²⁹²
- The second strategy expands upon the idea of a fully operational internal market by stating that the Community intends to ‘perfect’ the postal services market by specifically protecting the rights of users and essential public interest requirements.²⁹³
- The third strategy provides the Community guarantee of universal service and the procedure for its definition, i.e., by a Community-level definition of basic universal service with further specification by Member States in a manner appropriate to their needs.²⁹⁴
- The fourth strategy indicates that independent economic regulation will be employed to assure good quality universal service if, due to conditions of market dominance, the internal market cannot provide the normal checks of effective competition. It also acknowledges that there is a particular need to oversee the transition to more competitive markets without competitive distortions since in all Member States former public monopolists still enjoy dominant market positions that were created by governmental measures.
- The fifth strategy indicates that financial support will be employed to assure good quality universal service in cases where neither the internal market nor regulation of market dominant services is sufficient to do so.

Conclusion. In the new regulatory model, the two primary objectives of *current* Community postal policy can be, and should be, expressed clearly and precisely and related in a manner that is consistent with more general economic and legal policies.

²⁹² The language of the first strategy is taken from EC Treaty Articles 3(c) and 14, provisions which relate directly to the concept of a ‘fully operational internal market’.

²⁹³ The second strategy is derived from Articles 9 and 19 of Postal Directive which imply that one element of Community postal policy is to require minimum, non-economic standards of behaviour from all providers of postal services, whether universal services or not.

²⁹⁴ The language of the third strategy is adapted from recital 11 of the 1997 Postal Directive, the standard summary of the Community concept of universal service. The words ‘to be provided in all Member States’ have been replaced by the words ‘ensured by all Member States’ to eliminate any implication that a Member State must itself provide universal service. New language is added to make explicit the role of the Member State in defining universal service.

5.3 Postal services generally

Because postal services, like internet services, are important to a wide variety of economic and social activities, some would argue that government should adopt specific policies to facilitate availability of all types of postal services, not just universal postal services. Others would contend non-universal postal services should be left to the rules of the normal commercial market. Since the Postal Directive provides for minimal regulation of ‘services’ outside the universal service area, we conclude that the broad objective of a ‘fully operational internal market’ implies some attention to postal services generally. It may be conceded, however, that in the current regulatory model regulation of postal services outside the universal service area is disjointed and incomplete at best. The current regulatory framework fails to define which services are covered, and it provides for regulation only with respect to ‘essential requirements’ and user complaints.²⁹⁵ This section offers a tentative approach towards rationalizing the intimations of sector regulation found in the current regulatory model.

5.3.1 Definition of postal services

If the new regulatory model is not limited to universal postal services, then it should define clearly what services are covered. There is no universally recognized dividing line between a ‘*postal service*’ and other types of transportation or distribution services. We suggest that in common usage the term ‘postal service’ refers to a transportation service that provides a regular collection of documents and small parcels and transmits them quickly and reliably to a wide range to delivery points. By its nature, a ‘postal service’ is a conveyance system suitable for all sorts of envelopes and packages. A delivery service for newspapers or currency or telephone books would not be considered as ‘postal service’ even though each of these items could be conveyed by a postal service as well. To be useful as a medium of exchange, a postal service must operate on a scheduled basis. A special messenger hired for a particular occasion or distribution of monthly invoices is not a ‘postal service’.

While the public post office is obviously providing a ‘postal service’, there are other similar services. For example, a company providing regular collection and delivery of parcels could be considered a ‘postal service’. Likewise, an express company offering extra rapid and reliable conveyance of envelopes and parcels could be considered a ‘postal service’. What these services have in common is that they all provide companies and individuals with a reliable, continually available, ‘pipeline’ for exchanging documents and small goods.

In light of these observations, we propose the following definitions for consideration as one way of defining the concept of ‘postal service’:

Postal service: a regularly scheduled service that is offered to the general public for compensation and that provides, on at least a weekly basis,

²⁹⁵ Postal Directive Articles 9 (‘non-reserved services’) and 19 (‘services’).

collection, transport, and delivery of diverse postal items.

Postal item: a document, envelope, parcel, or similar thing that is wrapped and addressed in a form suitable for conveyance by a postal service and weighs not more than 30 kilograms. Postal items may consist of or contain such things as correspondence, books, catalogues, newspapers, periodicals and packages containing merchandise with or without commercial value.²⁹⁶

Postal operator: a public or private undertaking that provides postal services.

The rationale for this set of definitions is as follows.

- First, we believe that a *postal service* must necessarily be a service that is offered to the *general public for compensation*. Free services, such as might be provided by a charity, and non-public services, such as might be provided exclusively to one or a few companies, are not generally considered postal services.
- Second, as explained above, we believe that a *postal service* should provide for a conveyance of different types of items.
- Third, we believe that a *postal service* is a service that is organized to deliver *addressed* documents and parcels. A postal service may deliver unaddressed items as well, but its basic function is delivery of addressed items.
- Fourth, we believe that a *postal service* must be a *regularly scheduled* service. Exactly how regular is necessarily somewhat arbitrary. A delivery service that delivers less than once per week, however, does not seem to conform to the concept of a *postal service*.
- Fifth, the definition of a *postal service* is limited to services that provide collection, transport, *and* delivery. An undertaking which provides only collection (e.g., a mail preparation company) or only transport (e.g. a trucking company) is not considered a postal service.²⁹⁷
- Sixth, the definition of *postal item* is limited items below a certain *weight limit*. Conceptually, the weight limit should reflect the largest parcel that can be handled by an individual person without powered equipment. This is the

²⁹⁶ Compare Postal Directive, Article 2(6): ‘*postal item*: an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value’.

²⁹⁷ Whether or not an undertaking provides delivery depends in part on the contractual relationship between the sender and the undertaking. An undertaking that accepts contractual responsibility for delivery and then subcontracts with a second undertaking to provide actual delivery would be a ‘postal service’ whereas an undertaking which only accepts responsibility for mail preparation would not be a ‘postal service’.

practical consideration that defines the operations of most services generally thought of as postal services. The weight limit that we have suggested, 30 kilograms, is approximately the limit that an individual can lift without undue strain. A lower limit could be used, such as 20 kilograms. A higher limit could also be used, such as 60 kilograms, if one takes into account collection and delivery by hand truck, a practice commonly used by parcel and express companies.²⁹⁸

Conclusion. If the new regulatory model addresses postal services outside of universal services, then it should include a clear definition of *postal services* that reflects the kinds of services offered by public postal operators and their competitors. In brief, we suggest that a *postal service* may be defined as ‘a regularly scheduled service that is offered to the general public for compensation and that provides, on at least a weekly basis, collection, transport, and delivery of diverse postal items weighing up to 30 kilograms’.

5.3.2 Authorization of postal operators

To administer the new regulatory model, Member States will likely find it necessary to introduce an authorization regime for postal operators. As explained in Chapter 2, it appears sufficient to introduce general authorization procedures which require no more than filing a minimal registration form before starting operations.²⁹⁹ However, to safeguard universal service and implement other requirements of the new regulatory model, authorization should be subject to a continuing duty of substantial compliance with appropriate legislation and regulations. For postal operators that do not provide universal service, the continuing obligations of authorization would be minimal. As described in sections 5.3.4 to 5.3.7, below, non-universal postal operators would be required to comply with certain ‘essential public interest requirements’, to abide by user protection and market transparency rules, and to cooperate in development of address and postal code systems. Postal operators providing universal service, especially those with positions of market dominance, would be subject to more detailed obligations (e.g., controls on prices and services), as set out in sections 5.4 and 5.5, below. There is no apparent justification for permitting authorizations that are limited to specific services or specific geographic areas.

Conclusion. Member States should be authorized to introduce a general authorization regime for undertakings seeking to provide postal services. Individual licences and authorizations limited to specific services or geographic areas should not be authorized.

²⁹⁸ The proposed weight limit in the definition of ‘postal item’ is *not* the same as the weight limit on postal packages that are guaranteed universal service in the current Postal Directive, Article 3(4). The proposed weight limit in the definition of ‘postal item’ serves to define the range of services subject to regulation or authorization in the new regulatory model. In the current Directive, there is no equivalent demarcation of which ‘services’ are outside the scope of regulation. See the discussion of ‘postal services’ in section 2.7, page 75, above.

²⁹⁹ See section 2.3.2(b), page 66, above.

5.3.3 Prohibition of reserved area and other special or exclusive rights

For reasons stated in Chapter 2, we believe that a reserved area is unnecessary to sustain universal service or otherwise accomplish the objectives of Community postal policy (as we have inferred them).³⁰⁰ We conclude, therefore, that except for possible transitional provisions (considered in Chapter 6), the new regulatory model should prohibit the granting of all special or exclusive rights to postal operators.

As discussed in Chapter 2, it should be appreciated that a prohibition against creation of a reserved area and concomitant obligation to fund supplemental universal services by alternative methods implicitly places an upper limit on a Member State's discretion to establish an interventionist or restrictive definition of universal service. In effect, a Member State cannot require a universal service that is so different from normal commercial practice that the only possible solution is for government to take over the supply of postal services. In the new regulatory model, the Member State's tools for protecting universal service are limited to general laws and regulations, conditions attached to authorizations, and the funding of supplemental universal services by one means or another. While this feature of the new regulatory model reflects our understanding of the objectives of current Community postal policy, alternative objectives are considered in Chapter 6.

The reserved area is the most important legal advantage granted to the USP, but it is not the only one. Generally, the argument against the reserved area would apply to all other special or exclusive rights. In some countries, for example, the USP has the exclusive right to place mail collection boxes along public roads or to make use of entry keys to apartment buildings.³⁰¹ While regulation of activities with environmental or security implications may be justified, a non-discriminatory approach would serve the public interest as well. The same could be said for laws, if any, that give special treatment to the USP in respect to customs, safety regulation, taxes, or value-added tax (VAT).³⁰² In some cases, such laws may disadvantage the USP. Whether they favour or disfavour the USP, special or exclusive measures which treat postal operators differently in similar circumstances should be ended.

Conclusion. Member States should be prohibited from establishing a reserved area in the postal sector and should be required to eliminate special or exclusive rights which discriminate for or against the public postal operator.

³⁰⁰ See section 2.3.2(a), page 59, above.

³⁰¹ Some would add to this list access to post office boxes. See section 5.5.5, page 152, below.

³⁰² We are more sympathetic to laws, common in Member States, that give the public postal operator the exclusive right to sell postage stamps bearing the name of its country. So long as the public postal operator is actually owned by the government of a Member State, it does not seem unreasonable for the public postal operator to issue stamps that reflect this relationship. By the same token, a private operator should be able to issue stamps bearing its name.

5.3.4 Essential public interest requirements

The current Directive permits Member States to introduce authorization procedures for all postal operators to the extent necessary to guarantee compliance with ‘essential requirements’.³⁰³ ‘Essential requirements’ refers to general non-economic considerations which ‘can induce’, but do not necessarily induce, a Member State to regulate postal services, such as confidentiality of correspondence, security as regards the transport of dangerous goods, personal data protection, confidentiality of information transmitted or stored, protection of privacy, environmental protection, and regional planning.³⁰⁴ Indeed, under the current Directive, the universal service must guarantee compliance with ‘essential requirements’ even though the content of ‘essential requirements’ is wholly unclear.³⁰⁵ Neither the current Directive nor legislative history explains why an authorization regime for postal operators may be necessary to address such issues, as opposed to, say, legislation generally addressing data protection or the transport of dangerous goods.

Although the concept of ‘essential requirements’ is vague, it is difficult to reject out of hand the possibility that an authorization regime for postal operators may serve some public interest purpose. Nonetheless, the penalty of withdrawing an authorization to do business is so drastic that endorsing the current vague concept of ‘essential requirements’ is impossible. In the new regulatory model, therefore, we propose to clarify and limit the concept of ‘essential requirements’. For example, an authorization to provide postal services could be limited to specific set of public policy concerns, such as:

- maintenance of the confidentiality and integrity of correspondence and data transported;
- maintenance of the security of valuable goods transported;
- promotion of practices that protect the public security, safety, health, or morals; and
- non-involvement of persons convicted of crimes relating to dishonesty.

Moreover, such considerations should be introduced as conditions of an authorization only to the extent that they are presented in a unique or acute form in the postal sector and cannot practically be addressed in more general measures. For clarity, rather than the term *essential requirements* found in the current Directive, the new regulatory model employs the term *essential public interest requirements* for this revised concept.

³⁰³ Postal Directive, Article 9(1) (services outside universal service area); Article 9(2) (services inside universal service area).

³⁰⁴ Postal Directive, Article 2(19).

³⁰⁵ Postal Directive, Article 5(1), requires that ‘Each Member State shall take steps to ensure that universal service provision meets the following requirements: it shall offer a service guaranteeing compliance with the essential requirements.’

Conclusion. Member States should be permitted to make authorizations to provide postal services dependent on compliance with measures relating to a limited list of specific essential public interest concerns but only to the extent that postal operators pose a particular risk that cannot be protected by general legislation.

5.3.5 User protection

Under the current Directive, Member States may require that ‘services’ adopt transparent, simple, and inexpensive procedures for dealing with users’ complaints, especially complaints involving loss, theft, damage or non-compliance with service quality standards.³⁰⁶ Obviously, a minimal responsiveness to users is desirable. Indeed, one would expect such responsiveness from any undertaking in a competitive environment. Nonetheless, there seems to be no reason not to extend user protection requirements to all postal operators.

Conclusion. A requirement of basic responsiveness to user complaints could be extended to all postal operators and may have beneficial effects.

5.3.6 Market transparency

The best argument for extending sector specific regulation to all postal services may be a consideration absent from the current regulatory model, the benefits of market transparency. The current Directive requires USPs to give users ‘sufficiently detailed and up-to-date information . . . regarding the particular features of the universal services offered, with special reference to the general conditions of access to these services as well as to prices and quality standard levels’.³⁰⁷ Basic information about tariffs, terms, and service quality could be useful to individual users of all postal services (presumably large users have the market power to obtain such information). Introduction of such ‘market perfecting’ disclosure requirements is a common, and often helpful, consumer protection strategy.

A related issue is the absence of credible statistics about Community postal services. This is a real rather than a hypothetical problem. Recent studies have revealed three major issues:

- data that can be reliably compared year to year and country to country do not exist in many cases;
- a significant portion of data necessary to understand market developments will not be voluntarily disclosed by operators and regulators; and

³⁰⁶ Postal Directive, Article 19 (as amended by Directive 2002/39/EC). See section 2.3.1(g), page 58, above.

³⁰⁷ Postal Directive, Article 6.

- the data systems of some public postal operators are inadequate.³⁰⁸

Lack of accurate statistics severely limits the usefulness of available data. As NERA has observed in a recent study, ‘*One essential pre-requisite for successful cross-country benchmarking of this type is good comparable international data and our present study has demonstrated the limited availability of this within Europe*’.³⁰⁹ In many cases, it is not even clear whether postal markets have been growing or declining in recent years. Success or failure of postal policy in a given Member State may be wholly obscured by a veil of incomplete or incorrect statistics. In such circumstances, it is difficult for both the general public and public officials to evaluate intelligently the details of proposed changes in regulatory policies.

For public policy purposes, what is needed is a set of basic statistics about the volumes and weights of postal items conveyed, revenues earned, and numbers of persons employed. So far as possible, data should be broken down by major postal product lines and major geographic areas. To develop operational and regulatory data that is reliably comparable from year to year and country to country, uniform data standards must be defined *in advance*. Attempts to gather such data on an ad hoc basis are costly, time-consuming, and ultimately ineffective. To date, statistics gathered by the Universal Postal Union provide the only consistent time series of postal data from Member States and other countries. Yet the multiple inadequacies of the UPU statistical system are well known. Postal operators are not required to provide data, and many do not. UPU data is limited to public postal operators even though private operators form a large segment of many postal markets. Consistent definition of data categories among UPU postal operators is questionable, as is the accuracy of the data itself.

To develop an appropriate statistical description of postal services in the Community, postal operators could be required to report basic market data to the NRA as a continuing condition of authorization. The amount of data required must be carefully weighed against the need to maintain the confidentiality of commercially sensitive information and the cost of producing the data. From a Community perspective, a consistent definition of data categories for all Member States is an absolute necessity. Responsibility for defining a postal data system should therefore be vested in a Community-level institution. Since NRAs will necessarily be responsible for data collection in their Member States, a committee of NRAs by the Commission would seem to be the most suitable governmental format.³¹⁰ In the end, one may imagine that the appropriate statistical system will look something like a simplified version of the UPU statistical system, adapted to the specific characteristics of Community postal markets and extended to all types of postal operators.

³⁰⁸ See WIK, *EU Adhesion Candidate Countries* (2003), Part I, pages 121-23; WIK, *Main Developments* (2004) 26-27; NERA Economic Consulting, *Economics of Postal Services* (2004), Appendices C and D.

³⁰⁹ NERA Economic Consulting, *Economics of Postal Services* (2004) 154.

³¹⁰ See the recommendation for a Postal Regulatory Committee in section 5.8, page 178, below.

Conclusion. Regulation of the entire postal services market could be used to enhance market transparency by requiring postal operators to give the public basic information about publicly available services and to report to NRAs market data defined by an appropriate, Community-wide statistical system.

5.3.7 Address databases and post code systems

An address database is an invisible but central element of all postal services. Incorrect addressing by senders is a basic problem for all postal operators. To reduce the number of unsuccessful delivery attempts and correct addressing errors, every postal operator must keep records of valid physical addresses.

In each Member State, the public postal operator necessarily has the most extensive and up-to-date address database because of its position as the official, and historically the exclusive, provider of universal service. Even after the reserved area is terminated, competition in the entire postal services market—not only the market for universal services—will be inhibited if the public postal operator continues to have exclusive use of this byproduct of the reserved area. Moreover, from a social standpoint, it is obviously wasteful to increase the number of unsuccessful delivery attempts by denying postal operators access to a database of valid addresses.

For such reasons, some Member States which have liberalized the postal sector have included procedures for ‘liberalizing’ the national address database of the public postal operator. In Germany, the law requires the public postal operator to provide access to this database for a fee.³¹¹ Similarly, in the United Kingdom, the law obliges the public postal operator to make the national address database ‘available to any person who wishes to use it on such terms as are reasonable’ and authorizes the NRA to enforce this condition.³¹² In Sweden, Sweden Post and the second largest postal operator, CityMail, have established a jointly owned corporation to maintain a national address database. Maintenance of a current national address database is in the interest of all postal services, and all postal services should have access to this database to prevent waste of resources as well as potential anti-competitive conduct. Therefore, NRAs should ensure that there is a current national address database that is available on a non-discriminatory basis to all postal operators that bear an appropriate share of the costs of maintenance.

The national post code system offers a somewhat similar situation. Post codes represent a categorization scheme of physical addresses that substantially facilitates provision of postal services. Creation of the post code system is likewise a byproduct of the fact there has been a single provider of universal service in each Member State. In a more competitive environment, however, there may be more than one

³¹¹ German Post Law, Article 29(2).

³¹² United Kingdom, Postal Services Act, Article 116. Postcomm is currently investigating the reasonableness of Royal Mail’s management of the ‘postal address file’. U.K., Postcomm, Royal Mail’s Management of the PAF’ (Jun 2004). See Appendix C for a review of how other countries treat postal databases and how the United Kingdom regulates the supply of similar shared resources. Postcomm reports that the Netherlands also makes the national address database developed by the postal operator freely available to competing postal operators.

provider of universal services. Continuation and updating of a national post code scheme is in the interest to all postal services, not only providers of universal service. Hence, NRAs should likewise ensure that there is a transparent and non-discriminatory procedure for maintaining and updating the national post code system.³¹³

Conclusion. NRAs should ensure that (1) there is a current national address database that is available on a non-discriminatory basis to all postal operators that bear an appropriate share of the costs of maintenance and (2) there is transparent and a non-discriminatory procedure for maintaining and updating the national post code system.

5.4 Universal services generally

In the current Postal Directive, the Community definition of universal service is supposed to identify a ‘*minimum range of services*’ to be ensured throughout the Community.³¹⁴ In fact, however, the Directive is unclear about whether the term *universal service* refers to a basic level of service which Member States must guarantee at all costs or to a level of reasonable service which users have a right to expect. For example, are quality of service standards set by Member States under the current regulatory model truly minimum levels which the USP should regularly surpass or are they targets that the USP should strive to achieve? In actuality, the role of quality of service targets varies from Member State to Member State.³¹⁵

In the new regulatory model, the Community definition will more clearly have the function of a minimum level of service which Community citizens have a right to expect. As described in this section, in the new regulatory model, the definition of universal service establishes a common ‘floor’ for universal services throughout the Community. The elements of universal service are very basic and should be exceeded voluntarily by competitive and market dominant postal operators in most areas. As explained in section 5.5, where universal service is provided in conditions of market dominance, the regulatory bar is raised above this minimum threshold, and NRAs will have be able to require market dominant postal operators to provide an appropriate level of service that can be shown to be cost-based and objectively suited to the needs of users. In addition, as provided in section 5.6, where basic universal service is not provided voluntarily by competitive or market dominant postal operators, Member States will have clearly defined authority to specify the universal services that should be supplied in remote locations and to the most needy persons.

³¹³ Access to ‘post office boxes’, i.e., an addressee’s receptacle for receipt of mail located in an office of the public postal operator, may seem to present a somewhat analogous issue. However, we suggest that post office box access is more correctly viewed a matter of downstream access and interconnection. See section 5.5.5, page 153, below.

³¹⁴ Directive 1997/67/EC, recital 11.

³¹⁵ See section 3.2.1(f), page 89, above.

5.4.1 Services included in universal service

As explained in Chapter 2, the Postal Directive is unclear in defining which services are included in the concept of universal service.³¹⁶ Although the current Directive seems to define *universal service* as the distribution of addressed items weighing up to 10 or 20 kilograms, as a practical matter, no Member State regulates all such distribution services. However unclearly expressed, the focus of the Directive is limited to the distribution of things *by a universal service provider*. That is to say, ‘universal service’ refers to a type of *service*, not to the distribution system for certain set of articles. Many things conveyed by the USP are also distributed by the normal commercial market. For example, specialized security companies distribute money and financial instruments. Newspapers are delivered by newspaper delivery services. Large companies have internal services for moving documents and packages among branch offices. Merchants deliver goods to the homes of patrons. Items conveyed by such specialized services can be conveyed by the USP as well, yet the Directive is not concerned with such specialized distribution services but with general purpose distribution services traditionally provided by the USP. When the current Directive was developed, it was assumed that the reserved area would continue and the services of the incumbent USP would continue in more or less the traditional manner. Hence, it was clear enough that the services included in the *universal service* were the *services* provided by incumbent USPs.

The concept of universal service can no longer be defined as the distribution services of a single postal operator, the USP, when the reserved area has been repealed in several Member States. Reference to the scope of services provided by the USP is doubly inappropriate because incumbent USPs are expanding into new types of delivery services traditionally offered by private operators. Market developments in the last decade therefore necessitate a more explicit definition of the particular postal services included in the universal service.

In principle, what is required is a definition of ‘universal postal service’ that corresponds to the basic postal service traditionally expected of the USP but is independent of the identity of the service provider. We suggest that the service traditionally associated with the universal service provider includes the universal supply of two closely related services: *letter post* and *parcel post*. By ‘letter post’ (a traditional postal term), we refer to a postal service that conveys *letters* and other types of written or printed matter such as periodic publications (newspapers, magazines, etc.) and direct mail. The concept of a letter post reflects the historic preeminent social importance of the conveyance of letters, that is, individualized written communications.³¹⁷ Since some documents are fairly large, a letter post may also convey ‘small packets’. By ‘parcel post’, we refer to a postal service for larger packages that is offered in conjunction with letter post services. In brief, we believe that the Community objective of affordable, reliable, and efficient universal postal

³¹⁶ See section 2.3.1(a), page 37, above.

³¹⁷ As the Postal Green Paper explained, ‘the fundamental imperative is that universal service must be ensured for postal communication items of a personal or individualised nature’. Page 186; see also pp. 189, 201-2, 206. A postal service which does not convey letters is not a ‘letter post’, for example, a newspaper delivery service or a distribution system for direct mail.

service will be accomplished if Member States ensure universal provision of affordable, reliable, and efficient letter post and parcel post services.

This approach draws a distinction between ‘parcel post’ services offered in conjunction with letter post service and other types of parcel services. Why? In most Member States, specialized parcel companies have, for the most part, developed satisfactorily in a fully competitive environment.³¹⁸ As noted in Chapter 2, in many economically advanced countries, public postal operators offer commercial parcel services that are completely separate from their letter post services.³¹⁹ There is no reason—indeed, it would be positively harmful—to impose universal service obligations on economic activities that have developed satisfactorily in the normal commercial market. The only type of parcel service for which there may be special concern is the type of parcel service offered in conjunction with letter post services. For individuals and small businesses, especially in rural areas, dispatching a parcel ‘over-the-counter’ at a letter post office or agency may be the only practical option.³²⁰ In some areas, where there are not enough parcels delivered to justify specialized parcel delivery routes, the letter post carrier may be the only practical means of delivering parcels to an addressee. Alternatively, the addressee of a parcel may be notified by letter post that he or she can come to the nearest letter post office or agency to collect the parcel. In this manner, the universal letter post service has, since the late nineteenth century, served as the backbone of a parcel postal service that provides universal collection and delivery of parcels as well.³²¹

In this manner, we propose to define universal service as *a specific type of postal service*, that is, a postal service which conveys letter post items and also accepts and (where appropriate) delivers parcels.³²² This formulation, we believe, fairly describes the basic, traditional service that the Community is seeking to ensure on a universal basis. This approach implicitly retains the premise underlying current Community postal policy that this type of postal service is especially important to the economic and social development of the Community—so special as to require sector specific

³¹⁸ See, e.g., Sweden, Ministry of Transport and Communications, ‘Summary of Government Bill 1997/98:127, Responsibility of the State in the Postal Sector’ (The principal reason for regulation of letter and parcel delivery is to protect senders and addressees against the risk of the contents of the mail being revealed to other parties. As letters are generally considered to be particularly worthy of protection from the viewpoint of integrity, it is important that letter mail is subject to the supervision of a supervisory authority. However, as regards parcels, there are convincing reasons speaking against making parcel services subject to such supervision. The market has so far been virtually unregulated and the general view is that delivery functions satisfactorily.); U.K., Postcomm, *The UK’s Universal Postal Service* (Jun 2004) at 9 (‘Consultees commented that there was no need to require a choice between a priority and non-priority parcel services as part of the universal service because of the alternative parcels service already provided by competitive alternatives.’).

³¹⁹ See section 2.3.1(a), page 37, above.

³²⁰ Parcels which are accepted ‘over-the-counter’ are nonetheless typically transported and delivered with other parcels using specialized parcel systems.

³²¹ For a history of parcel post in several European states, see the classic book by A.D. Smith, *The Development of Rates of Postage* (1917), Chap. 3.

³²² The German Post Law adopts a similar approach. ‘Licensed services’ include the conveyance of letter post items weighing not more than 1 kilogram. Universal service is then defined as ‘postal services subject to licence and to such postal services as can, at least in part, be provided using conveyance means of postal services subject to licence.’ German Post Law, Articles 5, 11.

regulation.³²³

To offer a concrete example of this approach towards universal service, the new regulatory model might include the following definition of services to be included in universal service.

Each Member State shall ensure that at all points in its territory there is available a universal postal service provided by one or more postal operators who collectively provide, through their own facilities or by interconnection with other postal operators, the following specific services:

(a) one or more letter post services for postal items weighing up to 2 kilograms, provided that the national regulatory authority may decrease the maximum weight for such letter post service to not less than 500 grams if required by the public interest;

(b) one or more parcel post services which provide for collection and delivery of parcel post items weighing up to 10 kilograms in conjunction with letter post services, provided that the national regulatory authority may increase the maximum weight for such parcel post service to not more than 20 kilograms if required by the public interest; and

(c) registration and insurance services in connection with conveyance of all postal items conveyed under this paragraph.

In this example, key terms could be defined as follows:

Letter post: a postal service that conveys letters and other types of written or printed matter such as periodic publications (newspapers, magazines, etc.) and direct mail; a letter post may also convey other postal items of comparable size.

Letter: an individualized communication in written form on any kind of physical medium.

Parcel post: a postal service that conveys all types of postal items,³²⁴

³²³ Moreover, this formulation of universal service reflects an assumption that this bundle of services (letter post and parcel post) represents a generally viable business model. Looking to the future, it is conceivable that this assumption may break down some day. There may come a time when it is no longer commercially feasible to combine collection and delivery of (1) letters, (2) direct mail, and (3) parcels. In many cases, daily delivery of newspapers and parcels have already left the universal postal service; in Sweden, bulk computer-generated mail is delivered separately from the letter post. If fragmentation of universal service becomes general, then the proposition that ‘universal postal service’ in the traditional sense is especially important to the economic and social development of the Community will have to be abandoned and perhaps replaced by a different concept of universal service.

³²⁴ A ‘postal item’ was previously defined as ‘a document, envelope, parcel, or similar thing that is that is wrapped and addressed in a form suitable for conveyance by a postal service and weighs not more than 30 kilograms’. See section 5.3.1, page 133, above.

where at least part of the operations are provided in conjunction with a letter post.

In the new regulatory model, we propose that Member States may adjust the weight limits for both the letter post and parcel post services. Under the current Directive, NRAs have discretion only in setting the weight limit for parcel services.³²⁵ We would propose that a NRA should also be able to adjust the maximum weight limit for the letter post within a range of 500 grams to 2000 grams. The lower weight limit may be justified by market developments. With the introduction of automated sorting equipment, the costs of postal service have become increasingly related to the shape of items conveyed. Postal items which cannot be handled as ‘envelopes’ or ‘flats’ (large envelopes) are sorted out and handled as parcels. The upper weight of flats is generally considered to be 500 grams.³²⁶ Hence, a weight limit for the letter post of 500 grams may be most suitable for advanced postal systems. On the other hand, a weight limit of 2000 grams is the traditional rule found in the Directive and still followed by some USPs. For parcels, we propose to retain the current practice of allowing Member States to adopt a weight limit between 10 and 20 kilograms.

We would also suggest that the NRA be authorized to determine that, in specific areas, universal service does not require parcel post service because (A) there is no significant demand for collection of parcels with letter post items; or (B) there is no significant demand for the delivery of parcels with letter post items. It is easy to imagine, for example, that parcel delivery with the letter post may be unnecessary in some areas because all postal operators, including the public postal operator, deliver parcels in specific parcel delivery operations. Likewise, it is conceivable, although seemingly less likely, that in some areas, specialized parcel companies may offer so many access points that there is no need for over-the-counter service at letter post facilities. In either case, there is no reason to oblige Member States to ensure that the providers of universal letter post service also provide parcel post service.

For individual users, this new formulation will probably have no practical effect. Nonetheless, the suggested definition of universal service addresses several worthwhile points. First, the revised list of services omits commercial parcel service from the universal service, i.e., parcel services in which the parcels are collected and delivered separately from the letter post. Commercial parcel services are provided in fully competitive markets. Second, in the proposed definition, a box of letters or magazines weighing more than 2 kilograms is considered a ‘parcel post item’ and entitled to universal service. In the current Directive, this issue was unclear. Third, the proposed definition is better aligned with postal practice which will make it easier for postal operators to keep consistent operational statistics.

Unlike the regulatory models in some Member States, the suggested approach does not exclude bulk mail from the ambit of universal service. This difference is largely a matter of semantics, however. As explained below, we do not believe that bulk

³²⁵ Postal Directive, Article 3(5).

³²⁶ The REIMS II agreement appears to use 500 grams as the weight limit for flats. See Commission Decision 1999/695/EC of 15 September 1999, OJ L 275, 26 Oct 1999, p. 17 (REIMS II approval) point 19.

mail (or other mail) should be subject to uniform rate requirements even when provided by a market dominant operator.³²⁷ More generally, we propose that postal operators, even in market dominant circumstances, should have significantly more commercial flexibility in certain areas of pricing and services. Moreover, postal operators are free to provide bulk mail services (other than for bulk letters) outside the operation of the ‘letter post’ and therefore outside of the scope of universal service.³²⁸ For example, a postal operator that provides universal services could create a specialized subsidiary outside the universal service that provides distribution of newspapers or direct mail.³²⁹ In the same way, a service that delivers only parcels is not a ‘parcel post’. Under these circumstances, inclusion of bulk mail in the universal service does not imply the same regulatory restrictions found in current regulatory models.

In our view, the issue of excluding of bulk mail from the universal service comes down to the following question: *if there is an extraordinary social need to ensure universal delivery of correspondence, invoices, and advertisements posted singly, then why should there be a lesser social need to ensure universal delivery of such items when posted in bulk?* There is no apparent reason to adopt a different social policy in respect to bulk mail. To take a specific example, suppose a market dominant postal operator refused to deliver bulk mail to a remote location even though it grudgingly, through a contractor, delivered non-bulk mail. It would seem inconsistent with the objectives inferred for *current* Community postal policy to acquiesce in the absence of bulk mail service to this location.³³⁰ Indeed, exclusion of bulk mail could reduce the number of items covered by the universal service by more than half; such a big change might be considered tantamount to a revision in the objectives of current Community postal policy and thus beyond the scope of our immediate inquiry. Moreover, we believe that in principle the scope of close regulation of market dominant operators should be limited to universal services, but we are not convinced that bulk mail products which are delivered with the normal letter post should be free from close regulatory scrutiny unless they are in fact provided under competitive circumstances. Because there are economies of scale in the delivery of both retail letter post and bulk mail, there remains potential for disruptive abuse of dominant position.³³¹

³²⁷ See section in section 5.5.4(d), page 163, below.

³²⁸ A separate postal service for bulk letter mail would still be considered a ‘letter post’ under the proposed definitions. We would, however, allow a NRA to exempt a postal operator from universal service if, in the judgement of the NRA, the carriage of letters is offered only as a relatively minor, ancillary service in connection with another postal service.

³²⁹ Even though outside the universal service, a specialized direct mail delivery service could still be subject to an assessment for a universal service fund if the NRA concludes that carriage of direct mail by the USP is presently contributing to an internal (within the accounts of the USP) cross-subsidy that supports universal service. See section 5.6.2, page 158, below.

³³⁰ Of course, this may be considered an unlikely scenario from a practical commercial perspective, but the essence of the universal service obligation is to ensure universal service against even commercially irrational lapses.

³³¹ For reasons explained in section 5.5, page 141, below, we conclude that, to achieve the objectives of current Community postal policy, market dominant providers of universal service should be subject to a higher degree of regulatory scrutiny than afforded by the current regulatory model and the other rules of the normal commercial market.

Conclusion. Universal service should be defined as letter post service for items weighing up to 2 kilograms (may be reduced to 500 grams) and parcel post service for items weighing up to 10 kilograms (may be increased to 20 kilograms). Universal service should not include non-letter postal services offered separately from letter post service.

5.4.2 Characteristics of basic universal service

a) Minimum criteria

The new regulatory model must address both competitive and non-competitive markets. Where universal services are provided in competitive markets,³³² it is unnecessary and inappropriate for a regulator to set prices or quality of service standards in the same manner as in markets dominated by a single provider. In a competitive market, the definition of universal service should define the level of service which obliges a Member State to intervene and supply missing services, perhaps at substantial cost. Hence, in the new regulatory model, the Community definition of universal service should specify *minimum* criteria which a *basic universal service* must sustain.³³³ In contrast, in markets where there is no effective competition, the regulator will ensure that a market dominant operator achieves *appropriate* levels of universal service (see section 5.5, below).

Based on our review of the current regulatory model, we propose that the Community definition of universal service in the new regulatory model should provide for a continuous supply of universal service characterized by (1) accessibility; (2) reliability; (3) universal delivery; (4) affordability; (5) privacy of correspondence; (6) security; and (7) freedom from personal discrimination. Each characteristic is explained further below.

Accessibility. As provided in Article 3 of the Directive, every person in the Community should have the ability to tender items to a provider of universal service in a reasonably convenient manner using collection boxes, post offices, postal agencies, and other means of collecting postal items.

Reliability. Universal service should deliver almost all items sent by the fastest standard category of letter post service within a reasonable period of time. Reliability

³³² Competitive letter post services are provided, for example, in the main letter post markets in Sweden where Sweden Post and CityMail compete, or in the intra-city letter post markets in Spain, which have always been open to competition. Parcel post competes with other types of parcel services in most national markets.

³³³ Compare the definition of universal service in the electronic communications framework directive: “‘universal service’ means the minimum set of services, defined in Directive 2002/22/EC (electronic communications, universal service directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price’. Directive 2002/21/2002, Article 2(j).

is the most fundamental requirement of a universal service today.³³⁴ Reliability constitutes a bottom line quality of service standard in the same way that affordability serves as a bottom line tariff standard. A reliability standard offers a more flexible way of expressing the minimum level of quality of service than, for example, a delivery frequency requirement.

The current Directive includes a reliability standard for cross-border mail: 97 per cent of items in the fastest standard category must be delivered by the fifth business day after posting (D+5). For reasons developed in Chapter 2, we propose to adapt this concept as follows:³³⁵

- A reliability standard should be declared for delivery of national and inbound intra-Community letter post items sent by the fastest standard category (e.g., 97 per cent of items must be delivered within D+3, i.e., by the end of the third business day after receipt by the provider of universal service within a given Member State).
- A reliability standard should be declared for delivery to the destination postal operator of outbound intra-Community letter post items sent by the fastest standard category (e.g., 97 per cent of items must be delivered to a provider of universal service in the destination Member State within D+2, i.e., by the end of the second business day after receipt by the provider of universal service in the origin Member State).
- Similar, but separate, reliability standards should be set for parcel post.

To give one possible example, the current intra-Community reliability standard suggests that the reliability standard for the delivery of national and intra-Community letter post might require that 97 per cent of items in the fastest standard category must be delivered within D+3, i.e., by the end of the third business day after receipt

³³⁴ There is little quantitative research on customer preferences for postal services at Community level. In the United Kingdom, study prepared for Postwatch in 2002 revealed that reliability is considered the single most important aspect of postal service by business customers. For all seven mail products included in the survey, reliability was considered more important than any other aspect (price, speed of delivery, delivery time, and security) by almost half of all respondents. See NERA Economic Consulting, 'The Costs to Business from Postal Delays: A Report to Postwatch' (2002) at 22. See generally, Roland Berger Strategy Consultants, 'Monitoring developments in the postal market' (2004); TNS Nipo Consult, 'Betekenis en belang van postdienstverlening.' [Meaning and importance of the postal services] (2004); and this study, section 4.4, page 107, above.

³³⁵ See section 2.3.1(f), above. It may be necessary to adopt different standards of reliability for large and small Member States. Alternatively, the NRA in a large Member State might be authorized to define postal districts that are relatively self-contained in terms of postal exchanges and apply the reliability standards to postal items conveyed within the postal districts as though they were Member States. For example, the new regulatory model might include a provision such as, 'In Member States encompassing more 200,000 square kilometers, the reliability standard may be applied to postal districts determined by the national regulatory authority. A postal district shall encompass a reasonably self-contained operational subdivision of the universal service within a Member State and shall include at least 100,000 square kilometers.' Such provision would permit the establishment of the indicated number of postal districts in the following countries: United Kingdom (2), Italy (3), Poland (3), Finland (3), Germany (3), Sweden (4), Spain (5), and France (5). Greece, the next smallest Member State after the United Kingdom, is about one half the size of the U.K.

by the provider of universal service within a given Member State.

Universal delivery. As provided in Article 3 of the Directive, universal service should be able to deliver to the home or premise of every natural or legal person in the Community or to alternative locations approved by the addressee, such as a post office box.

Affordability Articles 3 and 12 of the Directive require that universal service should be affordable, but the Directive does not define affordability. For reasons explained in Chapter 2,³³⁶ we believe that a guarantee of affordability should apply only to postal items sent by individuals, particularly by individuals with low incomes or special social needs. For example, a guarantee of affordability in this sense might be expressed as follows:

Member States shall, in the light of national conditions, require that, if necessary, providers of universal services offer tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing or using the universal postal service.³³⁷

Privacy. Since privacy of correspondence is recognized as a basic human right in the European Convention on Human Rights,³³⁸ it is appropriate to include an assurance of privacy of correspondence as a specific element in the Community definition of universal service.³³⁹

Security. The provider of universal service should take reasonable and prudent steps to ensure the security of valuable entrusted to it. Overly expensive measures should be avoided, however, because of the availability of other means of conveyance and the requirement that the provider of universal service must in any case offer insurance for items transported.

Freedom from personal discrimination. Article 5 of the current Directive prohibits discrimination based on personal characteristics such as on political, religious, or ideological considerations. We understand this provision to refer to non-economic discrimination. Normal economic discrimination—for example, charging different prices to different users for similar services—is a sign of healthy competition in

³³⁶ See section 2.3.1(e)(i), page 46, above.

³³⁷ This example is adapted from Article 9(2) of Directive 2002/22/EC (electronic communications, universal service directive), OJ L 108, 24 Mar 2002, p. 51

³³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11) Article 8(1) ('Everyone has the right to respect for his private and family life, his home and his correspondence').

³³⁹ Privacy of letter correspondence has an uncertain status in the current Directive. Although the Postal Directive, Article 5, requires Member States to ensure that universal service that complies with 'essential requirements', the definition of essential requirements is left to each Member State.

competitive markets and should not be prohibited.³⁴⁰

In respect to each of these characteristics of universal service, Member States or their NRAs should have authority to adapt Community standards to national circumstances, provided they comply with the specific minimum criteria set at Community level.³⁴¹ They should adopt implementing legislation or regulations which define specifics for each characteristic and exemptions for exceptional circumstances. Because letter post and parcel post services are operationally distinct in many respects, regulatory measures should treat the two services differently. Member States might even be authorized to modify the reliability standards set at Community level with agreement of the Commission. In some cases, it may be possible to harmonize features of universal service through the work of a Postal Regulatory Committee.³⁴²

Conclusion. The basic universal service ensured by Member States, in competitive markets as well as non-competitive markets, should include seven characteristics: (1) accessibility; (2) reliability; (3) universal delivery; (4) affordability; (5) privacy of correspondence; (6) security; and (7) freedom from personal discrimination. NRAs should have substantial authority to adapt these characteristics to national needs. Separate standards should be applied to letter post and parcel post services.

b) Inapplicability of the uniform rate rule

Although a reserved area is not permitted in the new regulatory model, does this necessarily spell the end of the uniform tariff? The near term answer is ‘no’. Even without a reserved area, it is highly likely that national markets will continue to be dominated by incumbent postal operators for the immediate future. Market dominant incumbent operators are, in turn, likely to maintain a uniform tariff for *retail* mail to avoid the cost of administering a multi-tier tariff (bulk mail tariffs are unlikely to remain uniform even under the current regulatory model). While the uniform tariff is likely to persist even if liberalization is introduced under the current regulatory model, it is far more likely to persist under the new regulatory model because the incumbent postal operator will gain a greater degree of commercial flexibility and receive compensation for loss making services. Where the incumbent operator is paid compensation for loss making services, the NRA can require the postal operator to maintain tariffs consistent with those available in other parts of the country.³⁴³

Nonetheless, where genuine competition in universal service arises, there can be no

³⁴⁰ In imperfectly competitive markets, however, dominant operators will still be subject to restrictions on economic discrimination as well. See section 5.5.2, page 144, below.

³⁴¹ Some would argue that since many NRAs have failed to use the substantial discretion granted them under the current Directive, granting additional discretion to NRAs is unlikely to prove workable. We believe, however, that the new regulatory model can address these concerns by defining the powers and duties of NRAs more specifically than under the current Postal Directive. See section 5.7, page 164, below.

³⁴² See section 5.8, page 166, below.

³⁴³ See section 5.6, page 155, below.

assurance that the uniform tariff will be maintained for all postal products without regulatory intervention. Competitors normally compete in terms of price as well as service. A competing postal operator seeking to win over a customer of the incumbent operator must necessarily offer a lower price for the same service or, alternatively, a better service for the same price. Moreover, if the cost of producing postal service varies substantially from area to area, a competitive market will exert pressure on the operator to align prices with costs if the administrative costs of a multi-tier or multi-zone rate scheme are not prohibitive. Nonetheless, most postal experts, we believe, would predict that competing national postal operators will maintain uniform nationwide retail tariffs for letters in the first weight step transmitted by the fastest standard category of service (different operators might have slightly different uniform rates). On the other hand, experts might foresee introduction of distance-based rate zones for retail parcels, although perhaps only in the largest Member States and only for parcels weighing more than a kilogram or two. In short, in a competitive market, different postal operators are likely to charge different rates, and postal operators may introduce non-uniform tariffs for at least some universal services.

Why not use regulation to impose a uniform rate on universal services in a competitive market? While theoretically possible, the remedy would produce more problems than it would solve. A regulation requiring uniform rates could take one of two forms: (1) a rule that *each operator* must offer the same rate for delivery of letters (and/or other items) to any destination within the national territory but is not required to charge the same rate as other operators or (2) a rule that *all operators* must charge an identical rate for delivery of all letters within the national territory.

In the first case, the ‘each operator rule’, suppose, for example, that there are two operators. Each operator can establish any rate that it wants but is obliged to maintain the same rate regardless of destination. Assume Operator A charges € 0.40 for a 20-gram letter, and Operator B € 0.50. How would this market operate? A regulation does not change the underlying costs of production. If the cost of producing postal service varies little in different areas, then postal operators will charge uniform rates voluntarily and the regulation will have no effect (and Operator A will get all of the business if service levels are comparable). If, however, the cost of producing postal services varies substantially, then each operator will serve those areas where it can earn a profit.³⁴⁴ Operator A might serve only Megapolis, a large city where the costs of service are near € 0.40 per letter.³⁴⁵ Operator B could not compete in Megapolis since it has set its rate at € 0.50, but it could serve the rest of the country.³⁴⁶ Competition between operators will be inhibited, and the national postal system will be replaced by a series of operators that specialize in local service

³⁴⁴ The same thing would occur if the law required each coffee shop to charge the same rate for each coffee and croissant; chains of coffee shops would be forced to specialize in cost-specific markets.

³⁴⁵ The example in the text is a simplification for purposes of exposition. More realistically, Operator A is likely to select areas characterized by (1) high volume of mail per delivery stop and (2) many delivery stops per delivery route. These considerations favor urban areas over rural areas but they also favor high income areas over low income areas.

³⁴⁶ To counter the tendency of a uniform rate rule to divide the national postal market into uniform cost service areas, the regulation might further require each postal operator to serve the entire nation. Such a regulation, however, would virtually preclude market entry in a large Member State.

areas defined by approximately uniform costs. Indeed, division of the Community postal system into 25 uniform rate areas has already contributed to such problems at Community level.³⁴⁷

In the second case, the ‘all operators rule’, the NRA might, for example, declare that all postal operators must charge € 0.40 for retail 20-gram letters sent to all destinations in the national territory. This approach may be more workable than the ‘each operators rule’. Postal operators would compete in service quality, and the tendency to divide the country in service areas would be avoided. Nonetheless, users would be deprived of one of the key benefits of a competitive market, the continual search for combinations of price and service that are best suited to their needs.

Another approach would be to require one postal operator to charge uniform national rates. However, to the extent that this operator is forced to charge uniform rates in situations in which non-uniform rates would be more commercially sensible, this rule is fundamentally inequitable and discriminatory. It treats different postal operators differently under similar circumstances. The regulation will also inhibit competition by restraining the competitive capacity of the operator with the uniform tariff.

There are no clear social benefits to offset the obvious costs of imposing a uniform rate rule on a competitive postal market. As suggested in Chapter 2, uniform tariffs are unnecessary to accomplish the objectives of Community postal policy.³⁴⁸ Moreover, the fundamental fairness of a uniform tariff is questionable. If delivery of a letter costs € 0.30 in one set of circumstances and € 0.70 in another, it is no more just to charge the customers for these services that same price than it would be to charge them a different price for the same service.

Conclusion. In the new regulatory model, Member States should not be permitted to impose a uniform rate rule on competitive postal markets.

5.4.3 Non-discrimination between intra-Community and national postal articles

Distinctions between intra-Community and national mail create frontier effects that obstruct development of a fully operational internal market. There appears to be no need for such distinctions.³⁴⁹ Hence, we propose to prohibit such distinctions in the

³⁴⁷ As in the case of intra-Community mail, the pricing of cross-service area letters presents special problems. Some letters collected by Operator A in Megapolis will be destined for the rest of the country and some letters collected by Operator B will be destined for Megapolis. If Operator A gives a letter to Operator B for delivery and Operator B is required by law to charge the uniform rate of € 0.50, Operator A’s cost of service will necessarily exceed € 0.40, the maximum price that it can charge. Operator A will naturally discourage such business. If the law allows Operator B to charge a downstream rate for letters received from Operator A, Operator B must make the downstream rate available to local mailers to avoid price discrimination. In this manner, the uniform rate will be limited to non-bulk mail. The adverse effects of the uniform rate rule will be lessened but not eliminated.

³⁴⁸ See section 2.3.1(e)(iii), page 49, above.

³⁴⁹ See section 2.3.1(e)(iv), page 52, above, for problems presented by different prices for delivery of intra-Community and national mail and section 2.3.1(f), page 56, above, for problems presented by different quality of service standards for intra-Community and national mail..

provision of universal service.

Conclusion. Discrimination between intra-Community and national items in the universal service should be absolutely prohibited.

5.4.4 User and consumer protection

The current Directive includes several procedures designed to protect users of universal services. In Chapter 2, we concluded that these procedures are reasonable and necessary.³⁵⁰ On the other hand, we found that actual implementation in the Member States is sometimes incomplete. Some USPs, for example, fail to publish annual reports on user complaints even though required to do so by the Directive.³⁵¹ We would therefore propose to continue the current substantive obligations on postal operators but shift responsibility for publishing a report on implementation of the user protection provisions from the postal operator to the NRA. Publication by the NRA would ensure that users are regularly and reliably informed about user protection provisions within universal service. NRA publication will be still more necessary if more than one postal operator provides universal services.

We would also expand the content of the report to include not only complaints received by providers of universal service (and the manner in which they have been dealt with) but also complaints handled by the NRA or other government body and any steps taken to correct the cause of the complaints.³⁵² Reports on user protection could also include information on access conditions to universal services as well as quality of service targets and performances. RegTP, the German NRA, for example, regularly publishes such information as part of its annual report.

Conclusion. User protection provisions of the current Directive should be continued, but the NRA, rather than the postal operator, should be required to publish an annual report on implementation.

5.5 Universal services provided under market dominant conditions

Unchecked by competitive alternatives, a postal operator with market dominance may charge more than a reasonable price, provide services of low quality or poorly suited to the needs of society, or engage in unreasonable price discrimination among users or between users in one area and users in another. In a normal commercial

³⁵⁰ See section 2.3.1(g), page 58, above.

³⁵¹ WIK, *Main Developments* (2004) at 43-44 reported that USPs in 15 Member States publish regular reports on the handling of user complaints.

³⁵² A technical committee (TC331) of the European Committee for Standardisation (CEN) has developed a standard on the measurement of complaints and redress procedures related to postal services, EN 14012:2002. WIK, *Quality of Service* (2003), has recommended that this standard be mandatory for USPs. In new regulatory model, EN 14012 might be mandatory for market-dominant operators and voluntary for non-dominant providers of universal service.

market, these are matters for the competition authorities to address, not sector specific NRAs. Why, then, should provision of universal service by market dominant postal operators be subject to specific regulation by NRAs in the new regulatory model?

Our interpretation of *current* Community postal policy is that *ensuring* an accessible, affordable, reliable, and efficient universal postal service implies a more active level of regulatory scrutiny where competition does not exert its restraining and stimulating influence. Where universal services are offered in competitive circumstances, we have concluded that it is neither necessary nor equitable to impose strict regulation on one operator (the public postal operator designated as the USP) while not subjecting other providers of universal service to the same regulatory regime. Where there is no competitive check on the supply of universal service, the situation is different. If ‘ensuring’ universal service in market dominant circumstances meant no more than relying upon the competition rules, then there would be no reason for the Community to establish the regulatory framework set out in the Postal Directive in 1997 or to reaffirm it in 2002.³⁵³ The fact that the Community did not simply rely upon the competition rules in 1997 or in 2002, in our view, rules out the proposition that *current* Community postal policy objectives can be satisfied by mere enforcement of the competition rules.³⁵⁴ Indeed, the current Directive explicitly declares that NRAs may be authorized to enforce the competition rules *in addition to* the sector specific regulation required by the Directive itself.³⁵⁵

5.5.1 Identification of market dominant postal operators

In order to free the competitive products of today’s universal service providers from strict NRA regulation, it is necessary to distinguish between universal service products offered under competitive circumstances and universal service products offered under circumstances of market dominance. In competitive markets, unless the products of all postal operators are regulated in the same light-handed manner, there can be no fully operational market. Nor is there any way to implement a key

³⁵³ Compare Commission Decision 2002/344/EC of 23 October 2001, OJ L 120, 7 May 2002, p. 19 (La Poste mail preparation). In 2001, the Commission condemned France for failing to establish ‘any institutional arrangement ensuring, thanks to a proper separation of duties, that the tasks of economic and financial monitoring, on the one hand, and of supervision of La Poste, on the other, are carried out completely independently one of other.’ Paragraph 29. In this case, the activities to be monitored involved setting volume thresholds and tariffs for presorted mail. More generally, the Commission observed, ‘As regards services open to competition which fall within the scope of universal service, the general principle of cost orientation applies, *but the French rules do not spell out the implications of that principle or the arrangements for checking whether it is complied with.*’ Paragraph 18 (emphasis added). The Commission concluded that France could not, consistent with the Article 82 of EC Treaty (abuse of dominant position), allow La Poste to set requirements for presorted mail without supervision since La Poste would be in a position to favour its own subsidiaries in the mail preparation business to the detriment of competing firms. Paragraph 89. While the precise implications of this decision are unclear, it seems questionable whether, in respect to a public postal operator whose market dominance has been created by the state, a complete absence of sector specific monitoring represents an acceptable alternative to insufficiently independent monitoring.

³⁵⁴ In Chapter 6, we shall consider whether reliance upon the competition rules may be sufficient to accomplish a different set of objectives for Community postal policy.

³⁵⁵ Postal Directive, Article 22.

element of the principle of administrative fairness, equal treatment of all operators; it would be inequitable to public postal operators to regulate them more strictly than their competitors and harmful to users.

In the new regulatory model, we propose that NRAs should draw a distinction between universal service products offered under conditions of effective competition and those offered under conditions of market dominance. In this study, we shall refer to the latter products as market dominant products and the postal operator providing such products as a market dominant operator.

How can the line be drawn between the competitive products and the market dominant products of a public postal operator (or other market dominant operator)? In developing a new regulatory framework for the electronic communications sector, the Community faced a similar issue. The solution was a procedure for identifying operators with *significant market power* (SMP), a forward-looking concept similar to the retrospective determination of market dominance implied by the competition rules.³⁵⁶ There is, however, nothing in the SMP approach which is specific to the electronic communications sector. The legal principles employed to identify operators with SMP are drawn from the competition rules, which apply to the postal sector as well as the electronic communications sector. Use of SMP procedures would *not* imply similarity in the technologies or market structures of two sectors.

Thus, procedures developed to identify SMP in the electronic communications sector offer one procedure—indeed, the most readily applicable procedure—for distinguishing between competitive products and market dominant products in the postal sector. An operator is said to have SMP if it has ‘a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers’. While it would be the job of NRAs to apply the concept of SMP, the Commission would provide two documents to assist NRAs and encourage a harmonized approach:

- *Postal Recommendation*: A list of postal products which create separate possibilities for market dominance. The Recommendation would be based primarily on demand-side and supply-side substitutability. For example (for illustration only): *single-piece letters, bulk letters, direct mail, daily newspapers, weekly and monthly publications, and over-the-counter parcels* (bulk commercial parcels are not considered universal services in the new regulatory model).
- *Postal Guidelines*. A summary of principles of competition law, similar to the current Notice, but more focused on the specific issues presented by the SMP

³⁵⁶ The concept of SMP was introduced into Community in the 2002 directives for regulation of the electronic communications sector. See Directive 2002/21/EC, OJ L 108, 24 Apr 2002 (framework directive), p. 33, Chapter II, Articles 14 to 16. In the electronic communications sector, SMP is further defined by two Commission documents: Commission Recommendation of 11 February 2003, on relevant product and service markets within the electronic communications sector, OJ L114, 8 May 2003, p. 45; and Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Sector, OJ C 165, 11 Jul 2002, p. 6.

analysis.

Whether using the SMP approach or some other method of adapting the principles of the competition rules to the practicalities of postal regulation, NRAs would exercise their powers in consultation with the Commission and each other and in accordance with more specific standards of administrative fairness envisioned in the new regulatory model.³⁵⁷

Conclusion. The Community should adopt a reasoned and harmonized procedure for distinguishing between universal service products offered under conditions of effective competition and those offered under conditions of market dominance. The procedures for identifying significant market power in the electronic communications offer one plausible method for doing so, after making due allowance for differences in technologies and market structures in the two sectors. Once a procedure for identifying market dominance has been agreed, NRAs should, in consultation with the Commission and each other, identify market dominant postal operators and make specific determinations in respect to market dominant products in their respective national territories.

5.5.2 Regulatory guidelines: objective, non-discriminatory, user-oriented

There are two basic approaches that the new regulatory model could adopt to ensure the efficiency of universal service offered by a market dominant postal operator. One approach is for the NRA or legislator to establish *operational service standards*, for example, by specifying the level of access, quality of service, delivery frequency, or price to be met by the postal operator. The current regulatory model employs such operational criteria in certain cases. For example, the Directive specifies a minimum delivery frequency of five days per week and a cross-border quality of service standard, and it requires Member States to establish access and quality of service standards for national universal services. An alternative approach is to rely upon the postal operator to specify the service elements of universal service in accordance with *regulatory guidelines* enforced by the NRA. The current regulatory model also employs, or at least permits, this second approach. For example, the Directive requires that Member States ‘ensure’ that access and prices should be *transparent* and *non-discriminatory* and that prices should be *geared to costs* but does not specify, or require Member States to specify, the actual access rules and tariffs.

To make this distinction clearer, let us take a specific example. The current Directive provides that ‘*Quality of service standards . . . shall be set by the Member States in the case of national services*’.³⁵⁸ In such case, the task of the NRA is to establish quality of service standards that the postal operator must meet. Alternatively, the new regulatory model might provide that, with respect to products offered in market dominant circumstances, ‘the postal operator shall establish standards for quality of

³⁵⁷ See section 5.7, page 164, below. Although the new regulatory model requires a substantial level of regulatory expertise from NRAs, we suggest the new model is less sensitive to variations in the competence of NRAs than the current model. See section 6.2.4, page 178, below.

³⁵⁸ Postal Directive, Article 16.

service and delivery frequency provided that such standards are transparent, meet the reasonable needs of users and addresses, do not discriminate in an unreasonable manner among users or addresses, and are based on objective evidence.’ In this case, the task of the NRA would be to ensure that delivery and quality of service standards proposed or adopted by a market dominant postal operator comply with the regulatory guidelines. Where there is some overlap between these two approaches, the new regulatory model can choose to emphasize one approach or another.

In general, we believe that the principle of necessity and proportionality implies the wisdom of relying upon regulatory guidelines where feasible. In establishing operational criteria for postal products, the Member State legislator or NRA is, in effect, making critical business judgements for the postal operator. Placing key business decisions in the hands of governmental bodies creates a risk of imposing politically popular but unrealistic operational standards that may force the postal operator to operate at a loss or abandon markets. Political controls are also inherently slow to evolve. Public opinion changes more slowly than commercial conditions, and regulators are less immersed in the give and take of business than operators. Although more flexible than operational standards, regulatory guidelines can be a powerful discipline.³⁵⁹

In the new regulatory model, therefore, we propose that market dominant postal operators should be required to establish tariffs and service levels for universal services that are (1) objective, (2) non-discriminatory, (3) reasonably calculated to meet the needs of users, in addition to meeting any other regulatory or legislative criteria (such as relating tariffs to costs). Thus, the market dominant postal operator would be required to demonstrate to the satisfaction of the NRA that distinctions between different types of products (e.g., priority and non-priority, or letter and direct mail) are based on objective differences in cost, demand, or other relevant factors. Similarly, the market dominant operator should be able to show that both minimum quality of service requirements and performance targets are based on objective criteria. In the new regulatory model, as in the current regulatory model, ‘non-discriminatory’ (in an economic sense) implies that the market dominant operator ‘shall offer an identical service to users under comparable conditions’.³⁶⁰ Unless objectively justified, a market dominant operator may not provide more extensive access, lower tariffs, more frequent delivery, better quality of service, or otherwise favor one user over another or one area over another. As a result, every user and every area served by a market dominant operator is protected against poor performance by overall level of performance provided by the operator in the market

³⁵⁹ As discussed in Chapter 2, section 2.3.1(f), page 56, above, the inflexible standards for cross-border mail set in the Directive might also be deemed an illustration of this issue. At the same time, as Chapter 2 also explains, the more sophisticated quality of service criteria for cross-border service developed in the REIMS II agreement may be taken as an illustration of the practical benefits of allowing postal operators to set performance standards subject to strict regulatory oversight.

³⁶⁰ Postal Directive, Article 5. For a more elaborate but essentially similar definition of *non-discriminatory* consider Article 10(2) of the electronic communications access directive, Directive 2002/19/EC, ‘Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.’

as whole.³⁶¹

Even where the primary task of the NRA is to enforce regulatory guidelines, the NRA cannot rely solely on proposals from the postal operator. If a market dominant postal operator is unable to satisfy the guidelines—for example, if the operator is unable to propose a price that is objectively justified by costs—then the NRA must have reserve authority to impose the prices justified by objective evidence. Similarly, if a price that was once cost-based becomes out of line with the costs, the NRA must have the authority to require adjustment even in the absence of a proposal from the postal operator.

The timing of regulatory review is also an important issue. Should the postal operator be required to submit to the NRA proposed changes in prices or services before they are put into effect or should the NRA wait for a complaint after they have been put in effect? Perhaps the NRA should establish guidelines, such as price caps, which provide the postal operator with discretion to make limited changes without first seeking approval from the NRA? The current Directive allows the Member State to decide the best method of review or to delegate this authority to the NRA. In our view, there is no clear reason to do otherwise in the new regulatory model.

Conclusion. In general, NRAs and Member States should refrain from using regulations or legislation to specify operational criteria for universal service, such as the access levels, quality of service, delivery frequency, and tariffs that must be achieved by a market dominant postal operator. Instead, NRAs should normally ensure that market dominant postal operators establish tariffs and service levels for universal services that are objective, non-discriminatory, and reasonably calculated to meet the needs of users, in addition to meeting any other regulatory or legislative criteria set by the Member State or NRA. Nonetheless, where the postal operator is unwilling to meet regulatory guidelines, the NRA must have reserve authority to determine the final solution. The appropriate method of review (ex ante, ex post, price cap, or other method) should be determined by the Member State or NRA.

³⁶¹ One economic model prominent in the academic literature predicts that, in the absence of a uniform rate rule and faced with competition, the public postal operator might replace a uniform tariff with basic postage tariffs that vary by 6 to 1 from most favoured to the least favoured users, i.e., postage rates of € 1.20 for rural to rural household mail versus € 0.20 for urban to urban business mail, a *price difference* of € 1.00. In the model, however, the *cost difference* between the two mail streams is only € 0.20. The model assumes that the public postal operator will retain a dominant position in the rural to rural household market and extract large monopoly rents from the 1 per cent of total mail sent between rural households while offering a reasonable, cost-based tariff in the urban market where it faces competition. P. De Donder et al, ‘Uniform Pricing and Postal Market Liberalization’ (2001) (tables 1 and 6); see also, P. De Donder et al, ‘Funding the Universal Service Obligation under Liberalisation’ (2002). The authors are economists associated with the public postal operators of France and the United Kingdom. Although introduction of an especially abusive retail tariff for 1 per cent of the mail seems unlikely to us because of high transactions costs, to prevent such abuses, the new regulatory model proposes to require market dominant postal operators to maintain cost-based, non-discriminatory tariffs.

5.5.3 Quality of service monitoring

In national postal markets, NRAs generally arrange for monitoring of the quality of service achieved by the USP in conveying letter post items in the fastest standard category. Monitoring of second class and parcel service is less common, however.³⁶² Yet independent monitoring of quality of service has been one of the most positive regulatory innovations introduced in the current Directive.³⁶³ We suggest, therefore, that the new regulatory model should continue a requirement for quality of service monitoring for universal service products provided in market dominant circumstances. We believe that quality of service monitoring should focus explicitly on the services most important to the individual mailer:³⁶⁴ single-piece letter post items and parcel post items³⁶⁵ sent by the fastest standard category and the slower, more economical alternatives, if any. In addition, we believe that quality of service reports would be more useful if published more often than annually. Poor quality of service figures can help identify problem areas before they become too serious.

In intra-Community market, the current regulatory model requires quality of service monitoring for each bilateral cross-border mail exchange in each direction. In a Community of 25 Member States, this implies measurement of the quality of service achieved in 1,200 one-way mail flows.³⁶⁶ On the surface, this appears to be an expensive exercise to ensure the quality of 4 per cent of the Community mail market. Since we propose to rely more on national quality of service standards for intra-Community letter post items, it may be possible to better integrate the monitoring of national and cross-border service quality.

Conclusion. The new regulatory model should explicitly require independent monitoring of the quality of service of national first class and second class (if any) services for single-piece letter post and parcel post services provided in market dominant circumstances. More frequent than annual reports and closer integration of cross-border and national quality of service monitoring should be considered.

5.5.4 Pricing and accounting issues

In the new regulatory model, we propose to retain the requirement that, for market dominant products, the prices of universal services should be based on costs because

³⁶² WIK, *Main Developments* (2004) 40.

³⁶³ WIK, *Quality of Service* (2003).

³⁶⁴ It is less clear whether the regulatory model should require NRAs to monitor the quality of bulk mail products sold to large sophisticated buyers. Presumably, postal operators will be motivated to provide a cost-effective level of quality of service monitoring.

³⁶⁵ With respect to parcels, however, it is increasingly common to use track and trace systems even for 'over-the-counter' parcels, so a separate procedure for quality of service monitoring by an independent institution may be unnecessary. WIK, *Quality of Service* (2003) 193-194.

³⁶⁶ That is, each of the 25 Member States exchanges mail with 24 Member States resulting in 600 bilateral exchanges of mail. Moreover, there may be more than one mail stream from country A to B if the dispatching operator in country A contracts with several (competitive) operators for delivery in country B. Under the current model, this would lead a substantial increase of mandatory monitoring.

this concept is intrinsic to the concept of universal service embraced by the Postal Directive. Goals such as efficiency, non-discrimination (i.e., avoiding price differences not justified by cost differences), cost-justified discounts, prohibition of cross-subsidy, and user protection are all grounded in the principle that tariffs should be geared to costs.

Relating prices to costs implies, in turn, continuation of regulatory controls on the accounts of market dominant postal operators. In the new regulatory model, however, accounting controls must be adjusted to the absence of a reserved area. In the absence of a reserved area, it appears sufficient to require that a market dominant postal operator establish separate accounts (1) for each market dominant universal service product and (2) for all other postal services collectively. At the same time, as described below, we propose several changes in accounting practices that are implied by sound regulatory principles and our review of the current regulatory model.³⁶⁷

a) Methodology of cost allocation

At the heart of price regulation there must be a system of accounts used to categorize input costs (e.g., salaries, rent, equipment, vehicles, contract transportation, capital goods, etc.) and assign or allocate them to each market dominant product and to other postal services in accordance with a set of accounting principles such as those established in Article 14 of the current Directive. A valid system of accounts is critical to ensuring that prices of market dominant universal service products are based on costs and to preventing cross subsidization of competitive products from revenue earned in non-competitive universal service markets.³⁶⁸ In the current regulatory model, the system of accounts is not transparent and may escape specific approval by the NRA. In the new regulatory model, the NRA should be required to give specific approval to the system of accounts and the approved system of accounts should be published.

In addition, the NRA should publish an annual summary of regulatory accounts of the market dominant operator. The level of detail should strike a balance between competing considerations. On the one hand, postal operators have a legitimate need to protect commercially sensitive information and a reasonable desire to limit administrative costs. On the other hand, users and the general public should have

³⁶⁷ Postal Directive, Article 14(8), provides the NRA may exempt the USP from the accounting requirements of Article 14 if there is no reserved area and the USP does not benefit from a compensation fund or other government subsidy. In such case, however, the USP is still obliged by Article 12 to maintain tariffs that are based on costs, non-discriminatory, and free of cross-subsidy. We do not understand how a NRA can enforce Article 12 without the accounts required by Article 14. In our view, pricing rules and accounting rules must be related. In the new regulatory model, both pricing rule and accounting rules apply to market dominant products and neither apply to competitive products. In addition, in section 6.3.5, page 186, below, we consider possible elimination of sector specific pricing and accounting controls for market dominant products.

³⁶⁸ While regulation of the accounts of universal service products is justified in order to protect users of universal service, there appears to be less justification for regulation of non-universal service products, even for products over which the postal operator may exercise market dominance. In non-universal service markets, the principle of necessity and proportionality appears to argue in favor of reliance of the normal competition rules to prevent excessive or predatory prices.

sufficient information to be able to evaluate the effectiveness of regulation and the basic issues of postal policy. At a minimum, it would seem reasonable to provide the total revenue, total volume, and total cost associated with each major market dominant universal service product and with minor products on a collective basis. Indeed, in order to understand better the results of regulatory supervision, total costs could be divided into the directly assigned, indirectly assigned, and allocated common costs associated with each major input factor (e.g., labour, equipment, purchased transportation, etc.).

Conclusion. The NRA should be responsible for approving the system of accounts used to assign and allocate input costs in accordance with accounting principles set at Community level. The system of accounts and a summary of regulatory accounts should be published annually by the NRA.

b) **Allocation of unassigned common costs**

As described in Chapter 2, there is no objectively valid procedure for allocating unassignable common costs among jointly produced products.³⁶⁹ Nonetheless, the current regulatory model rigidly requires that unassigned common costs must be allocated to regulated products in the same proportion as directly and indirectly assigned costs. In the new regulatory model, we would propose to give the postal operator and NRA greater flexibility in respect to the allocation of costs to products with respect to which a postal operator exercises market dominance. The current method of proportional allocation could be retained as the starting point, while the NRA could be authorized to permit departures from proportional allocation based on objective evidence that a different allocation will advance agreed social objectives.³⁷⁰

The following paragraph illustrates how the new regulatory model might introduce some flexibility into the allocation of unassigned common costs. In this paragraph, the term ‘designated product’ has been used to refer to a product in respect to which a postal operator exercises market dominance:

The national regulatory authority may approve modifications to the allocation of common costs provided in paragraph X based on a careful consideration the following criteria:

(a) a fair and reasonable allocation of unassigned common costs between designated products, on the one hand, and other postal products, on the other, to protect users of designated products from unreasonably high prices and to prevent unfair competition against providers of non-designated products;

³⁶⁹ See section 2.3.1(e)(ii), page 48, above.

³⁷⁰ Since the current system of proportional allocation of unassigned common costs is the default rule, we do not believe that granting the NRA additional flexibility in this regard should create unmanageable transitional problems. Since any deviation from the current allocation system must be approved by the NRA, the NRA can at that time take into account transitional issues, if any.

- (b) the public interest in promoting the exchange of cultural mail;
- (c) the need to maintain the affordability of tariffs for the socially, medically, and economically disadvantaged;
- (d) the effect of different allocation methods on the total output of postal services and overall consumer welfare; and
- (e) such other factors as the national regulatory authority deems relevant.

In this paragraph, the factors which are proposed to justify deviation from a strictly proportional allocation of unassigned common costs are similar to those which the Commission has cited to justify cross-subsidy. We suggest, however, that a reasoned but disproportionate allocation of unassigned common costs achieves a broadly similar end by a means more consistent with economic principles.³⁷¹

Conclusion. While retaining the current rule providing that unassigned common costs should be allocated among products with respect to which a postal operator has market dominance in a manner proportional to assigned costs, the new regulatory model should also permit the NRA to approve deviations from proportional allocation to further socially desirable purposes.

c) Transparency of tariffs

The current Directive requires transparency for *all* tariffs for universal service products including the prices of individual contracts. In practice, however, this requirement has not been followed. Moreover, it seems unnecessarily intrusive into the details of the business of the USP. In the new regulatory model, we propose that a provider of universal service with market dominance should publish the prices and terms of all standard publicly available tariffs, including bulk mail tariffs. In addition, the postal operator should publish a summary of other tariffs in a format approved by the NRA. For this purpose, a plausible model is provided by a New Zealand regulation, adopted after experience with the pricing strategy of a market dominant New Zealand Post in a competitive environment. This regulation requires New Zealand Post to disclose summaries of discounts provided for standard products and the prices and terms of non-standard products; it does not require disclosure of the identity of mailers or the amount of mail involved.³⁷² Such information will notify users of the range of tariffs provided to other users. In the addition, the market dominant operator still be obliged to refrain from price discrimination among users

³⁷¹ Notice from the Commission on the Application of the Competition Rules to the Postal Sector, OJ C39, 6 Feb 1998, p. 2, at section 3.4. In order to provide flexibility in the allocation of unassigned common costs, it is necessary to grant the NRA a significant level of discretion. Nonetheless, it should be noted that the NRA's decisions must be supported by objective evidence and must be taken after consideration of the views of affected parties. If the NRA fails to follow these procedures or fails to conform to the guidelines set out in the proposed paragraph, its decision would be subject to reversal on appeal to higher authority. See generally the provisions described in section 5.7, page 164, below.

³⁷² New Zealand, Postal Services (Information Disclosure) Regulations 1998 (SR 1998/87).

and hence subject to oversight by the NRA in particular cases.

Conclusion. The prices and terms of standard, public tariffs should be fully transparent. Instead of requiring full transparency for all discount and individual non-standard tariffs, a market dominant provider of universal service should be required to publish periodic summaries of such tariffs in a form approved by the NRA.

d) **Uniform tariffs**

For reasons explained in Chapter 2, we believe that it is unnecessary and distortive for Member States to require uniformity in postal tariffs in excess of the substantial degree of uniformity in retail rates that will be provided naturally by a market dominant postal operator, especially if the postal operator is permitted greater flexibility in defining service standards.³⁷³ On the other hand, the new regulatory model should explicitly permit (as the current regulatory model does not) the market dominant operator to maintain uniform or zoned tariffs where cost-effective.

Conclusion. The market dominant operator should be authorized to maintain uniform or zoned tariffs where cost-effective, but Member States should not impose uniform tariffs.

e) **Special tariffs**

According to the current Directive, if a USP provides a ‘downstream’ product³⁷⁴ to some users, it must offer the same product to all users, including other postal operators and companies that consolidate the postal items of small mailers, on a transparent and non-discriminatory basis. This rule is a particular application of the general rule that the pricing of universal service products should be non-discriminatory. The current Directive further requires that a ‘special tariff’ for downstream products must ‘take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items’.³⁷⁵

As explained in Chapter 2, we do not believe that it is necessary or desirable to require all NRAs to regulate special tariffs based on a too rigid interpretation of this ‘cost avoided’ standard.³⁷⁶ Pricing of downstream products involves difficult judgements about how best to promote development of a fully operational market in

³⁷³ See section 2.3.1(e)(iii), page 49, above. See also the discussion of the impracticality of uniform tariffs in *competitive* postal markets in section 5.4.2(b), page 138, above.

³⁷⁴ A ‘downstream’ product is a postal service for users who collect, sort, and/or transport postal items before tendering to the postal operator. For example, a large mailer might sort the mail into the sequence in which it will be delivered by the postal operator and transport it to the distribution hub nearest the addressees. In general, downstream products are sold at a discount compared to normal postal services and are suitable only for bulk mailers.

³⁷⁵ Postal Directive, Article 12 (as amended by Directive 2002/39/EC).

³⁷⁶ See section 2.3.1(e)(v), page 54, above.

postal services. Reasonable persons can and do disagree. Therefore, the new regulatory model does not prescribe a specific standard for the pricing of downstream products.

Conclusion. Special tariffs for downstream market dominant universal service products offered by market dominant operators should be subject to the same standards as other tariffs: cost-based, objective, and non-discriminatory. The NRA should have discretion how to interpret these standards.

f) Relating tariffs to quality of service

The Commission believes—and the evidence appears to confirm—that rebates linked to quality of service have promoted improvements in the intra-Community postal market.³⁷⁷ Some USPs have introduced such rebates in national postal markets as well.³⁷⁸ The new regulatory model should therefore require that tariffs for market dominant products include reasonable rebates if the service provided falls below published quality of service standards. At the same time, the NRA should have ample authority to determine what is ‘reasonable’ in light of local circumstances.

Conclusion. Tariffs for the market dominant universal service products of market dominant operators should provide all users reasonable rebates for service failures.

5.5.5 Downstream access and interconnection

The current Postal Directive does not require Member States to ensure that dominant providers of universal service offer downstream access to large customers and postal operators on demand. As noted in Chapter 3, however, some Member States have instructed NRAs to require downstream access to the network of the USP under certain circumstances even if the postal operator is unwilling to give access voluntarily.³⁷⁹ Should the new regulatory model provide that users and postal operators have a right to downstream access to the network of a market dominant postal operator on terms set by the NRA if necessary?

We believe that NRAs must be empowered to require downstream access, and specifically to require interconnection between postal operators, in the limited case in which the absence of interconnection threatens to deprive users of universal service. To illustrate this situation, imagine Postal Operator A has a market dominant position in City A and Postal Operator B has a market dominant position in City B. If Postal Operator A refuses to interconnect with Postal Operator B, citizens in both

³⁷⁷ Commission Decision 2004/139/EC of 23 October 2003, OJ L 56, 24 Feb 2004, p. 76 (REIMS II renotification) at paragraphs 111-17.

³⁷⁸ For example, La Poste (France) offers products for bulk correspondence and bulk direct mail that relates tariffs to quality. Using these products, called ‘Tem’post’, postage is reimbursed (partly or fully) if La Poste fails to meet the routing time targets agreed in the standard contracts. See <http://www.laposte.fr/tempost/>.

³⁷⁹ See Chapter 3, section 3.2.2(b), page 106, above.

cities will be denied universal service. Although it seems unlikely that Postal Operator A and Postal Operator B will be unable to find a mutually agreeable basis for interconnection, if they cannot do so, the NRA must be able to order interconnection. In the current Community market, this principle implies, for example, that NRAs must be able to require interconnection to ensure cross-border universal services since few public postal operators provide intra-Community services themselves.

Whether or not a NRA should be authorized to require downstream access and interconnection in other cases is less clear. A recent study by Tilburg University (Netherlands) summarizes the pros and cons of ‘access regulation’ as follows:

Access regulation—in the form of putting a company under obligation to provide access to certain network components determined by the regulator for a fee also determined by the regulator—can in the short term be good for service competition, but also has a price. The scales are always balancing between supporting actual or potential competition in the short term and the adverse effects on the natural market mechanisms over the long term. In the short term, these negative effects could include loss of economies of scale and scope and the opportunity costs on the part of the party allowing access, and on the other side, inefficient entry as the result of regulation. Forcing network access stimulates entry, but the type of entry that is encouraged by regulation is not by definition socially desirable. Perhaps more importantly, regulation makes a trade-off between facilitating access, which is good for competition in the short term, and stimulating entrants to be innovative. The second option naturally requires more time but does result in a sustainable form of competition. The consumers profit from innovations and a standard rate will have more support.³⁸⁰

In light of its analysis, the Tilburg study expresses skepticism over the wisdom of access regulation: ‘Advancing liberalisation by forcing the incumbent to provide access to its network, as is being done in Germany, does not appear to deliver better results than opening the market wider, without giving entrants additional rights, the approach Sweden has taken.’³⁸¹

Others, however, have expressed a more sympathetic view of access regulation. For example, a paper by a senior staff member of Postcomm, the U.K. NRA, offers the following observations:

The regulatory response to economies of scale acting as a barrier to entry is not to remove the economies of scale. This might cause unit costs and prices to rise to the detriment of customers and the market. Rather than ‘throw the baby out with the bathwater’, a more reasoned regulatory

³⁸⁰ P. de Bijl, E. van Damme, and P. Larouche, ‘Towards a liberalised postal market’ (Tilburg Law and Economics Center, Aug 2003) at 67 (citations omitted). This study was commissioned by TNT.

³⁸¹ *Ibid* ix. See also N. van der Lijn and A. Meijer, ‘Is Mandatory Access in the Postal Sector the Key to Success?’ (2003).

response to promote effective competition would be to ‘share’ the incumbent’s benefits with other operators. This can be achieved by allowing operators to have access to the incumbent’s network and facilities. . . .

Access enables operators to compete ‘upstream’ of the access point for consolidation activities. It also enables those operators wishing to develop end-to-end operations to build up the necessary customer relationships and scale to make such investments worthwhile. Given the evidence discussed above about the market shares likely to be required by new entrants to compete in delivery activities, access arrangements are likely to be particularly important for promoting competition in less densely populated areas and for delivery frequencies similar to that provided for the universal service.³⁸²

Both analyses, however, share the conclusion that access regulation (in excess that needed merely to ensure universal service) requires regulatory decisions that strike a balance among competing considerations: competition in the upstream market versus competition in the end-to-end market, competition in the short run versus competition in the long run, entry by similar services versus more innovative entry. In general, the principle of necessity and proportionality would suggest caution in the introduction of possibly unnecessary regulation. On the other hand, consistent with the principle of competency, it seems to us that the costs and benefits of access regulation in a particular situation is not best determined at Community level.

In our view, the new regulatory model should leave the issue of access regulation to NRAs with appropriate guidelines.³⁸³ A possible formulation of this conclusion could be as follows, where ‘designated product’ and ‘designated operator’ refer to a product with respect to which a postal operator exercises market dominance and the a market dominant postal operator, respectively:

Where, in respect to provision of a designated product, access to the network of a designated operator is requested by a user or other postal operator but denied by a designated operator and the national regulatory authority considers such access unnecessary to ensure the availability of universal service, the national regulatory authority shall require access to the network of the designated operator only if and to the extent it considers such access to be necessary and proportionate to accomplishment of the objectives of Community postal policy.

To accommodate Member States who have concluded that the NRA should actively promote competition, it would also be possible to amend the statement of policy

³⁸² R. Moriarity and P. Smith, ‘Barriers to Entry in Post and Regulatory Responses’ (2005) at 113-14.

³⁸³ Although we suggest deference to Member State NRAs, some observers believe that different rules on downstream access in different Member States are inherently unfair. It may be noted that Article 11 of the Postal Directive appears to contemplate the possibility of an access directive for postal services. As an alternative to granting NRAs broad discretion, it would be possible to authorize the proposed Postal Regulatory Committee to harmonize downstream access requirements. See section 5.8, page 166, below.

objectives proposed earlier.³⁸⁴

A special case of downstream access is presented by post office boxes, i.e., boxes located in the office of a public postal operator from which addressees collect their mail. Even if where a NRA denies downstream access because of the potential for end-to-end competition, it might reasonably require access to post office boxes operated by a market dominant operator. To do otherwise would be to inconvenience the addressee by forcing him or her to notify potential correspondents of two different post offices boxes and to collect the mail regularly from two locations. Here, too, however, the NRA will need to exercise judgement based on specific circumstances. For example, the feasibility of a particular solution may depend upon the physical facilities in question. In the absence of an obvious Community-wide solution, the best approach would seem to be to require the NRA to adopt a policy towards access to post office boxes that takes into account the rights of affected parties.

Conclusion. The NRA should ensure that a market dominant postal operator provides access to its network where necessary to protect universal service. In other cases, the NRA should require access only to the extent that it considers access consistent necessary and proportionate to accomplish the objectives of Community postal policy. In the case of post office boxes, the NRA must also take into account the rights of users in particular.

5.6 Supplemental universal services

The guarantee of universal service means that if universal service is not voluntarily supplied by competing postal operators or by a regulated market dominant operator, then it must be supplied by government. In the new regulatory model, government should arrange for *supplemental universal services* as needed to complement services provided by the market. It should do so in a manner designed to ensure universal service with the least possible disruption to the normal commercial market (principle of necessity and proportionality).

At the outset, it should be stressed there is no evidence that an obligation to provide *supplemental universal services* will pose a significant burden for Member States. Under the new regulatory model, postal operators will be able to adjust prices and services. That is, within broad limits set at Community level, Member States and NRAs will determine the minimum acceptable levels for price (i.e., affordability) and service (i.e, reliability) that must be provided by the universal service. It is only when the competitive market fails to provide this minimum level of service, or a market dominant postal operator proposes to reduce service, that the NRA is obligated to step in and arrange for supplementary service. Depending on how Member States implement the definition of universal service, it appears possible that some Member States will never be called upon to underwrite supplemental universal

³⁸⁴ Promotion of competition as an element of Community postal policy is discussed in Chapter 6, section 6.3.3, page 183, below.

services because the leading postal operator will likely find that its universal service is a competitive advantage that it would be commercially foolish to abandon.

Nonetheless, the possibility that universal service will be provided voluntarily by the market is insufficient to *ensure* continuation of affordable, reliable, and efficient universal postal service. In this section, we suggest how the new regulatory model can, consistent with sound regulatory principles, supply and fund the supplemental universal services necessary to ensure universal service for all.

5.6.1 Measures to ensure universal service

To accomplish the objectives of Community postal policy, the new regulatory model must provide procedures that will simply, surely, and practically guarantee maintenance of universal service. To this end, we would propose a three-step procedure.

The first step in protecting universal service is ensuring the NRA knows in advance when and where there is a credible risk that universal service will be not provided. It will be important, therefore, that the NRA announces the operational standards for basic universal service in clear, unambiguous terms. In the new regulatory model, the minimum requirements of basic universal service will be outlined at Community level and must be specified explicitly in measures adopted by the Member State or NRA.³⁸⁵ The new regulatory model does not limit the discretion of the Member State or NRA to set the universal service level at a higher level than required at Community level. As a practical matter, however, a Member State cannot set the definition of universal service at such a high level that a reserved area is required to implement it or a politically infeasible funding mechanism is needed to support it.

Once the standards of universal service are adopted, the NRA will have ample authority to require both competitive and market dominant postal operators to give advance notice of operational changes that might adversely affect universal service. The NRA itself will monitor the performance of a market dominant operator providing universal service. In addition, users will have a strong incentive to bring lapses in the universal service to the attention of the NRA. Moreover, the authority of NRAs to obtain information from postal operators will be strengthened.³⁸⁶ In combination, these measures should give the NRA a clear picture (as least as clear as under the current regulatory model) of situations in which universal service is falling or may fall below established standards.

The second step in protecting universal service is to authorize the NRA to purchase necessary supplemental services from postal operators. In this manner, the NRA can arrange for additional access points, faster routing times, or more deliveries per week. As a contractor, the NRA can specify the precise level of service to be supplied; for example, the location of collection boxes or specific quality of service

³⁸⁵ The criteria of basic universal service are explained in section 5.4.2(a), page 135, above.

³⁸⁶ See section 5.7, page 164, below.

targets to be met. Contractual authority offers the NRA substantially more control than normal regulatory oversight.³⁸⁷

The final step in protecting universal service is to give the NRA emergency authority to order any provider of universal service to provide such supplemental services as the NRA may deem necessary. There can be no doubt that in each Member State universal service will be provided in most areas by the normal commercial market, so the NRA will have access to a supply of postal operators capable of providing additional universal service if necessary.³⁸⁸ If the NRA lacks sufficient notice to provide for supplemental services by contract, or if contractual arrangements prove impossible to negotiate, universal service will be absolutely guaranteed if the NRA is empowered to order postal operators to provide the necessary service. Under such circumstances, the postal operator should have the right to compensation for additional costs incurred by virtue of such an order.³⁸⁹

The same procedure can be used to obtain additional public services from providers of universal service, such as free services for blind and partially sighted persons. Member States should therefore be authorized to confer such powers on the NRA.

The NRA should administer the authority to contract for or compel supplemental universal services in an objective, transparent, and non-discriminatory manner. To prevent distortion of competition by paying a postal operator more than the cost of services rendered, the NRA must be the ultimate judge of the appropriate level of compensation.³⁹⁰ In addition, the NRA should periodically publish a public report on the cost of universal service provided through the use of supplemental services.

³⁸⁷ In Norway, the government pays Norway Post for certain universal services (primarily extra delivery frequencies) that both parties agree Norway Post would not provide voluntarily. While not a formal contract, this procedure is similar. See page 42, above. In the United States, the Postal Service has always contracted with individual private postal operators, called 'star route carriers', to provide universal services in the most rural areas. The new regulatory model could accommodate both the global contracting approach of Norway and the piecemeal contracting approach of the United States.

³⁸⁸ If there comes a time when letter post and parcel post services are not generally demanded by society, then it will be necessary to reconsider the proposition that such services are so vital to society that their universal supply must be assured by government.

³⁸⁹ German Post Law, Articles 12 to 14, provides a similar procedure for assuring universal service. The German NRA, RegTP, is authorized to contract for supplementary universal services if not provided voluntarily by postal operators and, if necessary, to order postal operators in adjacent areas to provide such services. Article 13 declares, in part, 'Where a universal service is not being appropriately or adequately provided or where there is reason to believe that such will be the case, the Regulatory Authority shall publish in its Official Gazette a statement to this effect. . . Upon expiration of [one month] the Regulatory Authority may oblige one of the companies [providing substantial universal service] to provide the relevant universal service. Such obligation may only be imposed on a licensee providing postal services subject to licence in the geographically relevant market or in a geographically adjacent market and having a dominant position in that market'. These articles of the German Post Law will become effective in 2008 when a transitional provision imposing a universal service obligation on Deutsche Post expires.

³⁹⁰ The postal operator should have a right of appeal to an impartial body if it considers that the NRA has incorrectly calculated the compensation. See section 5.7, page 176, below.

Conclusion. The Member State or NRA should clearly define the standards of basic universal service, and the NRA should be authorized to contract for, or if necessary compel, provision of such supplemental services as may be necessary to ensure universal service. A postal operator should have right to compensation in case it is compelled to provide universal services.

5.6.2 Funding universal service

a) Current model: internal geographic cross-subsidy

Professor John Panzar, a leading regulatory economist, has famously defined the total cost of universal service as follows:

By definition, a Universal Service Obligation mandates a flow of subsidy toward one group of users or another. In order to measure the cost of implementing any such plan *it is necessary to have in mind an alternative market outcome* that would be expected to occur in the absence of any subsidy scheme. Any rate plan involving a directed subsidy has this property.³⁹¹

In order to understand the funding of universal service under the current regulatory model, we must therefore ask which users are paying more or less than they would under an ‘an alternative market outcome’? For purposes of this discussion, we shall assume the alternative market outcome to be a single USP operating in its own financial self-interest under the rules of a normal commercial market. Under the current model, the USP is obliged to provide universal services throughout the national territory. The USP may also be required to maintain a uniform tariff for at least some universal services. Because the cost of universal service varies from area to area, it is possible that in some cases the uniform tariff fails to cover the cost of service. If we assume that a rational USP would abandon at least some services priced below cost, it follows that the funds needed to maintain such loss-making services represent a *cross-subsidy* that other users are paying. But what services precisely would be abandoned, who is paying for them, and how much is the cross-subsidy?

The first point to note is that the current regulatory model does not provide answers to any of these questions. It is impossible to determine what services the USP would abandon or what tariffs it would raise or lower if it had the freedom to do so. If, in the absence of regulatory obligations, the USP would in fact maintain essentially the same services and prices, then the burden of the ‘universal service obligation’ would be zero. If, on the other hand, the USP would reduce services or (what is equivalent) raise prices in a large portion of the country, then the burden of universal service might be substantial. The absence of commercial flexibility and competitive alternatives obscures the cost of universal service to such a degree that there is great uncertainty about how much money society is actually spending to ensure universal

³⁹¹ J. Panzar, ‘Funding Universal Service Obligations: The Costs of Liberalization’ (2001) at 102 (emphasis added).

service.³⁹² This obscurity, in turn, makes it impossible for policy makers to make informed decisions about the allocation of public resources.

Even though we do not know the cost of universal service under the current regulatory model, we can describe the concept of cross-subsidy in principle. The USP provides universal service by overcharging some users for the conveyance of letter post items and undercharging others. If the USP maintains a uniform tariff, then the users who are overcharged are those who send letter post items to areas that are relatively inexpensive to serve, for example, urban areas (or other low cost areas).³⁹³ The users who are undercharged are those who send letter post items to rural areas (or other high cost areas). In short, mailers of urban letters are ‘cross-subsidizing’ mailers of rural letters. The reserved area protects the cross-subsidy mechanism by preventing other postal operators from providing more cost-based services in the urban areas and thus ‘cream skimming’ the business from the USP, who is overcharging for these services (by regulatory design).³⁹⁴ For an individual letter post item, the uniform tariff and the underlying cost structure determine the level of cross-subsidy.

For bulk mail, the situation is murkier. As described in Chapter 2, it appears that the uniform tariff is less and less applicable to bulk mail, which is to say one half or more of the letter post.³⁹⁵ If a specific user tenders bulk mail destined for a distribution of urban and rural addresses that approximates the national profile and pays an average price per item that corresponds to the uniform tariff, then that user neither gives nor receives a cross-subsidy. The same conclusion would result if the bulk mailer collects and sorts his mail and transports it to a ‘downstream’ mail processing facility if the total price correctly reflects the cost of the downstream services rendered.³⁹⁶ Likewise, if the bulk mailer receives a higher or lower total

³⁹² For examples of scholarly attempts to calculate the cost of universal service, see, e.g., I. Dobbs and J. Golay, ‘Universal Service Obligation and Reserved Sector’ (1995); W. Elsenbast, F. Pieper and U. Stumpf, ‘Estimating the universal service burden of public postal operators’ (1995); Kowalewski and Mueller, ‘The Cost of Universal Service Obligation: The German Perspective’ (1995); F. Rodriguez, S. Smith and D. Storer, ‘Estimating the Cost of the Universal Service Obligation in Postal Service’ (1999); H. Cremer, M. De Rycke, and A. Grimaud, ‘Cost and Benefits of Universal Service Obligations in the Postal Sector’ (1997); H. Cremer, A. Grimaud, and J.-J. Laffont, ‘The Cost of Universal Service in the Postal Sector’ (1999); M.D. Bradley and J. Colvin, ‘Measuring the Cost of Universal Service for Posts’ (2000); and R. Cohen et al, ‘The Cost of Universal Service in the U.S. and Its Impact on Competition’ (2003).

³⁹³ We shall use the terms ‘urban’ and ‘rural’ to simplify the exposition. Although urban routes are generally more profitable than rural routes, it should be kept in mind that profitability in fact depends on several other factors as well, most importantly the number of pieces of mail per delivery stop. See S. Bernard et al, ‘Delivery Cost Heterogeneity and Vulnerability to Entry’ (2002).

³⁹⁴ In reality, experience in the last decade strongly suggests that it is difficult for a new entrant to gain the economies of scale necessary to pose a significant competitive threat to an incumbent postal operator even for urban mail. See section 2.3.2(a), page 59, above. In this discussion, our concern is to describe in principle the cross-subsidy mechanism presumed to exist in the current regulatory model not to evaluate its susceptibility to competition.

³⁹⁵ See section 2.3.1(e)(ii), page 63, above.

³⁹⁶ That is, if the downstream price per item corresponds to the uniform tariff less the savings to the postal operator by virtue of the downstream entry. Of course, there is disagreement about how to calculate the ‘correct’ level of downstream tariffs, but for purposes of this discussion we assume it can

price based on the geographic distribution of his mail, he is not participating in the cross-subsidy. On the other hand, if the bulk mailer pays more than the ‘correct’ price derived in this way, then he is contributing to the cross-subsidy; if he pays less, then he is receiving part of the cross-subsidy. If one accepts the view, urged by some observers, that bulk mail is more and more a competitive service due the rise of other media, then it is less and less likely that bulk mailers contribute substantially to the cross-subsidy mechanism.³⁹⁷

From these considerations, it appears that the current regulatory model ‘funds’ the costs of universal service (if any) primarily by creating a cross-subsidy that mailers of non-bulk urban mail pay to mailers of non-bulk rural mail. Of course, the same person or business may send mail to an urban area one day and to a rural area on another day, so at the end of the year, there may be only relatively few mailers that finish up as net winners or losers. The amount of the cross-subsidy is *not* the difference between the obligatory uniform tariff and an imaginary cost-based tariff. Given the cost of administering multiple rates, a retail tariff that reflects the costs of delivery in each neighborhood would be wholly impractical. Hence, the amount of the cross-subsidy is the difference between the obligatory uniform tariff and a zoned tariff that, one must presume, the USP would put in place in an ‘alternative market outcome’. For example, if the uniform tariff is € 0.50 and one assumes that in a normal commercial market the USP would ‘de-average’ this rate by establishing a € 0.40 rate for urban mail and € 0.75 for rural mail, then one would conclude the current regulatory model creates a cross-subsidy that imposes a tax of € 0.10 on each letter sent to an urban address and a subsidy of € 0.25 for each letter sent to a rural address.

The universal service tax on urban letters, whether all urban letters or only non-bulk urban letters, implied by the current regulatory model has negative consequences. Over time, the tax presumably tends to retard the demand for non-bulk letter post services in the same manner as would an increase in tariffs. Although some mailers of non-bulk urban letters may be relatively indifferent to price, they all cannot be wholly indifferent.

In addition to the cross-subsidy, in the current regulatory model a Member State may provide additional support for universal service by payments to the USP either from general government revenues or from a compensation fund to which authorized postal operators may be required to contribute. In most Member States, these alternative sources for universal service funds are secondary to the cross-subsidy mechanism.

Conclusion. The current regulatory model ‘funds’ universal service by creating a cross-subsidy that pays the USP for losses—the difference, if any, between the uniform tariff and what the USP would charge in an alternative market

be calculated in principle. See section 2.3.1(e)(v), page 54, above.

³⁹⁷ NRA oversight of special tariffs does not appear to be detailed enough to rule out a tendency to give bulk mailers ‘the best possible price’, thus exempting them from the burdens of the cross-subsidy mechanism. See WIK, *Main Developments* (2004) 71, 150-51.

outcome—incurred in the delivery of letters to rural (or other high cost) areas. The current regulatory model makes it impossible to know the extent of this cross-subsidy or precisely who pays and who benefits. It seems probable that the cross-subsidy is paid primarily by mailers of non-bulk urban letters and benefits primarily mailers of non-bulk rural letters. Bulk mailers are, it seems, increasingly likely to escape contributing to the cost of universal service.

b) **New model: a limited external cross-subsidy**

Since the new regulatory model does not provide for reserved areas or designation of USPs, it cannot rely upon an *internal* cross-subsidy to fund universal service. Instead, we propose an *external* cross-subsidy, that is, a funding mechanism derived from the compensation fund provision in the current Directive.³⁹⁸ Unlike the current compensation fund, however, the purpose of the proposed universal service fund is not to relieve the USP of an ‘unfair financial burden’. The new regulatory model does not impose an unfair financial burden on any postal operator. Rather, the purpose of the proposed universal service fund is to pay for universal services which postal operators do not provide voluntarily.

Specifically, we propose that the NRA should establish a universal service fund composed of contributions from all postal operators which provide traditional (i.e., non-express) delivery services for letters and addressed direct mail below a certain weight. These are the main categories of letter post items which bear the burden of the current cross-subsidy. The goal should be an assessment scheme which, in the judgement of the NRAs, reflects the current internal cross-subsidy as closely as possible while providing simplicity, clarity, and comparability among Member States.³⁹⁹ For this reason, we believe a fixed assessment per postal item should be considered. However, it may be desirable to allow a NRA to provide a different assessment for different products (e.g., single piece letters, bulk letters, bulk direct mail) since social policy may plausibly place the burden of the cross-subsidy more on some mailers than on others (e.g., more on large businesses and less on individual mailers).⁴⁰⁰

The following language provides an illustrative example of such a provision:

A universal service fund may be established by and under the direction of the national regulatory authority. The fund shall consist of contributions which the national regulatory authority shall assess postal operators provided that—

³⁹⁸ Postal Directive, Article 9(4).

³⁹⁹ This goal would imply that the NRA could extend the assessment to direct mail delivered by postal services which specialize in the delivery of direct mail only—and hence, do not provide universal services—if the NRA concludes that, prior the institution of the new funding system, direct mail contributed to the cross-subsidy that sustained universal service.

⁴⁰⁰ As described in section 6.2.3, page 176, below, it may be necessary to permit the USP to rebalance tariffs before introducing an assessment scheme.

(a) the national regulatory authority shall fix the assessment as a specific amount per letter or per direct mail item although the assessment may vary by type of product;⁴⁰¹ and

(b) the national regulatory authority shall apply the assessment to all postal operators providing delivery of letters and addressed direct mail at a charge that is less than three times the average public tariff for an item of correspondence in the first weight step of the fastest category,⁴⁰² provided that the national regulatory authority may exempt postal operators that convey fewer than a specific number of items.

In Chapter 6, we describe how the transition from internal to external cross-subsidy might proceed.⁴⁰³

Such an approach would be superior to the mechanism for funding universal service in the current regulatory model in several respects.

- The new model will produce a definite, straightforward figure for the cost of universal service; the cost of universal service is the total cost of supplemental universal services arranged by the NRA.⁴⁰⁴
- The new model will likely reduce the total cost of universal service by putting more competitive pressure on the leading postal operator and thus inducing greater efficiency in the supply of all universal services.⁴⁰⁵
- The new model will ensure that all mailers are contributing to the maintenance of universal service, not only non-bulk mailers.

⁴⁰¹ It might be acceptable for a NRA to set this figure at zero if the reserved area does not currently include direct mail, i.e. if direct mail is not part of the cross-subsidy scheme under the current model.

⁴⁰² It should be appreciated that the approach in this illustration has advantages and disadvantages. Advantages include the fact that the specific assessment per letter and per direct mail item is simple and clear, and it depends on what is likely to be the most easily obtained and reliable market data, i.e., volume data. Assessment per item would permit easy comparison of postal tax levels among Member States. Disadvantages include the fact that a specific per piece assessment imposes a tax which is a higher percentage of price for lightweight items than for heavy items. Indeed, a postal operator specializing in heavy items will be relatively less affected than an operator specializing in lightweight items. An alternative that avoids such difficulties would be to establish the assessment as a percentage of the revenues earned from (1) letters and (2) direct mail.

⁴⁰³ See section 6.2.3, page 176, below.

⁴⁰⁴ As Professor Panzar notes at the end of the passage quoted above, ‘*Any rate plan involving a directed subsidy has this property*’, i.e., the property of establishing a definite ‘alternative market outcome’ which permits a calculation of the cost of universal service.

⁴⁰⁵ See NERA Economic Consulting, *Economics of Postal Services* (2004) 46 (‘The current need for postal operators to achieve an efficient cost level is usually driven by [inter alia] increased competition, or the threat of competition, both from substitutes and, in some cases, from competing operators. Where competition is leading to falling volumes, this may create an environment in which the organisation might be able to make decisions that would have been unthinkable in the past.’) Improvements in efficiency might be realized in ways not immediately obvious to the individual mailers, such as a postponement of rate increases or in rate reductions for bulk mail.

- The new model will be competitively neutral as between different postal operators.

Overall, this approach would establish an *external* cross-subsidy from mailers of urban letters to mailers of rural letters. In broad concept, this mechanism is thus similar to the current system for funding universal service, but it avoids many of the defects of the current regulatory model. The universal service fund would be maintained so long as there is a need for the provision of supplemental universal services.

Some observers have objected that a universal service fund would be difficult to administer. It is apparent that the proposed approach would require each postal operator to report to the NRA periodically the volumes and revenues of letters and addressed direct mail. The NRA might find it necessary to review and approve statistical procedures for estimating these figures. For a market dominant postal operator, this level of record-keeping is no more than required to comply with other requirements of the new regulatory model (or, for that matter, the accounting requirements of the current regulatory model). For competitive postal operators, the problems of administration do not appear greater than normally associated with the regulation of markets. Nonetheless, the NRA may find it necessary to establish fines and penalties for uncooperative postal operators who fail to provide necessary data. Indeed, given the importance of universal service, one could imagine empowering the NRA to fix an assessment on an uncooperative postal operator based on any available information and requiring the postal operator to disprove the level of the assessment using credible records.

Other observers have objected that a universal service fund is politically irresponsible, anti-competitive, and economically distortive. They argue that the self-financing nature of the scheme allows political leaders to avoid their responsibility to justify public expenditures. They observe, as well, that an assessment that mimics a high cross-subsidy could discourage new entry. More generally, these critics observe that the assessments needed to support a universal service fund will depress the demand for commercially viable services while subsidizing other services and encouraging inefficient overuse. Hence, these critics conclude, funds used to support universal service should come from general revenues and be justified as part of normal governmental process.

While these objections have some merit, they do not, in our view, overcome the advantages of an external cross-subsidy compared to an internal cross-subsidy. It is true that a cross-subsidy will distort demand. It will stimulate demand for subsidized products and depress demand for products subject to assessment. Stimulating demand for subsidized products is simply another way of saying universal service will be guaranteed despite lack of commercial viability. The new regulatory model assumes that ensuring affordable, reliable, and efficient universal postal service is an objective of Community postal policy. Whether or not it should continue to be so is a legitimate question of public policy but beyond the scope of this study (see Chapter 6). And, while we agree that political leaders should justify public expenditures, we would maintain that in this respect the external cross-subsidy represents an improvement in transparency over the internal cross-subsidy. Assuming that stimulating demand for subsidized services is desirable, the hard

question is where the burden should fall: on the general taxpayer or user of commercially viable postal services? Although the general taxpayer is probably the better choice as a matter of public policy, there is no simple answer to this question.⁴⁰⁶ As for the problem of discouraging competition, it seems to us that an assessment scheme that falls equally on all postal operators is competitively neutral even though it may be granted that this leaves the incumbent with the advantage of economies of scale and other benefits of incumbency. Allowing a new entrant to compete without making an equal contribution to the cost of supplemental universal services would tend to promote competition, but whether promotion of competition is a proper objective of postal policy we leave to Chapter 6.

Based on these concerns, we suggest the new regulatory model would be improved by introducing a limit on the amount of external cross-subsidy that could be raised. This limit could be expressed as a percentage of the revenues earned from the sale of the products assessed (e.g., the total of all assessments could be limited to no more than X percent of the revenues earned from the products assessed). Additional subsidies, if needed, would have to come from general revenues and be approved by normal governmental procedures, presumably an appropriately contentious public process. The effect of such a limit would be, in effect, to require a Member State to consider with an extra measure of public transparency whether the definition of universal service should be extended beyond what can be funded by means of the universal service fund.

Conclusion. To cover the cost of supplemental services, Member States should be authorized to establish universal service funds created from contributions by postal operators who convey letters and direct mail. To promote clarity and simplicity, assessments could be specified in terms of a specific amount per item although it should be possible to vary the assessment by product. Contributions should be limited to a reasonable percentage of revenues earned so that additional funds, if necessary, would have to be paid for, and justified, by the normal process of government expenditures.

5.7 National regulatory authorities

The current Directive requires establishment of an independent NRA in each Member State that is ‘*legally separate from and operationally independent of the postal operators*’. The Directive further provides that NRAs ‘*shall have as a particular task ensuring compliance with the obligations arising from this Directive.*’

⁴⁰⁶ Without empirical information on the welfare effects of price distortions in the postal sector versus price distortions in the overall economy, economics cannot determine with certainty whether it is more efficient to charge the costs of universal service to other users of the postal service sector or to taxpayers generally. Normally one would expect that the broader the ‘tax’ base, the fewer distortions and the greater neutrality between competing technologies. Transaction costs of an additional tax provide another argument against universal service funds since administering this scheme will generate additional costs (both for public authorities and postal operators). See generally, H. Cremer, M. de Rycke, and A. Grimaud, ‘Costs and Benefits of Universal Service Obligations in the Postal Sector’ (1997) 35-37; E. Saez, ‘Direct or Indirect Tax Instruments for Redistribution: Short-run Versus Long-run’ (2004).

Beyond this, the Directive provides virtually no guidance on institutional arrangements.⁴⁰⁷

The new regulatory model should do more to implement the principle of administrative fairness and promote mutual confidence among NRAs. A review of Community regulatory instruments suggests that the new regulatory model should include provisions addressing such points as the following:

- Member States that retain ownership or control of undertakings providing postal services should ensure effective *structural separation* of NRAs from government activities associated with ownership or control.
- Member States should ensure that NRAs exercise their powers impartially and transparently.
- Member States should publish the tasks assigned to NRAs in an easily accessible form.
- Member States should ensure that NRAs and national competition authorities provide each other with the information necessary for the application of the provisions of the new regulatory model.
- Member States should ensure that NRAs have full legal authority necessary to carry out the tasks assigned to them under the new regulatory model including the authority to issue orders and levy fines, subject to judicial enforcement.
- Member States should ensure that postal operators provide all the information, including financial information, necessary for the NRA to ensure conformity with the provisions of the new regulatory model.
- Member States should ensure that NRAs publish such information as will contribute to an open and competitive market, subject to national rules on public access to information and Community and national rules on business confidentiality.
- Member States should ensure that NRAs give interested parties the opportunity to comment on the draft measures within a reasonable period, publish procedural rules for consultation, and publish the results of consultations (except in the case of confidential information).
- Member States should ensure that each decision of a NRA which adversely affects the rights or interests of a private person or business states in writing the relevant facts and the legal basis of the decision and is published (except in the case of confidential information).

⁴⁰⁷ Postal Directive, Article 22. This article continues '[NRAs] shall, where appropriate, establish controls and specific procedures to ensure that the reserved services are respected. They may also be charged with ensuring compliance with competition rules in the postal sector'.

- Member States should ensure any user or postal operator that is affected by a decision of a NRA has the right of appeal against the decision to an appeal body that is independent of the parties involved.

In addition, as the ‘fully operational internal market’ develops, it will become ever more important for NRAs to consult with each other and the Commission in order to develop coherent and consistent regulatory frameworks. The new regulatory model should therefore establish basic procedures for consultation among NRAs and with the Commission.⁴⁰⁸

Conclusion. The new regulatory model should include provisions requiring Member States to ensure the independence, impartiality, and powers of NRAs, to define their tasks clearly and transparently, to require equitable and transparent administrative procedures, and to guarantee the right of appeal from adverse decisions by NRAs. In addition, the new regulatory model should provide for consultation among NRAs and between NRAs and the Commission.

5.8 Community-level committees

As described in Chapter 4, the European postal sector is being transformed from a collection of national services into more business-like regional systems that cannot be fully regulated by a single NRA. The current regulatory model provides two mechanisms for coordinating regulatory policy at Community level: the European Committee for Standardization (CEN) and a committee of Member State representatives.

The role of CEN is primarily to develop technical operational standards for providers of universal service. The new model raises the possibility that even within a national territory universal services could be provided in part by interconnection between two operators. CEN is now considering measurement standards in case of a ‘multi-operator’ environment. Such useful work should continue under the new regulatory model.

In the new model, however, we would propose to split the current committee of Member States into two committees, one composed of representatives of Member States and one composed of representatives of NRAs.

The committee of representatives of Member States established by the current Directive is chaired by the Commission and usually called (for lack of a specific title) the Postal Directive Committee. Member States may be obliged to follow standardized methods for measuring USPs’ quality of service by independent

⁴⁰⁸ Since 18 of 25 Member States have committed postal regulation to the NRA responsible for electronic communications and since the framework directive for electronic communications establishes guidelines for institutional arrangements of NRAs addressed in the text, it would be most practical for the new regulatory model to adapt the institutional guidelines established by the framework directive of the electronic communications sector. Directive 2002/21/EC, OJ L 108, 24 Apr 2002, p. 33, Chapter II, Articles 3 to 7.

monitors if the methods are approved by the Postal Directive Committee or alternatively, by the European Council.⁴⁰⁹ In the future, one can imagine the usefulness of standardizing other types of regulatory measures as well. For example, it will become increasingly useful and necessary for NRAs in all Member States to have generally accepted accounting systems for market dominant postal operators. Indeed, both for reasons of scale (development of a sound cost accounting system is a difficult and expensive process) and for reasons of mutual reassurance, the best answer may be a uniform system of accounts developed jointly by the Commission and the NRAs. Then, too, standardization of authorization procedures in whole or in part would facilitate development of an internal market in postal services. Similarly, NRAs should adopt a standardized system for collecting the market data needed to facilitate comparison between Member States. These observations suggest the desirability of expanding the scope of the Postal Directive Committee.

As currently organized, however, the Postal Directive Committee fails to reflect the firm division of policy making and regulatory authority implied by the principle of administrative fairness embodied in the new regulatory model. The strengthening of the NRAs proposed in the new regulatory model is intended to ensure that wholly impartial and technically proficient bodies translate general policies into specific requirements affecting the rights of individual parties. This sound division of responsibilities should be reflected in Community level institutions as well. In principle, therefore, we propose that the current Postal Directive Committee should be replaced by two new committees:

- *A Postal Policy Committee* composed of representatives of Member States.
- *A Postal Regulatory Committee* composed of representatives of NRAs.

These committees could be set up in accordance with established Community procedures.⁴¹⁰ They could include observers from the three countries of the European Economic Area (EEA) (Norway, Iceland and Liechtenstein), from Switzerland, and perhaps from countries who are candidates to join the Community in the future. The committees, or the Commission, could be authorized to invite additional observers and experts.

The Postal Policy Committee would be a committee of general jurisdiction. It would be responsible for advising the Commission on the implementation of the new regulatory model and future development of Community postal policy. This committee could also develop Community positions for presentation in external organizations such as the Universal Postal Union.

The Postal Regulatory Committee would be a committee of limited jurisdiction. Its focus would be on the areas of responsibility committed to NRAs under the new

⁴⁰⁹ Postal Directive, Articles 16 and 21.

⁴¹⁰ See Council Decision 1999/468/EC of 28 June 1999, OJ L 184, 17 Jul 1999, p. 23 (powers conferred on the Commission).

regulatory model.⁴¹¹ The committee would serve as forum for coordinating the work of NRAs. In particular, the Postal Regulatory Committee could develop and approve methods of standardizing a specified set of regulatory measures, such as:

- revisions, if needed, to the standardized method for the measurement of quality of service;
- a uniform system of accounts for market dominant postal operators;⁴¹²
- simple and consistent procedures for authorization of postal operators; and
- a system of market statistics that will provide government officials and the general public with adequate and consistent data about the sector without inhibiting competition or imposing an undue burden on postal operators.

The proposed Postal Regulatory Committee will, to some extent, overlap the work of the European Committee for Postal Regulators (CERP). CERP, however, is not an agency of the European Union. Since it includes regulatory authorities from countries which are not bound by the postal laws of the Community, it would obviously be inappropriate to delegate policy making and rule making authority for the Community to a non-Community body.

Conclusion. The increasingly regional and commercial nature of postal services has enhanced the need for Community-level coordination of policy and regulatory efforts. To do so, two committees, chaired by the Commission, should be established: a Postal Policy Committee composed of representatives of Member States and a Postal Regulatory Committee composed of representatives of NRAs. The Postal Regulatory Committee should be authorized to standardize certain important regulatory tools, such as quality of service measurement methods, accounting systems, authorization procedures, and statistical systems.

⁴¹¹ In the electronic communications sector, the Commission established a European Regulatory Group because it concluded that ‘the need for the relevant rules to be consistently applied in all Member States is essential for the successful development of an internal market’. Commission Decision 2002/627/EC of 29 July 2002, OJ L 200, 30 Jul 2002, p. 38 (European Regulators Group for Electronic Communications Networks and Services) recital 4.

⁴¹² Such standardized system of accounts would only address how to measure and assign costs which can be directly or indirectly assigned. The allocation of unassigned common costs is not so much an accounting issue as a matter of commercial and regulatory judgement to be decided by the postal operator and the NRA. See section 5.5.4(b), page 149, above.

6 Towards a New Postal Directive

This chapter considers possible implications of the new regulatory model developed in Chapter 5 for a new postal directive. Our treatment is summary and impressionistic, for we are in no sense attempting to solve a political equation whose terms we have not systematically investigated. Our concern is to illuminate some of the steps that must be taken to move from a theoretical model to an actual draft directive. What role should sound regulatory principles play in a new directive? What problems and risks would have to be addressed in a transition from the current regulatory model to the new regulatory model? To what extent is the new regulatory model we have developed compatible with other possible objectives for Community postal policy?

6.1 Role of sound regulatory principles in the next directive

In answer to the first question, we believe that sound regulatory principles should form the basis of a new postal directive. To understand why, it is helpful to reconsider the current Postal Directive in the broader context of the Information Revolution.

The Postal Directive was generated in a period of rapid and fundamental change in the postal sector, a period that continues into the present. In the 1980s, the most visible harbinger of change were the private express companies. Public postal operators viewed private express companies as a threat to a vital public service, not to mention trespassers on ancient prerogatives. When private express companies, working with commercially minded public postal operators, began to offer cross-border remail services, a broad inquiry into the nature and future of Community postal services was launched.

The Postal Green Paper of 1992 and the Postal Directive of 1997 were focused almost entirely on protection and regulation of universal postal service, that is, the set of postal services traditionally provided by government owned ‘universal service providers’. Most public postal operators opposed giving users a choice among providers of postal services. They advocated an expansive definition of the ‘universal service obligation’ and demanded a large reserved area to pay the costs of meeting that obligation. No one could question the importance of universal postal services in the economic and social life of each Member State. For many citizens and governmental officials, any possibility of disrupting the existing pattern of postal service was a matter of great concern, whether the perceived risks were realistic or not. Weighing the proper scope of the universal service obligation and the size of a reserved area ‘proportional’ to that obligation, Community institutions took ten years to formulate a postal policy, from 1988, when the Commission began work on the Postal Green Paper, to 1997, when the Directive was adopted by the European Council.

In retrospect, however, it is apparent that private express companies were merely the harbinger of a much larger ‘Information Revolution’ that was reshaping all forms of communication in interrelated ways. At the core of the Information Revolution was the proliferation of personal computers and improved telecommunications. The basic innovation of private express companies was to adapt these new technologies to the task of coordinating the collection, transport, and delivery of documents and small parcels across large geographic distances.⁴¹³ The ability to ‘track and trace’ allowed development of faster, more reliable delivery services, albeit at a higher cost than traditional postal service. The private express companies were a threat to traditional postal services only at the margins.

But the Information Revolution implied changes for traditional postal services far broader and more fundamental than the rise of a few new competitors. The ability to manipulate large amounts of information gathered and disseminated over great distances increased the natural scale of commerce. Companies used the innovations of the Information Revolution to shorten manufacturing times and reduce inventory, increasing the number of parcel shipments. Manufacturers acquired a new ability to sell directly to businesses and households. Larger companies, regional in reach, adopted a more regional approach towards mail preparation. For postal operators, as well, computers changed the nature of mail processing by making possible automated sortation. Sorting machines forced postal operators to redesign transportation networks (fewer, bigger hubs with less work for local post offices) and redefine their products (from content-based to shape-based categories of mail). While business customers of traditional postal services have grown larger, individual customers have increasingly turned to cheaper telephone service, and more recently, mobile phones for personal messages.

Compared to the universal service familiar to drafters of the Postal Directive in the 1990s, implications of the Information Revolution that are already apparent include the following:

- The letter post is becoming less a medium for exchanging correspondence and more a medium for delivering advertisements.
- The importance of parcels and express items has increased and is continuing to increase.
- Traditional postal services post are becoming more of a one-way ‘broadcast’ medium and less of a two-way communications medium.
- Users are demanding more choice from providers of universal service in the tradeoff between service quality and price due to the proliferation of other means of communications (physical and non-physical).
- Traditional public postal operators are becoming more dependent on large mailers who are increasingly supra-national organizations; these mailers are

⁴¹³ Another key to development of the express companies was the expansion of air transportation made possible by improvements in commercial jet aircraft.

demanding regional suppliers who can offer a full range of postal services.

- The printing of bulk mail can be located in any Member State or even outside the Community regardless of the physical location of offices of the mailer or the origin of the information used to create the mail.
- Using computers, bulk mail can be produced in a state already sorted for postal delivery.
- The sorting of letter post items is becoming highly automated, and automation is substantially changing the economies of transportation and mail processing.
- The operational function and commercial viability of small post offices serving limited localities is declining sharply.

For the foreseeable future, these trends will continue or even accelerate. Service providers, the most important customers of traditional postal operators, have only begun to realize the full economies of organization at Community level. Use of the internet as a substitute for correspondence and advertisements is still in its early stages. While it will take time for individuals and businesses to learn how to take full advantage of the new technologies and for electronic communications providers to extend inexpensive broadband access to all offices and households, such developments are inevitable. In 2002, Professor Peter Drucker estimated that ‘the Information Revolution is now at the point at which the Industrial Revolution was in the early 1820s’.⁴¹⁴ In 2005, we might consider ourselves up to the equivalent of 1830 or 1835—but this leaves a long way to go before the full implications of the Information Revolution are realized.

Changes rippling through electronic and physical networks that make possible business and social interaction at a distance are interrelated not only because the technological drivers are the same but also because electronic and physical networks complement to each another. Better electronic communications generate a greater demand for reliable distribution systems. Better distribution systems in turn allow users to take greater advantage of electronic communications. Catchy phrases like ‘just-in-time manufacture’ or ‘e-commerce’ refer to the possibilities presented by the synergy of modern electronic and physical distribution systems. Increasingly, universal postal systems are the physical counterpart of the ubiquitous internet.

From this perspective, it seems to us that the current Postal Directive may be viewed as an incomplete response to the earliest manifestations of the Information Revolution, incomplete because the implications of the Information Revolution for postal systems were even more dimly perceived than for electronic communications systems. With the benefit of hindsight and experience, it seems clear that Community policy should treat the transformation of electronic communications and postal systems in a more unified manner. A fully operational internal market for one requires a fully operational internal market for both. Universal postal service and universal electronic communications services cannot be understood as discrete

⁴¹⁴ P. Drucker, *Managing the Next Society* (2002) at 5.

phenomena.

Yet, despite what, in retrospect, we regard as a too narrow and short-term focus, the first Postal Directive has been notable success. Why? In adopting the Directive, the Commission and the Council insisted upon inclusion of certain new principles in the regulatory framework of postal services. Although the Directive permitted continuation of the reserved area, it linked the scope of the reserved area to the broader public interest by added the limitation ‘to the extent necessary to ensure maintenance of universal service’. Similarly, the Directive resisted the arbitrary inflexibility of uniform tariffs in favour of the objective standard of ‘affordability’. To bring better accountability to reserved services, the Directive required independent regulatory authorities, objective accounting practices, public quality of service standards, independent audits of service performance and USP accounts, and greater transparency in many areas. Intra-Community postal services have improved under pressure of greater transparency, more competition, and the linking of compensation to performance.

In short, using the terminology of this study, the Postal Directive introduced ‘sound regulatory principles’ into regulation of traditional postal services. As a direct result, universal postal services in the Community have become more efficient, more transparent, and better adjusted to the Information Revolution than they otherwise would have been. Although today one can see how much more could have been done to implement sound regulatory principles, this latter day perspective should not obscure the significant accomplishments achieved in the Postal Directive.

The lesson to be drawn is that sound regulatory principles can lead to sound legislation and advance the public interest even when the forces changing the market and their outcome are incompletely perceived. Economic analyses underlying the first Directive were rapidly overtaken by events. What have not been overtaken by events are the Directive’s prescriptions for objectively grounding sector policies in the broader public interest, greater transparency (especially in markets lacking effective competition), and regulation by impartial independent bodies.

In light of these developments, we believe that a new regulatory model based on sound regulatory principles represents the proper starting point for developing a new postal directive. Indeed, we suspect that sound regulatory principles constitute a better starting point than analyses of current market trends. Such analyses are enlightening to a degree, but the implications of the Information Revolution are so pervasive and rapid that one must question whether it is possible to predict the key features of future markets with confidence. The essential virtue of ‘sound regulatory principles’ is that they are ‘sound’. They have been found flexible enough to guide regulation over many years in many different contexts. In times of change, flexibility is a virtue. While the economics of postal markets will surely shift in the next decade, we doubt that the sound regulatory principles of today will be considered less sound.

Nonetheless, we note that some observers have expressed profound skepticism about whether Member States are ready to embrace a basic implication of sound regulatory principles: non-discriminatory regulatory treatment of the public postal operator and other postal operators. Some believe that certain Member States are determined to

promote their public postal operators as ‘national champions’ by giving them more favourable regulatory treatment than accorded other postal operators, including the postal operators of other Member States. Other observers find incredible the notion that Member States will ever allow their public postal operators to withdraw from universal service markets and turn over universal service responsibilities to other postal operators. For them, universal service is a burden that the public postal operator will never escape, and hence the public postal operator will never have a fair chance in competition with other postal operators. The premise that supplemental universal services may be contracted in a non-discriminatory manner is deemed incredible.

These concerns lie outside the scope of this study. With only minor exceptions (e.g., free postal service for the blind), postal services are an economic activity taking place in a broader economic context. About 85 per cent of all postal items are sent by businesses, governments, and other organizations. Most of the remaining items are sent to these organizations for commercial or institutional purposes. In virtually every case, even in the case of a strictly personal letter, the mailer decides to send a particular postal item or not based upon normal economic considerations such as price, quality of service, and the availability of alternatives. There is nothing so extraordinary about postal markets to suggest that the sound regulatory principles derived from the regulation of economic activity generally should not also be applied in the regulation of postal markets. While Member States may possibly have legitimate governmental reasons for not applying sound regulatory principles to the regulation of postal markets, such considerations cannot be addressed in the present analysis.

6.2 Transitional issues posed by the new regulatory model

To answer the second question posed at the start of this chapter, we believe that the transition from the current regulatory model to the new rulemaking will pose some problems and risks, but these are manageable. Although detailed implementation measures are well beyond the scope of this study, consideration of the major issues presented by a possible transition helps to clarify the strengths and weaknesses of the new regulatory model.

6.2.1 Model's sensitivity to changes in mail volume and mail density

If letter post volumes or parcel volumes do not grow as much as expected or fall more than feared, would this eventuality require adjustment of the new model? Within fairly broad limits, we believe the answer to this question is ‘no’. The soundness of the new regulatory model does not appear to vary within the range of future scenarios sketched in Chapter 4. If the principles are sound, then the essential regulatory framework should remain valid whether the volume of letter post items rises or falls. Maximum reliance on the normal commercial market, market transparency, fairness in administrative proceedings, and so forth will be equally important. While different future scenarios have important consequences for the scope and market structure of Community postal services, the new regulatory model accommodates such possibilities by allowing Member States and NRAs substantial discretion to adjust the criteria of basic universal service.

For similar reasons, we believe the new regulatory model would promote the objectives inferred for Community postal policy in Member States with different absolute levels or distributions of mail density. It must be recalled that the current Postal Directive applies to Member States with a wide range in annual mail volume per capita, from less than 50 to more than 350 letter post items. Nonetheless, as noted above, the sound regulatory principles incorporated in the Postal Directive (transparent, independent regulation, objective accounting, etc.) have had a beneficial effect on universal service in both high and low volume countries. There is no reason to believe that the new regulatory model would be any less adaptable to the range of conditions presented in the Community. Indeed, we believe it should prove more adaptable precisely because it is more flexible than the current Directive. Of course, as with the current Directive, different Member States will rely more or less heavily on specific provisions of the new regulatory model depending on their particular circumstances. In Member States with low mail density, regulatory provisions relating to market dominant postal operators may be more important than in other Member States. Likewise, in some Member States, there is greater variation in the costs of producing postal services than in others. In a Member State with sharply defined, distinctly different urban regions and rural regions (or high income and low income regions), there is (presumably) greater reliance on cross-subsidy within the accounts of the USP to sustain universal service. In such a state, the external cross-subsidy permitted by the new regulatory model may be more necessary than in other Member States. Overall, the new regulatory model appears flexible enough to accommodate substantial differences in the letter post markets of different Member States.

At some point, of course, a changing letter post market could undercut the validity of the new regulatory model. The new regulatory model assumes that the letter post is important to society, that is, that there is a substantial social demand for regular collection and delivery of letters and other types of documents. If demand for letters declines radically while demand for distribution of bulk direct mail increases, it is perhaps possible that commercial postal services will find it profitable to specialize in direct mail and not invest in the additional machinery and processes needed to accommodate letter mail. In such case, a government guarantee of universal letter post service may make little sense if it no longer corresponds to an actual need of society. The new regulatory model would be entirely inappropriate. Such changes in the market are so drastic, however, that they will require more than a different regulatory approach; they will imply an entirely different regulatory purpose.

6.2.2 From reserved area to competition: possible failure of a USP

Like other observers, we believe that a reasonably efficient public postal operator will be able to operate successfully in a fully competitive environment.⁴¹⁵ The end of the reserved area will require a public postal operator to make adjustments and improvements. It is often forgotten, however, that public postal operators have faced and overcome other serious challenges in recent years, including the rise of private express companies, introduction of fax and email, changes in business practices, and

⁴¹⁵ See page 62, above. A 'fully competitive' environment necessarily assumes that the universal service obligation is administered in a reasonably competitively neutral manner.

the ups and downs of the economic climate. Three public postal operators have adapted to—and seemingly benefitted from—a reduction in government ownership, and more are expected to follow. While not every public postal operator will be a commercial success forever, so long as demand for letter post services remains strong, economies of scale and market presence will give the incumbent operator a significant commercial advantage over potential competitors.

This is not to say that there is no possible way for a public postal operator to fail under the new regulatory model, but reflection on how financial failure could occur will demonstrate how remote is the possibility. Under the new regulatory model, the public postal operator can adjust prices to costs and depart from a uniform tariff if necessary to defend itself against a new entrant. Moreover, the public postal operator can cut back on loss-making services, although if postal operator has market dominant power, its actions must be objective, non-discriminatory, and reasonably calculated to meet the needs of the public. If the public postal operator is required to provide supplemental universal services, it is entitled to compensation for losses incurred. In order to fail financially, a public postal operator must be so inefficient that, despite incumbency and economies of scale *and a virtual absence of universal service burden*, it is *both* (1) unable to compete successfully against a new entrant and (2) unable to take reasonable steps to reduce its size and liabilities fast enough to maintain its financial equilibrium.⁴¹⁶ Moreover, this problem must be so severe that it cannot be remedied by better management since government would presumably prefer to retain new managers or sell an interest in the public postal operator to a strategic partner rather than lose universal service. Taken together, these considerations make financial collapse extremely unlikely.

For public postal operators, adjustment to the end of the reserved area, like adjustment to any other major change in the conditions of doing business, will require time and planning. Experience in the Member States that have liberalized postal services and corporatized their public postal operators suggests that even with energetic and competent management, it may take a few years to transform a government agency into a competitive undertaking. A critical step in preparing for competition is the ‘rebalancing’ of tariffs. Restructuring of tariffs may involve politically painful adjustments, such as the raising of prices for single letters and the reduction of prices for bulk letters. Nonetheless, the NRA must allow, even encourage, the public postal operator to move towards a tariff structure that is commercially viable in a competitive environment.

A reasonable period of transition to a liberalized environment would seem to be on the order of a couple of years for a relatively small post office and up to five years or more for a large post office.⁴¹⁷ Judging by such time scales, public postal operators in all Member States will have had ample time to prepare for an end to the reserved

⁴¹⁶ By ‘reasonable steps’, we include fair and reasonable treatment of managers and employees.

⁴¹⁷ For the United Kingdom’s Royal Mail, a large public postal operator, the reserved area will end on 31 December 2005, five and a half years after enactment of the Postal Services Act in July 2000 and three years after the market-opening program actually started, on 1 January 2003. In Sweden, a smaller public postal operator adapted to a fully competitive market in 1994 without any legislatively defined transition period.

area on the first day of 2009. In the EU-15 Member States, public postal operators will have had at least six and half years since the target date for full liberalization was announced in the amendatory directive in June 2002. In the ten Member States that joined the Community in May 2004, public postal operators will have had less notice, but none can claim less than three and half years to manage the transition.

Special circumstances or poor planning may nonetheless leave a public postal operator unprepared for full liberalization in 2009. Regardless of the reason, so long as the Community as a whole is making progress towards the objectives of Community postal policy, we do not believe that it is necessary or desirable for a single Member State to undergo a disruption in universal service. Therefore, a new directive might include an emergency transitional provision that would allow a Member State, with agreement of the Commission, to adopt a reorganization plan for the public postal operator. The reorganization plan could include extension of the reserved area for such time and under such conditions as may be demonstrably necessary to maintain universal service. A reorganization plan should adopt a realistic approach towards measures needed for true transformation, perhaps including replacement of management, renegotiation of employee contracts, and sale of assets or equity. Moreover, out of fairness to other public postal operators and other Member States, a reorganization plan should include assurances that the public postal operator will not reap an advantage in competitive markets by virtue of its failure to make the same preparations as other public postal operators. For example, a reorganization plan might require structural separation between competitive and non-competitive operations while a reserved area is extended.

6.2.3 Ending the USP designation: shifting from internal to external cross-subsidy

The new regulatory model ensures universal service in a different way than the current model. To avoid disruption in universal service, it will be necessary for NRAs to manage the transition between models in an orderly manner.

The first step will be adoption of legislation or regulations to define the standards of universal service that the Member State will have to ensure through a program of supplemental universal services in case of market failure. A period of public consultation and debate will be required. In most cases, however, we suspect that the revised standards for universal service will likely be similar to current standards. Instead of wholesale change, we expect Member States to use the increased flexibility offered by the new model to adopt marginally broader derogations from national standards where justified by economic circumstances.⁴¹⁸ Over time, however, the broader flexibility accorded Member States will allow them to adapt more easily to a rapidly changing market.

The next step will be for the USP to designate which universal services, if any, it proposes to terminate if permitted to do so. The rebalancing of tariffs necessary to

⁴¹⁸ For example, in New Zealand, a rural country by Community standards, the 1998 Deed of Understanding (a universal service contract) between government and New Zealand Post provides, 'New Zealand Post shall provide: (a) six day per week deliveries to more than 95 per cent of delivery points; (b) five or six day per week deliveries to more than 99.88 per cent of delivery points; and (c) one to four day per week deliveries to the remainder of delivery points'.

prepare for liberalization is also required as a precondition to this step. Unless tariffs have been properly restructured, the public postal operator will be unable to make a reasoned decision about which services are profitable and which are not. For services that may be terminated, the USP must indicate the net cost of maintaining these services and the profitable services that are currently bearing the burden of the implicit cross-subsidy. Developing this information may entail a certain amount of negotiation between USP and NRA. Nonetheless, it will be in the interest of both parties to come to a reasonable solution. An excessively high estimate of the cross-subsidy will open the door to new entry in the subsidized areas without conferring a competitive advantage on the incumbent in the commercially viable areas (since all postal operators will pay the same ‘universal service assessment’).⁴¹⁹

If the USP and the NRA agree that it would be reasonable for the USP to terminate some universal services,⁴²⁰ then the NRA must arrange for continuation of these services as ‘supplemental universal services’. If the NRA can expend public funds, it can contract with the USP or another postal operator to provide the universal services in question. If the NRA is required to establish a universal service fund, it can—even in the absence of a significant new entrant—fix a tax on the commercially viable letter post services of the *USP* that raises sufficient funds to pay for the losses incurred by the *USP*. That is, the NRA can establish an assessment scheme that creates an *external* cross-subsidy that mimics the *internal* cross-subsidy reported by the USP. The universal service fund will, in effect, consist of the contributions of one postal operator, the USP, and make payments to one postal operator, the USP. Other than the cost of administration, the net effect on the USP and universal services should be zero.

When these steps are completed, the NRA will be able to end the designation of the incumbent postal operator as USP and, if necessary, employ contracts (or orders) for supplemental universal services as the legal guarantor of universal service. New entrants will be subject to the same assessment per letter or direct mail item as the former USP. In contracting for future supplemental universal services, the NRA will be able to switch from the former USP to other postal operators if they offer identical

⁴¹⁹ To rebalance tariffs and identify internal cross-subsidies, public postal operators need accounting systems that reflect ‘consistently applied and objectively justifiable cost accounting principles’. The Directive required all USPs to introduce such accounting systems after a transition period of no more than two years, i.e., by February 2001 (or by the date of accession in the case of Member States that joined the Community after that date). Postal Directive, Article 14. It is not entirely clear, however, that all USPs have prepared the required accounts. See WIK, *Main Developments* (2004) 79-85. However, such lapses, if any, do not threaten continuation of universal service, as explained in the next footnote.

⁴²⁰ Since conversion from internal to external cross-subsidy will have little initial effect on the USP—the USP is the sole payer and sole recipient in both cases—there is no reason to believe that an agreement on the details of the external cross-subsidy will be unattainable. The prospective end of the reserved area should encourage the USP to resolve the matter. Technically, however, an agreement is unnecessary to ensure universal service. Under the new regulatory model, if the public postal operator and NRA cannot agree whether certain services are loss-making or not, the NRA can require the public postal operator to maintain current services as supplemental universal services and reject its claim for compensation of net losses for lack of objectively justifiable accounts. The public postal operator would have the right to appeal the decision of the NRA to an impartial body. Of course, it would be better for the NRA and public postal operator to agree on a proper set of accounts so that the public postal operator can be promptly compensated for legitimate universal service costs.

or better services for lower payments.

The major change from the current model to the new model will be transparency and control. The NRA will have a better understanding of the costs of universal service. By means of contract provisions or administrative orders, the NRA will gain better administrative control over the quality of services provided in areas served by supplemental universal services. Meanwhile, new entrants can begin letter post operations in the commercially viable area without undermining the financing of universal service.

The most serious transitional problem may be posed by the effects on existing competitors to the USP. Under the new model, they may be required to pay an assessment into the universal service fund that is not required under current law. To avoid disruption of their businesses, Member States should be authorized to phase-in such assessments over a reasonable period of time.

6.2.4 Building up the administrative capabilities of NRAs

The new regulatory model relies upon the NRA for several key tasks. The NRA must identify the operators, products, and markets characterized by market dominance; regulate provision of universal services by market dominant postal operators; oversee the competitive supply of universal services, if any, to ensure basic universal service; arrange for and oversee supplemental universal services, if needed; and administer an authorization regime that could include all types of postal services. Regulation of market dominant postal operators will require a sophisticated approach to cost accounting as well as the monitoring of service quality. Additional issues may include, among others, controversies over special tariffs, petitions for downstream access, and management of the address database and post codes systems.

In some Member States, the demands of the new regulatory model may require an upgrading of the staff and resources of the NRA. The prospect of upgrading NRAs raises several related questions: How long will it take to bring postal NRAs up to a sufficient capacity to implement the new model? Is the upgrading of postal NRAs an effective use of public funds? Is the new model overly dependent on an excessive level of NRA expertise?

Unfortunately, there is no easy or inexpensive way to regulate postal markets well. Regulation of postal markets presents an intellectually challenging task. It requires a significant commitment of several types of professional expertise and support staff. Judging from responses of NRAs in last year's Main Developments study, we believe it may take several years and significantly more resources for some NRAs to acquire genuine proficiency in the regulation of postal markets even under the current model.⁴²¹ Such time periods are not out of line with the experience in countries such as the United States and United Kingdom, two countries which have invested substantial resources in postal regulation.

Whether development of 25 expert regulatory bodies for postal affairs represents a

⁴²¹ WIK, *Main Developments* (2004) 88-89.

wise use of public funds is a reasonable question. In 2003, Community NRAs employed 291 persons and expended more than € 25 million annually. In contrast, the United States spends far less to regulate a letter post market that is twice the size of the Community's.⁴²² Moreover, universal services for letters (individual and bulk), which are truly the *raison d'être* of sector specific regulation, appear to be in a long term decline. Assuming a new directive is adopted in 2007, it may take until 2010 or later to build a truly capable corps of NRAs in all Member States. Yet, after only few more years, the long term need for postal regulation may be in doubt due to the migration of correspondence to email and an increase in competition.

In our view, it would be plausible for Member States and NRAs to work together through the proposed Postal Regulatory Committee to reduce the cost of postal regulation. As suggested in Chapter 5, the Committee could assist NRAs by developing common approaches to some types of regulatory tasks such as a uniform system of accounts for market dominant postal operators and standardized authorization regulations. Beyond this, one might imagine that some Member States would find it economical for the Committee to retain a small common staff which could provide regulatory assistance to NRAs. For example, small NRAs might request the Committee's staff to review the accounts of market dominant providers of universal service and evaluate the technical aspects of proposed changes in rates and services. In some regulatory areas, Member States may even wish to delegate authority to the Committee to develop preliminary findings of law and fact for the review of NRAs. Such a mechanism might allow smaller Member States to meet their responsibilities under a new regulatory model in a more economical manner⁴²³

Such considerations raise the question, why not create a single Community level NRA for all Community postal services? A European regulator may be worth considering on grounds of economy, but there are practical difficulties. About 96 per cent of letter post services are national in character (sender and addressee are in the same Member State) and perhaps 50 per cent of postal services are local (sender and addressee are in the same metropolitan area). It is apparent that it would be difficult for a European postal regulator to *ensure* the details of universal service in each Member State and still comply with the ideals of subsidiarity.

Despite a need for substantial regulatory expertise, we believe that the new model is *less* sensitive to the competence of NRAs than the current model. In the current model, the NRA is focused primarily on the USP(s) while in the new model, the NRA is focused primarily on the market dominant postal operator(s). As a practical matter, these will be the same postal operators for the foreseeable future. In both models, the necessary regulatory skills are similar. Both models require the NRA to

⁴²² In 2003, the U.S. Postal Rate Commission had 45 employees and a budget of € 7 million. WIK, *Main Developments* (2004) 88-89. It should be noted, however, that the responsibilities of the U.S. Postal Rate Commission are somewhat different from those of European NRAs under either the current or new regulatory models.

⁴²³ While the appropriateness of delegating regulatory authority to a committee of postal operators (such as UPU's Postal Operations Council) may be questioned under the principles of the Commission Decision 2002/344/EC of 23 October 2001, OJ L 120, 7 May 2002, p. 19 (La Poste mail preparation), there would seem to be no intrinsic legal obstacle to delegation of regulatory authority to a group of NRAs.

oversee development of regulatory accounts; check that tariffs are affordable, cost-based, and non-discriminatory; and ensure that access and quality of service meet the needs of the public. The major innovation of the new model is to increase the role of actual and potential competition. It also increases the transparency of the postal market and postal regulation in key respects and allows the public better access to regulatory procedures. In the new model, the twin spurs of potential competition and user-initiated proceedings before the NRA will help to accomplish the objectives of Community postal policy even if the NRA is not as expert or vigilant as may be hoped. In addition, compared to the current model, the new model gives NRAs much clearer guidelines about how to regulate postal markets.

We do not believe that there is any way to accomplish the objectives inferred for Community postal policy without a firm regulatory hand. While the new regulatory model moves in the direction of a more market-based, self-policing postal sector, it still gives users and the public broad governmental assurances in respect to universal service. If these assurances are to be honoured, a substantial commitment to postal regulation is implied. However, as discussed below, it would be possible for the Community to adopt other policy objectives for the postal sector that would call for less for investment in postal regulation.

6.2.5 Risk of divergence among Member States

For some observers, implementation of the new model may seem to present a risk that the increased flexibility granted to Member States will lead to increased diversity in the quality of universal service among Member States, i.e., the emergence of a ‘two-speed’ or ‘multi-speed’ Europe. We believe the opposite is the case. Rather than increasing differences in service quality among Member States, the new model should exert more pressure than the current model for convergence of Community postal systems. Convergence should occur along two lines.

First, there will be a tendency for postal services in all countries to become similarly efficient, i.e., to give the same value for money. Inefficient postal systems will run the risk of new entrants at least in border areas. Skillful managers and successful operational techniques will become more transferable. NERA has described this process as follows:

Internationalisation of postal operators is another factor that has the potential to impact on the economics of postal services. It may do so in one of the following ways:

- to the extent internationalisation leads to increased competition between operators (for example Deutsche Post World Net entering the Dutch and UK markets), this will increase pressures for cost efficiency on the incumbents;
- in the future, structural alliances or mergers between universal service providers may lead to cost efficiencies in case ‘economies of skill’ are exchanged between the two partners; and
- alliances or mergers between universal service providers may exploit

economies of scale where these exist. . . . [P]ostal operations in original Member States are characterised by broadly constant returns to scale, but . . . economies of scale may exist in the new Member States.⁴²⁴

By this process, the new model will tend to ‘level up’ the postal services in the several Member States.

National postal systems will also converge in respect to alignment with the needs of the public. Even an efficient postal system may fail to satisfy a public demand, such as, for example, a desire for a less expensive and slower alternative to first class service. Again, failure to meet the needs of the public will invite new entrants.

In contrast to these forces of convergence in the new model, in the current model national reserved areas promote differences among Member States by *insulating* national letter post markets from one another.

In one respect alone, the new model may lead to greater diversity among Member States. Since the new model gives users an enhanced role in shaping postal services, there will be a tendency for postal services to vary from place to place in reflection of local preferences. In some places, the economies of delivery to residential mail boxes located at kerbside might find favour; in other places, the convenience of door slot delivery will be insisted upon. In some areas, delivery three or five days per week could suffice, while in others delivery six or seven days per week will be demanded. Viewing the Community postal sector as a whole, however, it is difficult to believe that what people want from postal services varies by as much as current service levels. Virtually everyone wants a regular, inexpensive, reliable collection and delivery system for documents and parcels. Methods of production are essentially the same throughout the Community. In any case, to the extent there are small differences in postal preferences among Community citizens, there is no more reason to force all Community citizens to accept precisely the same postal service than there is to require all citizens to drive the same type of automobile. Reasonable, user-based differences do not threaten either the ‘fully operational internal market’ or the ‘affordable, reliable, and efficient universal postal service’.

6.3 Alternative policy objectives

In response to the third question posed at the beginning of this chapter, we would say the new regulatory model developed in Chapter 5 could be modified to be compatible with policy objectives other than the ones derived from the current regulatory model, but there is a limit to how far compatibility can be stretched. Current Community postal policy, as we have interpreted it, is moderately interventionist. That is, rather than accepting the outcome of the normal commercial market, Community policy requires Member States to ensure certain features of the postal market. For some, the objectives of Community public postal operator should mandate greater intervention in the market in the pursuit of one objective or another. For others, Community

⁴²⁴ NERA Economic Consulting, *Economics of Postal Services* (2004) 56.

policy should provide less government intervention in one respect or another. In this section, we shall consider how different or alternative policy objectives may relate to the new regulatory model described in Chapter 5.

6.3.1 More interventionist Member State definitions of universal service

In Chapter 2, we considered the extent to which Member States could, consistent with the new regulatory model, adopt highly interventionist definitions of universal service. We concluded that the objectives of Community postal policy that we have inferred implicitly place limits on the discretion of Member States to do so.⁴²⁵ In particular, a Member State should not introduce a definition of universal service that is so restrictive that a reserved area is required because of the resulting obstruction to the internal market. Some persons may believe that this balance of objectives should be struck differently.

If the objectives of Community postal policy are modified (or differently interpreted) so as to permit Member States to adopt highly interventionist universal service obligations, then the new regulatory model will have to be modified to permit continuation of the reserved area at national level. Even if the objectives of Community postal policy are decided in this manner, we believe that sound regulatory principles can still be employed fruitfully. That is, we would argue that the specific purpose of regulation should be stated clearly and precisely, that regulation be necessary and proportionate, that market transparency should be expanded, that NRAs should administer the law equitably and impartially, etc. Given the continuing vitality of sound regulatory principles even to the monopoly supply of postal services, we suggest that much of the new regulatory model would still prove useful as an analytical framework for improving regulation.

6.3.2 Rules of partial uniformity

For some persons, Community postal policy should require, if not a radically more interventionist definition of universal service, then at least certain uniform features. For example, some would argue that Community objectives should require or allow Member States to set a uniform tariff requirement for all universal services, or perhaps only for non-bulk universal services, within a Member State. Some would support a provision requiring five-day delivery of universal service items in all areas (as in the current Directive). Rules of partial uniformity do not prevent competition or necessarily imply a reserved area. Instead, they prevent certain forms of competition while allowing others.

As described earlier, a fundamental issue posed by rules of partial uniformity is reconciliation with a competitive market.⁴²⁶ If uniformity in tariffs or services is legally imposed on one postal operator, then regulation is unacceptably

⁴²⁵ See section 2.3.2(a)(ii), page 63, above.

⁴²⁶ See section 5.4.2(b), page 138, above.

discriminatory.⁴²⁷ If uniformity is required of all postal operators, but operators are allowed to differ from one another, then postal operators will tend to limit their operations to areas suited to whatever uniform tariff or service is provided; that is, operators will specialize in portions of the market where costs are uniform. This, too, is unacceptable. To prevent postal operators from concentrating in selected portions of the market, each operator could be required to serve the entire national territory; yet this requirement would effectively preclude entry and prevent competition.⁴²⁸ The best way to reconcile uniformity and a competitive supply of universal service may be to treat a rule of partial uniformity as an additional requirement of the basic universal service that must be provided by the market as a whole.⁴²⁹ In such case, the NRA would be responsible for ensuring that at least one postal operator provides such service, if necessary by arranging supplemental universal services.

The new regulatory model does not include rules of partial uniformity because it seeks to regulate the prices and services of postal services in a more integrated manner, whether in the context of universal services generally, universal services provided by market dominant postal operators, or supplemental universal services. That is, the new regulatory model implicitly adopts the view that NRAs should focus on the combination of price and service, rather than controlling either prices without regard to services or services without regard to prices.

Rules of partial uniformity are not wholly incompatible with the new regulatory model, however, if they are applied transparently and non-discriminatorily. For example, suppose the objectives that we have inferred for Community postal policy were amended to require Member States to ensure uniform national tariffs for non-bulk letter post items? The revised objective would require a corresponding modification in the new regulatory model but not wholesale reworking.

6.3.3 Promotion of competition

In light of the substantial economic benefits flowing from active competition,⁴³⁰ some persons believe that Community postal policy should require positive promotion of competition where competition does not exist.⁴³¹ A supporting

⁴²⁷ In the new regulatory model, the NRA may contract with individual postal operators for provision of supplemental universal services, or even compel them to do so, but the procedures for arranging supplemental universal services must be transparent, non-discriminatory, and open to all postal operators. See section 5.6.1, page 158, above.

⁴²⁸ Alternatively, each postal operator could be required to serve, at a minimum, a portion of the national territory that exhibits a representative range of cost characteristics. This condition would prove anti-competitive as well, and it would be extraordinarily difficult to administer objectively (since, *inter alia*, different postal operators have different cost structures).

⁴²⁹ The minimum requirements for universal service included in the new regulatory model—i.e., the ‘floor’ level for all universal services in the Community—are described in section 5.4, page 129, above.

⁴³⁰ See section 1.3.3, page 25, above.

⁴³¹ See, e.g., R. Moriarity and P. Smith, ‘Barriers to Entry in Post and Regulatory Responses’ (2005); R. Cohen et al, ‘Will Entrants into a Liberalized Delivery Market Attract Investors?’ (2005); NERA Economic Consulting, *Economics of Postal Services* (2004) at 157-58 (substantial scope of competition only if competitors have access to delivery networks). For a more skeptical view of the

consideration is that government is responsible for having created a national postal operator which is so dominant that it may be able to thwart competition indefinitely. Some Member States, notably the United Kingdom,⁴³² have included promotion of competition as an objective of postal regulation.

Promotion of competition implies measures that go beyond merely allowing competition among existing postal operators by termination of the reserved area. Some examples will illustrate possibilities for promoting competition in postal services.

- *Mandating downstream access at low prices.* The new regulatory model provides that a NRA should decide whether to require dominant postal operators to give downstream access to other postal operators based on whether such access would or would not further the objectives of Community postal policy. Adding promotion of competition to the objectives of Community postal policy might oblige NRAs to require downstream entry unless, perhaps, certain contrary indications are demonstrated. At a minimum, NRAs would have to consider promotion of competition in deciding such issues.⁴³³
- *Authorization conditions that promote the credibility of small operators.* To promote competition, a NRA could adopt authorization procedures that are designed to give users of new postal operators confidence that each authorized postal operator is capable and reliable. To use authorization procedures in this manner implies a relatively detailed vetting process by NRAs that might include, for example, submission of information about the new entrant's operational expertise and financial capacity. Operators who fail to meet proper standards could be de-authorized.
- *Restructuring the public postal operator.* To put the public postal operator on a playing field more nearly equal to its competitors, the public postal operator could be privatized.
- *Government procurement.* To encourage new or small producers of goods or services governments often make a special effort to buy their products. As a large buyer of postal services, government could promote competition by using new entrants whenever possible.

The new regulatory model does not recognize promotion of competition as an element of current Community postal policy. However, promotion of competition would not be incompatible with the objectives of current policy and the new

ability of incumbents to thwart competition, see P. de Bijl, E. van Damme, and P. Larouche, 'Towards a Liberalised Postal Market' (Tilburg Law and Economics Center, Aug 2003).

⁴³² United Kingdom, Postal Services Act 2000, Section 5 ('Subject to section 3 [ensuring universal service], the [NRA] shall exercise its functions in the manner which it considers is best calculated to further the interests of users of postal services, wherever appropriate by promoting effective competition between postal operators').

⁴³³ See section 5.5.5, page 152, above. As noted in that section, some argue that the best strategy to promote competition over the long run is to deny downstream entry and thus encourage end-to-end competition.

regulatory model. Promotion of competition should not impede promotion of a fully operational internal market or impede protection of an affordable, reliable, and efficient universal postal service. Promotion of competition could be added to the objectives of Community postal policy either as a Community-level objective or as a Member State option.

6.3.4 High quality of universal service

For some, the main risk of a fully operational internal market is the possibility of too much competition rather than too little. In a more competitive market, users may prefer to pay less for a lower quality universal service.⁴³⁴ Some would argue that users' short-term preferences may prove a poor guide for the long term financial well being of the sector. A decline in service quality may ultimately lead to less mail volume. Once volume begins to decline, higher prices will be needed to cover fixed costs, which will lead to further declines in mail volumes, and so into a 'graveyard spiral'.⁴³⁵ A lower quality universal service may also fail to serve the more intangible needs of society. A reliable universal service plays an essential role in increasing the quality of life of all citizens and overcoming social exclusion and isolation. There can be no assurance, it could be argued, that a universal service whose parameters are determined by users will maintain a high enough level of quality to serve these intangible needs.

For advocates of this view, one objective of Community postal policy might be expressed as 'to ensure a high quality of universal service that will promote the long term social and economic welfare of society'. If postal operators vigorously competing for the business of users will fall short of this goal, then government must intervene to prevent excessive competition and a lowering of the general quality of universal service.

The new regulatory model described in Chapter 5 only incompletely incorporates this objective. The new model would establish a Community-wide standard of *reliability* that, in effect, prevents the quality of service of universal services from declining to unacceptable levels. This concept, however, is not intended to limit the power of users to determine the quality of universal services. In Chapter 2, we concluded that it was unnecessary for government to establish quality of service standards for competitive markets. Hence, in the new regulatory model, where competition exists, the market is allowed to establish appropriate quality of service standards.⁴³⁶ In market dominant circumstances, the new regulatory model provides that, in general, NRAs should ensure that providers of universal services offer appropriate service levels that are reasonably calculated to meet the objective needs of users rather than criteria set by governmental decree.⁴³⁷

⁴³⁴ There are some indications that users would prefer more universal services that are slower and less expensive than the 'fastest standard category'. See section 2.3.1(d), page 41, above.

⁴³⁵ It is unclear, however, what empirical evidence supports this concern. Among the Member States, domestic letter post volume per capita varies over an enormous range, from 12 to 350 items per year in 2002, yet all are able to support universal postal service. See WIK, *Main Developments* (2004) 136.

⁴³⁶ See section 2.3.1(f), page 56, above.

⁴³⁷ See section 5.5.2, page 144, above.

On the other hand, maintaining a high quality of universal service would not be wholly incompatible with the objectives of current policy and the new regulatory model. One could imagine, for example, adding a provision to the new regulatory model authorizing Member States to establish minimum quality of service standards for universal services. For example, Community law might require each Member State to ensure universal service achieves D+1 service (delivery one business day after posting) for a minimum percentage of postal items sent by the fastest standard category. Such a provision could supplement the more basic reliability standard proposed in the new model.

6.3.5 Minimization of sector specific regulation

For some members of the postal sector, the objectives of Community postal policy should place a greater emphasis on minimization of sector specific regulation. The normal commercial market has worked well for most types of commercial activities, they would say, and so there is no reason why postal services should be treated differently. We suspect that this would be the counsel of most economists. An associate editor of the *Financial Times* expressed this philosophy in a recent defense of free markets as follows:

While of the state's activities are unquestionably essential, even well-run liberal democracies do far more than they can do well and almost certainly far more than they need to do. There are strong pressures for governments to 'do something' where nothing might be far better.⁴³⁸

Advocates of this view could urge several changes in the objectives of Community postal policy to minimize sector specific regulation. For example,

- Non-universal postal services could be withdrawn from sector specific regulation.
- The definition of universal service could be limited to single piece letters and parcels sent by individual users.⁴³⁹
- Regulation of market dominant providers of universal services could be left to competition authorities; the task of the NRA could be limited to definition of universal service and arrangement of supplemental universal services.
- National NRAs could be replaced by a Community level regulator to minimize differences between the regulations in Member States and reduce the cost of regulation.

⁴³⁸ M. Wolf, *Why Globalization Works* (2004) at 65.

⁴³⁹ For a detailed argument why a more limited definition of universal service should be adopted in the future see M. Finger, I. Alyanak, and P. Rossel, 'The Universal Postal Service in the Communications Era: Adapting to Changing Markets and Customer Behavior' (2005). This study concludes that 'There is no need for a Universal Service Obligation (USO) for business customers. As a matter of fact, the vast majority of letter mail volume is generated by the business sector: approx. 80 to 85 percent of all mail is sent by companies to either consumers or other companies.' Page 2.

In developing the new regulatory model, we concluded that current Community policy implies a higher level of regulatory control over market dominant operators at both Community and Member State level to *ensure* the quality of universal services which do not face market discipline.⁴⁴⁰ Similarly, we provided for minimal regulation of non-universal postal services because this is implied by current Community policy.

We do not suggest, however, that reduction in sector specific regulation of postal markets is an implausible or unreasonable objective for the long term. Indeed, postal reform in New Zealand has travelled far along this route without yet arriving at the final destination.⁴⁴¹ To be workable, however, we suspect that, in the absence of sector specific regulation, all of the disciplines of the normal commercial market must be fully effective. In a normal market, private ownership and capital markets reinforce the threat of competition to force economic rationality on undertakings. Reduction in sector specific regulation may therefore imply that Member States governments must sell their interest in the public postal operator and withdraw entirely from the commercial aspects of the business.⁴⁴²

It is certainly possible to imagine ways to modify the new regulatory model to reflect better the objective of reducing sector specific relation. For example, regulation of non-universal postal services could be left to the option of Member States or prohibited entirely. Another possibility would be to permit Member States to suspend NRA regulation of universal services by market dominant postal operators if the Member State government has privatized the public postal operator and entirely withdrawn from the market.⁴⁴³

6.4 Conclusions with respect to a new postal directive

While the new regulatory model developed in Chapter 5 is not a proposal for a new postal directive, it may be treated as a source for concepts and even specific provisions, provided several important caveats are kept in mind.

First, one must accept that the proposition that a new directive should be based on

⁴⁴⁰ See section 5.5, page 141, above.

⁴⁴¹ New Zealand has no reserved area and no statutory guarantee of universal service. The law requires providers of letter post services to comply with only a few sector specific obligations (e.g., respect for privacy of correspondence, marking of envelopes to inform addressees of responsibility for carriage, protection of national security). Nonetheless, NZ Post is still fully owned by government and, as owner, government requires NZ Post to maintain a schedule of universal services.

⁴⁴² Issues posed by government ownership of the public postal operator were outside the scope of this study.

⁴⁴³ The 'opt out' concept suggested in the text is somewhat similar to the Article 14(8) of the Postal Directive which allows an NRA to exempt the USP from the accounting controls of the Directive if it does not benefit from a reserved area or compensation fund. While the new regulatory model does not accept the proposition that mere absence of a reserved area is sufficient to justify an end to regulatory controls of market dominant operators, we believe that the further step of complete government withdrawal from the commercial aspects of the postal sector provides a much more plausible case for ending sector specific regulation of commercially viable services.

sound regulatory principles such as those identified in this study. On this point, we would argue that sound regulatory principles are indeed the correct starting point.

Second, a new directive must address transitional issues. In this chapter, we have outlined some of the major transitional problems that might be posed. Overall, we do not believe that transition from the current model to the new model presents major risks or obstacles, but transitional considerations may take time and imply significant additions to the new regulatory model.

Third, and most importantly, it will be necessary to reconsider and determine the objectives of the postal regulation. In the new regulatory model, we have assumed continued support for the objectives that we have ascribed to the current regulatory model. We do *not* assert that these are *correct* objectives for the Community; we only assert that they are the *current* objectives (or at least, our interpretation thereof). It is for the Community policymaking process to decide what are the ‘correct’ objectives.

Appendix: Comparison of Current and New Regulatory Models

This table compares the major features of the current regulatory model for Community postal services, as set out in the Postal Directive, and the corresponding features of the new regulatory model presented in Chapter 5 of the report.

In many cases, after a regulatory feature is described, the table provides the relevant text from the current Postal Directive and an *example* illustrating how the corresponding feature of the new regulatory model might be expressed in legislative language. The purpose of these examples is to offer a more precise description of the feature of the new regulatory model under consideration, not to propose articles in an actual directive.

The new regulatory model is theoretical model only. As explained in Chapter 6, development of a actual draft directive necessarily involves considerations outside the scope of this study.

Item	Topic	Current Regulatory Model	New Regulatory Model
1	Objectives of Community postal policy		
1.1	Statement of objectives	<p>The Directive does not include an explicit statement of objectives. From various sources, WIK has <i>inferred</i> the objectives of Community postal policy to be:</p> <ol style="list-style-type: none"> 1) to protect and promote an affordable, reliable, and efficient universal postal service; and 2) to promote a fully operational internal market in postal services. <p><u>Directive</u></p> <p>No provision.</p>	<p>The objectives of Community postal policy should be stated as explicitly and coherently as possible. SRP1; SRP7. Policy objectives should also be consistent with more general economic and social policy of the Community. SRP2.</p> <p>For purposes of the new model, the basic objectives inferred for current Community postal policy should be retained but restated in accordance with these principles. <i>In this study, WIK expresses no opinion on whether these objectives are the appropriate objectives for future policy in the Community.</i></p> <p><u>Example</u></p> <p>The objective of Community postal policy is to promote development of a fully operational internal market in postal services while ensuring the availability of an accessible, affordable, reliable, and efficient universal postal service that responds to the basic needs of users and society by—</p> <ol style="list-style-type: none"> (a) establishing and relying upon a Community market without internal frontiers in which the free movement of postal services is ensured in conditions of undistorted competition; (b) prescribing objective, transparent, and non-discriminatory requirements for providers of postal services to the extent necessary and appropriate to protect the rights of users and essential public interest requirements; (c) defining at Community level a basic universal postal service encompassing a minimum range of affordable services of

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>specified reliability for the benefit of all users, irrespective of their geographical location in the Community, whose supply shall be further specified and ensured by all Member States in a manner appropriate to their national needs;</p> <p>(d) providing objective, transparent, and non-discriminatory regulation by independent authorities of universal postal services offered under conditions of market dominance to the extent necessary and appropriate to ensure the availability of universal service of appropriate quality without distortion of competition;</p> <p>(e) providing necessary and appropriate financial support and other means to ensure the supply of universal service in circumstances in which universal service is not otherwise satisfactorily supplied.</p>
2	Regulation of postal services generally		
2.1	General concept	The Directive provides for regulation of all types of public and private 'services'—presumably postal-type services—to protect 'essential requirements' and users' rights, but the scope and nature of regulation is ill-defined.	All types of public and private postal services—specifically defined (SRP7)—could be subject to certain minimal requirements to promote the public interest and operation of the market consistent with the objectives of Community postal policy.
2.2	Definition of postal services	<p>The term <i>postal service</i> is defined by reference to the services of the USP. The Directive does not specify how regulation of 'services' (as in 'non-reserved services') is related to the definition of <i>postal service</i>.</p> <p><u>Directive</u></p> <p>Art. 2. 1. postal services: services involving the clearance, sorting, transport and delivery of <u>postal items</u>;</p>	<p>The scope of regulation should be clearly limited to <i>postal services</i> and the term defined to include in a non-discriminatory manner all services of a 'postal-like' nature whether provided by public or private operators. SRP5; SRP7.</p> <p><u>Example</u></p> <p>Postal service: a regularly scheduled service that is offered to the general public for compensation and that provides, on at least a weekly basis, collection, transport, and delivery of diverse postal items.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>6. postal item: an item addressed in the final form in which it is to be carried <u>by the universal service provider</u>. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;</p>	<p>Postal item: a document, envelope, parcel, or similar thing that is wrapped and addressed in a form suitable for conveyance by a postal service and weighs no more than 30 kilograms. Postal items may consist of or contain such things as correspondence, books, catalogues, newspapers, periodicals and packages containing merchandise with or without commercial value.</p>
2.3	Authorization of postal operators	<p>The Directive provides for three types of authorizations for postal operators:</p> <ol style="list-style-type: none"> 1) A general authorization for ‘non-reserved services’ <u>outside</u> the universal service area conditioned on compliance with essential requirements. 2) A general authorization for ‘non-reserved services’ <u>inside</u> the universal service area conditioned on compliance with essential requirements and certain conditions to safeguard universal service 3) A licence for ‘non-reserved services’ inside the universal service area conditioned on compliance with essential requirements and certain conditions to safeguard universal service. <p><u>Directive</u></p> <p>Art. 9.1. For non-reserved services which are outside the scope of the universal service as defined in Article 3, Member States may introduce general authorisations to the extent necessary in order to guarantee compliance with the essential requirements.</p> <p>2. For non-reserved services which are within the scope of the universal service as defined in Article 3, Member States may introduce authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the</p>	<p>A single type of general authorization could be required of all providers of postal services, without limitation as to geography or type of services, subject to compliance with requirements of the new model and implementing legislation or regulations. These requirements will vary depending on upon the postal service provided. Failure to maintain compliance with the requirements would be grounds for penalty or revocation. SRP3.</p> <p><u>Example</u></p> <ol style="list-style-type: none"> 1. In order to implement the provisions of this directive, a Member State may require that undertakings desiring to provide postal services comply with the terms of a general authorization regulation that conforms to the following provisions: <ol style="list-style-type: none"> (a) The undertaking concerned may be required to submit a notification to the national regulatory authority but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>essential requirements and to safeguard the universal service.</p> <p>The granting of authorisations may:</p> <ul style="list-style-type: none"> - where appropriate, be made subject to universal service obligations, - if necessary, impose requirements concerning the quality, availability and performance of the relevant services, - be made subject to the obligation not to infringe the exclusive or special rights granted to the universal service provider(s) for the reserved postal services under Article 7(1) and (2) <p>3. The procedures described in paragraphs 1 and 2 shall be transparent, non-discriminatory, proportionate and based on objective criteria. Member States must ensure that the reasons for refusing an authorisation in whole or in part are communicated to the applicant and must establish an appeal procedure.</p>	<p>stemming from the authorization. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use specified in this article.</p> <ul style="list-style-type: none"> (b) The notification required shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of the postal services covered by the authorization and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of such services. This information must be limited to what is necessary for the identification of the provider, such as company registration numbers, and the provider's contact persons, the provider's address, a short description of the network or service, and an estimated date for starting the activity. (c) No more than one authorization regime, covering the provision of all or a specified subset of postal services, may be introduced for providers of postal services. No type of authorization or licence procedure may be introduced for providers of postal services other than the authorization procedures set out in this article. (d) Undertakings authorized to provide postal service pursuant to this paragraph shall have the right to provide all services covered by the authorization without limitation, including limitations with respect to the type of services provided or the geographic areas served. <p>2. Authorization provided under this article may be subject to a continuing duty of substantial compliance with legislation, regulations, and orders authorized by this directive. Any determination by the national regulatory authority that an undertaking is no longer entitled to use the general authorization must be stated in writing, together with a full statement of the reasons for the determination, and</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>communicated to the undertaking.</p> <p>3. Authorization procedures established pursuant to this article shall be objective, transparent, non-discriminatory, and proportionate.</p>
<p>2.4</p>	<p>Reserved area</p>	<p>Member States are permitted to establish a reserved area for the benefit of postal operators designated as USPs.</p> <p><u>Directive</u></p> <p>Art. 7.1. To the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s). Those services shall be limited to the clearance, sorting, transport and delivery of items of domestic correspondence and incoming cross-border correspondence, whether by accelerated delivery or not, within both of the following weight and price limits. . . .</p> <p>To the extent necessary to ensure the provision of universal service, direct mail may continue to be reserved within the same weight and price limits.</p> <p>To the extent necessary to ensure the provision of universal service, for example when certain sectors of postal activity have already been liberalised or because of the specific characteristics particular to the postal services in a Member State, outgoing cross-border mail may continue to be reserved within the same weight and price limits.</p>	<p>Member States should not be permitted to establish a reserved area (except for possible transitional arrangements permitted by the Commission). SRP3, SRP6.</p> <p><u>Example</u></p> <p>Member States shall not grant or maintain in force exclusive or special rights relating to the provision of postal services.</p>
<p>2.5</p>	<p>Essential public interest requirements</p>	<p>USPs are required to comply with essential requirements. 'Non-reserved services' may be required to comply with essential requirements. The definition of <i>essential requirements</i> is unclear.</p>	<p>All postal operators could be required to comply with a specific set of essential public interest requirements. Such conditions should not exceed what is necessary to address issues specific to the postal sector. SRP3; SRP7.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p><u>Directive</u></p> <p>Art. 5.1. Each Member State shall take steps to ensure that universal service provision meets the following requirements:</p> <ul style="list-style-type: none"> - it shall offer a service guaranteeing compliance with the essential requirements, <p>For <i>non-reserved services</i>, Art. 9 permits Member State to require compliance with <i>essential requirements</i>, defined as follows in Article 2.:</p> <p>Art 2.19. essential requirements: general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons are the confidentiality of correspondence, security of the network as regards the transport of dangerous goods and, where justified, data protection, environmental protection and regional planning.</p> <p>Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy.</p>	<p><u>Example</u></p> <p>1. Member States may require postal operators, as a condition of authorization, to comply with measures which address the following considerations:</p> <ul style="list-style-type: none"> (a) maintenance of the confidentiality and integrity of correspondence and data transported; (b) maintenance of the security of valuable goods transported; (c) promotion of practices that protect the public security, safety, health, or morals; and (d) non-involvement of persons convicted of crimes relating to dishonesty. <p>2. Such considerations may be required as conditions of an authorization only to the extent that they are presented in a unique or acute form in the postal sector and cannot practically be addressed in more general measures.</p>
2.6	User protection	<p>Under the Directive, protection of user rights:</p> <ul style="list-style-type: none"> 1) Must be required of the USP and may be required of other 'services'. 2) Must include a right of appeal to a 'competent national authority'. 3) Shall be the subject of a report by the USP published annually. 	<p>Protection of user rights should be:</p> <ul style="list-style-type: none"> 1) required equally of all postal operators. SRP5. 2) include the right of appeal to the NRA in cases involving universal service. SRP5. 3) be the subject of a report by the NRA published annually. SRP5.

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p><u>Directive</u></p> <p>Art. 19. Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved). Member States may provide that this principle is also applied to beneficiaries of services which are:</p> <ul style="list-style-type: none"> - outside the scope of the universal service as defined in Article 3, and - within the scope of the universal service as defined in Article 3, but which are not provided by the universal service provider. <p>Member States shall adopt measures to ensure that the procedures referred to in the first subparagraph enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation.</p> <p>Without prejudice to other possibilities of appeal under national and Community legislation, Member States shall ensure that users, acting individually or, where permitted by national law, jointly with organisations representing the interests of users and/or consumers, may bring before the competent national authority cases where users' complaints to the universal service provider have not been satisfactorily resolved.</p> <p>In accordance with Article 16, Member States shall ensure that the universal service providers publish, together with the annual report on the monitoring of their performance, information on the number of complaints and the manner in which they have been dealt with.</p>	<p><u>Example</u></p> <ol style="list-style-type: none"> 1. The national regulatory authority shall ensure that transparent, simple, and inexpensive procedures are drawn up for dealing with complaints of users of postal services, particularly in cases involving loss, theft, damage, or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved). These procedures shall enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation. 2. In addition to protections of users required of all postal operators, and without prejudice to other possibilities of appeal under national and Community legislation, Member States shall ensure that users of universal services, acting individually or, where permitted by national law, jointly with organizations representing the interests of users and/or consumers, may bring before the national regulatory authority cases where users' complaints to a postal operator have not been satisfactorily resolved. 3. The national regulatory authority shall publish at least once per year a report giving information on the number of complaints relating to universal services and the manner in which they have been dealt with by postal operators and, if applicable, by the national regulatory authority or other bodies. In addition, the report shall provide information on measures taken by postal operators, if necessary and appropriate, to reduce or eliminate the cause of the complaints.

Item	Topic	Current Regulatory Model	New Regulatory Model
2.7	Market transparency	<p>The Directive addresses market transparency as follows:</p> <ol style="list-style-type: none"> 1) the Directive requires USPs, but not other postal operators, to publish information about universal services, but not other services; and 2) the Directive does not require any postal operator to provide basic statistical information to NRAs. <p><u>Directive</u></p> <p>Art 6. Member States shall take steps to ensure that users are regularly given sufficiently detailed and up-to-date information by the universal service provider(s) regarding the particular features of the universal services offered, with special reference to the general conditions of access to these services as well as to prices and quality standard levels. This information shall be published in an appropriate manner.</p>	<p>The new model could foster greater market transparency (SRP 4; SRP5) by:</p> <ol style="list-style-type: none"> 1) requiring a basic level of transparency to be provided for the benefit of all users of public postal services; and 2) requiring all postal operators to provide basic market statistics to NRAs for consolidation into an annual statistical report by the Commission. <p><u>Example</u></p> <ol style="list-style-type: none"> 1. The national regulatory authority shall ensure that users are regularly given sufficiently detailed and up-to-date information by postal operators regarding the particular features of the postal services offered to the general public, with special reference to conditions of access, terms and conditions, prices, and quality of service to be provided. This information shall be published in an appropriate manner. 2 (a) National regulatory authorities, taking into account any common rules adopted pursuant to Article X, shall submit to the Commission a summary of available market statistics and other information relating to postal services in such form and at such time as the Commission shall determine. (b) The Commission shall annually publish a statistical report that provides users, operators, regulators, legislators, and the general public with appropriate information on the development of Community postal services while respecting the confidentiality needed to protect the rights of all parties and the operation of the internal market.

Item	Topic	Current Regulatory Model	New Regulatory Model
2.8	Address databases and post code systems	The Directive has no provision on the address database and post code system.	All postal operators could have access to and share in cost of the maintenance of the address database. All postal operators should be able to participate in evolution of the post code system. SRP4; SRP5.
3	Universal service		
3.1	General concept	Rather than defining criteria for the acceptable supply of universal service by a normal commercial market, the Directive provides that Community universal service will be provided by one (implicitly) government-designated <i>universal service provider</i> in each Member State and requires strict regulation of the universal services provided by the USP.	The new model provides for the competitive supply of universal service by defining the minimum criteria of <i>basic universal service</i> that must be supplied and thus the corresponding obligation of the Member State to intervene in the market to provide supplemental services. SRP3; SRP5.
3.2	Services included in universal service	<p>The Directive loosely defines <i>universal service</i> as the conveyance of certain types of things by a USP rather than by describing the precise nature of the service to be ensured.</p> <p><u>Directive</u></p> <p>Art. 3.4. Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:</p> <ul style="list-style-type: none"> - the clearance, sorting, transport and distribution of postal items up to 2 kilograms, - the clearance, sorting, transport and distribution of postal packages up to 10 kilograms, - services for registered items and insured items. <p>5. The national regulatory authorities may increase the weight-limit</p>	<p><i>Universal service</i> could be defined as a specific type of service independent of the identity of the postal operator providing the service as a <i>letter post</i> service that also offers <i>parcel post</i> service where needed. SRP3; SRP5; SRP7.</p> <p><u>Example</u></p> <p>1. Each Member State shall ensure that at all points in its territory there is available a universal postal service provided by one or more postal operators who collectively provide, through their own facilities or by interconnection with other postal operators, the following specific services (except as permitted by paragraph 2 of this article):</p> <p>(a) one or more letter post services for postal items weighing up to 2 kilograms, provided the national regulatory authority may decrease the maximum weight for such letter post service to not less than 500 grams and introduce limitations on the size of items if required by the public interest;</p> <p>(b) one or more parcel post services which provide for collection and</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>of universal service coverage for postal packages to any weight not exceeding 20 kilograms and may lay down special arrangements for the door-to-door delivery of such packages.</p> <p>Art 2. 6. postal item: an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;</p> <p>['Postal package' is undefined.]</p>	<p>delivery of parcel post items weighing up to 10 kilograms in conjunction with letter post services, provided that the national regulatory authority may increase the maximum weight for such parcel post service to not more than 20 kilograms if required by the public interest; and</p> <p>(c) registration and insurance services in connection with conveyance of all items covered under this paragraph.</p> <p>2. This article shall not require provision of parcel post services in circumstances where the national regulatory authority determines that:</p> <p>(a) there is no significant demand for the collection of parcels with letter post items; or</p> <p>(b) there is no significant demand for the delivery of parcels with letter post items.</p> <p>3. Definitions—</p> <p>(a) Letter post: a postal service that conveys letters and other types of written or printed communications such as periodic publications (newspapers, magazines, etc.) and direct mail; a letter post may also convey other postal items of comparable size.</p> <p>(b) Letter: an individualized communication in written form on any kind of physical medium.</p> <p>(c) Parcel post: a postal service that conveys all types of postal items, where at least part of the operations are provided in conjunction with a letter post.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
3.3	Access and clearance	<p>The Directive requires Member States to “take account” of the needs of users while ensuring access to universal service.</p> <p><u>Directive</u></p> <p>Art 3.2. To this end, Member States shall take steps to ensure that the density of the points of contact and of the access points takes account of the needs of users.</p>	<p>The right of access to universal service may be stated more positively as a necessary characteristic of universal service. SRP3; SRP7.</p> <p><u>Example</u></p> <p>The universal service shall provide access through a sufficient number of offices, agencies, public collection boxes, or other means to meet the basic needs of all users for the dispatch of letter post and parcel post items.</p>
3.4	Universal delivery	<p>The Directive requires that universal service provides for delivery of postal items and packages to the home or premise of every natural or legal person in the Community or to an alternative repository appointed by such natural or legal person, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities.</p>	<p>The new model should likewise require that universal service provides for delivery of letter post and parcel post items to the home or premise of every natural or legal person in the Community or to an alternative repository appointed by such natural or legal person, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities. SRP3.</p>
3.5	Affordability	<p>The Directive requires that universal service should be ‘affordable for all users’ but does not define the concept of affordability.</p> <p><u>Directive</u></p> <p>Art. 3.1 Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.</p> <p>Art. 12. Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:</p> <ul style="list-style-type: none"> - prices must be affordable and must be such that all users have access to the services provided, 	<p>The new model could define the term <i>affordability</i> so that it can be enforced. The concept of <i>affordability</i> should be related to the needs of natural persons of low income or special needs to use the universal service, not to the requirements of commercial users. SRP3; SRP7.</p> <p><u>Example</u></p> <p>Member States shall, in the light of national conditions, require that, if necessary, providers of universal services offer tariff options to consumers which depart from those provided under normal commercial conditions to ensure that those on low incomes or with special social needs are not prevented from accessing or using the publicly available universal postal service.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
3.6	Personal and price discrimination	<p>The Directive prohibits both personal discrimination (i.e., discrimination based on political, religious, or ideological considerations) and price discrimination in the provision of universal service.</p> <p><u>Directive</u></p> <p>Art. 5.1. Each Member State shall take steps to ensure that universal service provision meets the following requirements: . . . it shall be made available without any form of discrimination whatsoever, especially without discrimination arising from political, religious or ideological considerations; . . .</p> <p>Art. 12. Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles: . . . tariffs must be transparent and non-discriminatory.</p>	<p>The new model should prohibit personal discrimination in the provision of universal service. However, the new model should not prohibit price discrimination in supply of <i>competitive</i> universal services because price discrimination leads to lower prices and expanded output (prohibitions on price discrimination should be continued in market dominant markets). SRP3.</p> <p><u>Example</u></p> <p>Universal service shall be provided without any form of personal discrimination, in particular, discrimination based on political, religious, or ideological considerations.</p>
3.7	Intra-Community service	<p>The Directive requires Member State to 'encourage' USPs to set prices for delivery of intra-Community universal service items that are cost-based, related to quality, transparent, and non-discriminatory.</p> <p><u>Directive</u></p> <p>Art. 13. 1. In order to ensure the cross-border provision of the universal service, Member States shall encourage their universal service providers to arrange that in their agreements on terminal dues for intra-Community cross-border mail, the following principles are respected:</p> <p>- terminal dues shall be fixed in relation to the costs of processing and delivering incoming cross-border mail,</p>	<p>The new model should require providers of universal service to give intra-Community universal service items the same prices and services as equivalent national universal service items. SRP3; SRP5; SRP7.</p> <p><u>Example</u></p> <p>1. Except as provided in paragraph 2, Member States and their national regulatory authorities shall ensure that providers of universal service shall provide comparable services to users of intra-Community and national universal services under comparable conditions.</p> <p>2. Notwithstanding any contrary weight limit of universal service coverage for parcel post services established by a Member State</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
		<ul style="list-style-type: none"> - levels of remuneration shall be related to the quality of service achieved, - terminal dues shall be transparent and non-discriminatory. 	<p>under Article X, each Member State shall ensure that parcel post items from other Member States weighing up to 20 kilograms are delivered within their territories.</p>
<p>3.8</p>	<p>Quality of service and frequency of clearance and delivery</p>	<p>The Directive requires:</p> <ol style="list-style-type: none"> 1) Collection and delivery of all universal service products at least 5 days per week. 2) Member States to establish quality of service standards for all national universal services that are consistent with uniform cross-border quality of service standards set in the Directive. 3) NRAs to ensure that independent monitoring is provided and reports published once per year. <p>Member States have only limited authority to create derogations from universal service requirements in response to specific circumstances.</p> <p>The Directive does not recognize the operational interrelationship between quality of service and delivery frequency. Nor does the Directive recognize the operational differences between letter post and parcel post.</p> <p><u>Directive</u></p> <p>Art. 3.3. They shall take steps to ensure that the universal service provider(s) guarantee(s) every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a minimum:</p>	<p>The new model should not impose a costly standard for the frequency of clearance and delivery for all universal services since such a standard may exceed the needs of users and adversely affect the price and overall performance of universal services. For the same reasons, the new model should not impose uniform quality of service criteria on all Member States. Member States should have authority to adjust the parameters of universal service to meet the needs of their citizens, subject to the minimum Community level criteria needed to accomplish Community objectives. Because letter post and parcel post are operationally distinct, Member States should have discretion to adopt different universal service standards for each. SRP3; SRP6.</p> <p>The goal of affordable, reliable, and efficient universal postal service may be accomplished in <i>competitive markets</i> by requiring all Member States to ensure that universal services meet a minimum standard of <i>reliability</i>, i.e., a routing time standard within which almost all universal service items are delivered. Moreover, in a competitive market, reports by postal operators and other observers should generally suffice to keep the NRA informed about quality of service. SRP3; SRP5.</p> <p><u>Example</u></p> <ol style="list-style-type: none"> 1. Member States shall ensure that the universal service shall provide for conveyance of letter post and parcel post items from the point of access to the point of delivery within the standards of reliability set out in this article. 2. For items conveyed by the fastest standard category of service

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>- one clearance,</p> <p>- one delivery to the home or premise of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations.</p> <p>Article 16. Member States shall ensure that quality-of-service standards are set and published in relation to universal service in order to guarantee a postal service of good quality.</p> <p>Quality standards shall focus, in particular, on routing times and on the regularity and reliability of services.</p> <p>These standards shall be set by:</p> <ul style="list-style-type: none"> - the Member States in the case off national services; - the European Parliament and the Council in the case of intra-Community cross-border services . . . <p>Independent performance monitoring shall be carried out at least once a year by external bodies having no links with the universal service providers under standardized conditions to be specified in accordance with the procedure laid down in Article 21 and shall be the subject of reports published at least once a year.</p> <p>Article 17. Member States shall lay down quality standards for national mail and shall ensure that they are compatible with those laid down for intra-Community cross-border services. . . .</p> <p>National regulatory authorities shall ensure that independent performance monitoring is carried out in accordance with the fourth subparagraph of Article 16, that the results are justified, and that corrective action is taken where necessary.</p>	<p>between two points in a single Member State, each user shall have access to at least one provider of universal service who provides delivery to the addressee of at least P percent of items within D working days after the day of deposit, provided deposit occurs before the last collection time publicly noted for the access point, where the values of P and D are as follows:</p> <p>(a) For letter post items, P equals [?] and D equals [?]; and</p> <p>(b) For parcel post items: P equals [?], and D equals [?].</p> <p>3. The reliability standards set out in paragraph 2 shall apply equally to items deposited by a user within the Member State and to items deposited by a postal operator brought from outside the Member State or postal district.</p> <p>4. For items conveyed by the fastest standard category of service between a point in a single Member State or postal district and a point in a second Member State or postal district, each user shall have access to at least one provider of universal service who provides delivery to a postal operator in each destination Member State or postal district at least X percent of items within D working days after the day of deposit, where the values of X and D are as follows:</p> <p>(a) For letter post items, X equals [???], and D equals [???]; and</p> <p>(b) For parcel post items: X equals [???], and D equals [???].</p> <p>5. A national regulatory authority may exempt from the reliability standards set out in paragraphs 2 and 4 services to or from certain areas due exceptional circumstances or geographic conditions.</p>

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3.9	User and consumer protection	See item 2.6, above.	See item 2.6, above.
3.10	Privacy of letters	The Directive requires universal service to protect 'essential requirements' but does not require that Member States include protection of privacy of letters in the definition of 'essential requirements'. See item 2.5, above.	The new model should explicitly require Member States to ensure the privacy of letters conveyed by the universal service. See item 2.5, above.
3.11	Security of valuables	Although the Directive requires that users should be able to insure items conveyed in the universal service, it does not require Member States to ensure that the security of valuable items conveyed by the universal service is assured by reasonable and prudent measures.	The new model should require Member States to ensure that the security of valuable items conveyed by the universal service is assured by reasonable and prudent measures.
4	Postal operators with market dominant power		
4.1	General concept	Current Directive requires specific regulation of postal operators designated as USPs. USPs almost necessarily have market dominance because (1) they have been designated as USPs and (2) they may have the benefit of a reserved area, but the scope of regulation is unrelated to existence of market dominance.	The new model requires specific regulation only for market dominant postal operators ('designated operators') in respect to specific universal service products in which they exercise market dominance ('designated products'). SRP3; SRP5.
4.2	Identification of market dominant postal operators	<p>The identity of postal operators subjected to specific regulation is determined by government designation as USP.</p> <p><u>Directive</u></p> <p>Art. 4. Each Member State shall ensure that the provision of the universal service is guaranteed and shall notify the Commission of the steps it has taken to fulfill this obligation and, in particular, the identity</p>	<p>The identity of postal operators subjected to specific regulation is determined by an objective procedure that aims to (1) identify market dominant power (2) while maintaining a reasonably uniform approach in the Community that (3) is consistent with the competition rules. SRP3; SRP6; SRP7.</p> <p><u>Example</u></p> <p>Article X. Definition of significant market power</p> <p>1. A postal operator shall be deemed to have significant market</p>

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		<p>of its universal service provider(s). Each Member Suite shall determine in accordance with Community law the obligations and rights assigned to the universal service provider(s) and shall publish them.</p>	<p>power (a 'designated operator') if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is, a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.</p> <p>2. After consultation with the public and national regulatory authorities, the Commission shall adopt a Recommendation on relevant product and service markets ('the Recommendation'). The Recommendation shall identify products within the scope of universal postal service, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in this chapter, without prejudice to markets that may be defined in specific cases under competition law. In its analysis, the Commission shall also take into account the changing nature of the communications market and interrelationships between postal and non-postal communications and transportation services. The Commission shall define markets in accordance with the principles of competition law.</p> <p>3. The Commission shall also publish guidelines for market analysis and the assessment of significant market power ('the Guidelines') which shall be in accordance with the principles of competition law.</p> <p>4. The Commission shall regularly review the Recommendation and Guidelines to ensure consistency with market conditions and administration of the competition rules.</p> <p>Article XX. Identification of significant market power</p> <p>1. National regulatory authorities shall, taking the utmost account of the Recommendation and the Guidelines and after consultation with the Commission and other national regulatory authorities pursuant to Article X, define relevant products ('designated products') appropriate to national circumstances, in particular relevant geographic markets</p>

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			<p>within their territory, in accordance with the principles of competition law.</p> <p>2. After consultation with national regulatory authorities the Commission may, pursuant to Article Y, adopt a Decision identifying transnational markets.</p> <p>3. National regulatory authorities shall regularly review their definitions of relevant products to ensure consistency with market conditions and administration of the competition rules.</p>
4.3	Tariffs	<p>Article 12 requires Member State to ensure that all universal service tariffs meet certain legislative criteria. Key features:</p> <ol style="list-style-type: none"> 1) Prices must be affordable (see item 3.5). 2) Tariffs must be geared to costs. 3) Member States may require uniform tariffs. 4) All universal service tariffs must be transparent. 5) Tariffs must be non-discriminatory. 6) No requirement that prices should be related to service quality 7) Cross-subsidy is permitted from reserved area to other universal services if necessary. 	<p>The new model could provide that market dominant operators should establish tariffs that meet regulatory guidelines. SRP3; SRP5: SRP7. Key features:</p> <ol style="list-style-type: none"> 1) Prices must be affordable (see item 3.5). 2) Tariffs must be geared to costs. 3) Member States may not require uniform tariff, but postal operators may introduce either uniform or zoned tariff if cost effective. 4) Public tariffs and conditions must be transparent. The postal operator must publish a summary of non-public tariffs and conditions. 5) Tariffs must be non-discriminatory, both as to price and associated conditions. 6) Tariffs shall include provision for reasonable compensation for the user if published quality of service standards are not met. 7) No cross-subsidy permitted between designated products and other products.

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		<p>8) No requirement that tariffs meet the objectives needs of users.</p> <p><u>Directive</u></p> <p>Art. 12. Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:</p> <ul style="list-style-type: none"> - prices must be affordable and must be such that all users have access to the services provided, - prices must be geared to costs; Member States may decide that a uniform tariff should be applied throughout their national territory, - the application of a uniform tariff does not exclude the right of the universal service provider(s) to conclude individual agreements on prices with customers, - tariffs must be transparent and non-discriminatory. . . . - cross-subsidisation of universal services outside the reserved sector out of revenues from services in the reserved sector shall be prohibited except to the extent to which it is shown to be strictly necessary to fulfil specific universal service obligations imposed in the competitive area; except in Member States where there are no reserved services, rules shall be adopted to this effect by the national regulatory authorities who shall inform the Commission of such measures. 	<p>8) Tariffs should be reasonably calculated to meet the needs of users</p> <p><u>Example</u></p> <p>1. A designated operator shall establish the tariffs for each of the designated products that are comply with the following principles:</p> <ul style="list-style-type: none"> (a) prices shall be geared to costs, provided that uniform rates and rate zones may be used to reduce administrative costs; (b) tariffs shall be non-discriminatory, both as to price and associated conditions; (c) tariffs shall be reasonably calculated to meet the needs of users; (d) tariffs shall include provision for reasonable compensation for user if published quality of service standards are not met; (e) cross-subsidisation of non designated products by revenues from designated products shall be prohibited. <p>2. A designated operator shall publish and keep up-to-date, the standard tariff and the standard terms and conditions, applicable to each designated product, in such form and at such times as the national regulatory authority may require. In addition, the designated operator shall publish quarterly, in such form as the national regulatory authority may require, the following information:</p> <ul style="list-style-type: none"> (a) For each designated product sold at a discount compared to the standard tariff and conveyed in compliance with terms and conditions similar to standard terms and conditions: <ul style="list-style-type: none"> (i) the principles or guidelines applied in giving the discount; and

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			<p>(ii) the discount given, expressed as a percentage of the price usually charged for such designated product under standard tariff; and</p> <p>(b) Each set of non-standard terms and conditions applied to the conveyance of a designated product, together with the tariff charged.</p> <p>3. The national regulatory authority shall ensure that tariffs established by a designated operator for designated products are consistent with requirements of directive and based on objective considerations.</p>
4.4	Special tariffs	<p>Article 12 requires that special tariffs are non-discriminatory and based on avoided costs (in unclear sense).</p> <p><u>Directive</u></p> <p>[Art. 12, indent] Whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs shall take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items and, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to private customers who post under similar conditions,</p>	<p>The new model could require that special tariffs should be non-discriminatory but allow NRAs to decide on specific means of applying general price principles to special tariffs. SRP3; SRP5. SRP6.</p> <p><u>Example</u></p> <p>Special tariffs (for example for services for businesses, bulk mailers or consolidators of mail from different customers) shall in particular apply equally both as between different third parties and as between third parties and postal operators supplying equivalent services, and any such tariffs shall also be available to private customers who post under similar conditions.</p>

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4.5	Accounting requirements	<p>Article 14 of the Directive requires USPs, but not other operators, to maintain accounts according to certain rules. Key features:</p> <ol style="list-style-type: none"> 1) Separate accounts for each reserved service, for non-reserved universal services, and for non-universal services. No accounting requirement in absence of reserved area. 2) Directly and indirectly assignable costs to be assigned; unassigned common costs to allocated in proportion to assignable costs. 3) NRA ensures compliance with cost allocation principles is verified by competent independent body. No publication of the system of accounts. 4) No public summary of regulatory accounts. <p><u>Directive</u></p> <p>Art 14. 2. The universal service providers shall keep separate accounts within their internal accounting systems at least for each of the services within the reserved sector on the one hand and for the non-reserved services on the other. The accounts for the non-reserved services should clearly distinguish between services which are part of the universal service and services which are not. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.</p> <p>3. The accounting systems referred to in paragraph 2 shall, without prejudice to paragraph 4, allocate costs to each of the reserved and to the non-reserved services respectively in the following manner:</p>	<p>The new model could require market dominant postal operators to maintain accounts according to certain rules. SRP 3; SRP4; SRP5; SRP6; SRP7. Key features:</p> <ol style="list-style-type: none"> 1) Separate accounts for each market dominant product and for other postal services. 2) Directly and indirectly assignable costs to be assigned; unassigned common costs to allocated in proportion to assignable costs except deviation is justifiable under several public interest considerations. 3) NRA to review and approve system of accounts used to allocate costs and to publish. 4) Public summary of regulatory accounts to be published annually consistent with protection for commercially sensitive data. <p><u>Example</u></p> <ol style="list-style-type: none"> 1. A designated operator shall keep separate accounts within its internal accounting systems for each of the designated products, on the one hand, and for other postal services, on the other. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles. 2. The accounting systems referred to in paragraph 1 shall assign or allocate costs to each of the designated products and to other postal services collectively in the following manner: <ol style="list-style-type: none"> (a) costs which can be directly assigned to a particular service shall be so assigned; (b) common costs, that is costs which cannot be directly assigned to

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		<p>(a) costs which can be directly assigned to a particular service shall be so assigned;</p> <p>(b) common costs, that is costs which cannot be directly assigned to a particular service, shall be allocated as follows:</p> <p>(i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;</p> <p>(ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;</p> <p>(iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the reserved services and, on the other hand, to the other services.</p> <p>4. Other cost accounting systems may be applied only if they are compatible with paragraph 2 and have been approved by the national regulatory authority. The Commission shall be informed prior to their application.</p> <p>5. National regulatory authorities shall ensure that compliance with one of the cost accounting systems described in paragraphs 3 or 4 is verified by a competent body which is independent of the universal service provider. Member States shall ensure that a statement concerning compliance is published periodically.</p> <p>6. The national regulatory authority shall keep available, to an adequate level of detail, information on the cost accounting systems</p>	<p>a particular service, shall be allocated as follows:</p> <p>(i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;</p> <p>(ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;</p> <p>(iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the designated products and, on the other hand, to the other postal services.</p> <p>3. The national regulatory authority may approve modifications to the allocation of common costs provided in paragraph 2(b)(iii) based on a careful consideration the following criteria:</p> <p>(a) a fair and reasonable allocation of unassigned common costs between designated products, on the one hand, and other postal products, on the other, to protect users of designated products from unreasonably high prices and to prevent unfair competition against providers of non-designated products;</p> <p>(b) the public interest in promoting the exchange of cultural mail;</p> <p>(c) the need to maintain the affordability of tariffs for the socially, medically, and economically disadvantaged;</p> <p>(d) the effect of different allocation methods on the total output of</p>

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		<p>applied by a universal service provider, and shall submit such information to the Commission on request.</p> <p>7. On request, detailed accounting information arising from these systems shall be made available in confidence to the national regulatory authority and to the Commission.</p> <p>8. Where a given Member State has not reserved any of the services reservable under Article 7 and has not established a compensation fund for universal service provision, as permitted under Article 9(4), and where the national regulatory authority is satisfied that none of the designated universal service providers in that Member State is in receipt of State subvention, hidden or otherwise, the national regulatory authority may decide not to apply the requirements of paragraphs 2, 3, 4, 5, 6 and 7 of this Article. The national regulatory authority shall inform the Commission of all such decisions.</p>	<p>postal services and overall consumer welfare; and</p> <p>(e) such other factors as the national regulatory authority deems relevant.</p> <p>4. The national regulatory authority shall review and approve the system of accounts used by the designated operator to assign or allocate categories of input costs (e.g., salaries, rent, equipment, vehicles, contract transportation, capital goods, etc.) to individual designated products and to other postal services collectively. To the maximum extent possible, objective criteria, such as volumes, time (labour) usage, or intensity of usage, should be used as the basis for assignment or allocation. The national regulatory authority shall publish and keep up to date the approved system of accounts together with explanatory notes providing details of the approach adopted and the reasons therefor.</p> <p>5. The designated operator shall submit to the national regulatory authority the accounts required by paragraph 1, in such form and at such times as the national regulatory authority may require, provided that such accounts shall be required by the national regulatory authority at least annually.</p> <p>6. The national regulatory authority shall verify that the accounts are drawn up in accordance with this article and may employ a competent body which is independent of the universal service provider to assist in this verification.</p> <p>7. The national regulatory authority shall publish at least annually a summary of the verified regulatory accounts of the designated operator. The summary shall take due account of the right of the designated operator for confidentiality of sensitive commercial information as well as the right of users to have a basic understanding of the basis for tariffs of designated products. Subject to these</p>

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			<p>considerations, the summary shall provide at least the following data on an annual basis:</p> <p>(a) for major designated products individually and for minor designated products grouped in an appropriate manner:</p> <ul style="list-style-type: none"> (i) total revenue; (ii) total volume; (iii) total cost; (iv) total costs assigned to the product under each of the procedures specified in paragraphs (2)(a), (2)(b)(i), and (2)(b)(ii), further broken down by major categories of input costs. (v) total costs assigned to the product under paragraph (2)(b)(iii); and <p>(b) for other postal services collectively:</p> <ul style="list-style-type: none"> (i) total revenue; (ii) total cost; and (iii) total costs assigned to the products under paragraph (2)(b)(iii).
4.6	Downstream access and interconnection	No provision on regulation of downstream access.	NRAs could be required to provide access to a market dominant postal operators where necessary to ensure universal service and in other cases permitted to provide access where necessary to implement Community or Member State objectives.

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		<p><u>Directive</u></p> <p>No provision.</p>	<p><u>Example</u></p> <p>1. Where necessary to ensure the availability of universal service, the national regulatory authority shall, on application of any affected party or its own initiative, require a designated operator to provide access to its network on such terms and tariffs as the national regulatory authority considers appropriate.</p> <p>2. Where, in respect to provision of a designated product, access to the network of a designated operator is requested by a user or other postal operator but denied by a designated operator and the national regulatory authority considers such access unnecessary to ensure the availability of universal service, the national regulatory authority shall require access to the network of the designated operator only if and to the extent it considers such access to be necessary and proportionate to accomplishment of the objectives of Community or Member State postal policy.</p>
<p>4.7</p>	<p>Access, quality of service, and delivery frequency</p>	<p>The Directive requires:</p> <ol style="list-style-type: none"> 1) Collection and delivery of all universal service products at least 5 days per week. 2) Member States to establish quality of service standards for all national universal services. 3) NRAs to ensure that independent monitoring is provided and reports published once per year. <p>The Directive does not recognize the operational interrelationships between quality of service and delivery frequency.</p>	<p>Market dominant postal operators could be required to establish collection, quality of service, and delivery service standards in respect to market dominant products (designated products) in accordance with regulatory guidelines. SRP3; SRP5; SRP6; SRP7.</p> <ol style="list-style-type: none"> 1) Service standards must be objective, non-discriminatory, and reasonably calculated to meet the needs of users. 2) NRA should assure that service standards meet these regulatory guidelines. 3) NRA to monitor performance, with specific focus on products of most importance to individual users.

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		<p><u>Directive</u></p> <p>Art. 3(3). They shall take steps to ensure that the universal service provider(s) guarantee(s) every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a minimum:</p> <ul style="list-style-type: none"> - one clearance, - one delivery to the home or premise of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations. <p>Article 16. Member States shall ensure that quality-of-service standards are set and published in relation to universal service in order to guarantee a postal service of good quality.</p> <p>Quality standards shall focus, in particular, on routing times and on the regularity and reliability of services.</p> <p>These standards shall be set by:</p> <ul style="list-style-type: none"> - the Member States in the case of national services, . . . <p>Independent performance monitoring shall be carried out at least once a year by external bodies having no links with the universal service providers under standardized conditions to be specified in accordance with the procedure laid down in Article 21 and shall be the subject of reports published at least once a year.</p> <p>Article 17. Member States shall lay down quality standards for national mail and shall ensure that they are compatible with those laid down for intra-Community cross-border services. . . .</p>	<p><u>Example</u></p> <ol style="list-style-type: none"> 1. For designated products, a designated operator shall establish standards for access, for the frequency and manner of collection and delivery in all areas serviced, and for the quality of service to be provided, and such standards shall be objective, non-discriminatory, and reasonably calculated to meet the needs of users. 2. A designated operator shall publish information on delivery and quality of service standards for designated products in such form and at such times as the national regulatory authority may require. 3. The national regulatory authority shall ensure that delivery and quality of service standards established by a designated operator for designated products are consistent with this directive and based on objective considerations. 4. The national regulatory authority shall provide for independent performance monitoring of designated products provided by designated operators. The monitoring shall be provided by external bodies having no links with the designated operator. Monitoring shall be conducted under standardized conditions specified in accordance with the procedure laid down in Article X. The national regulatory authority shall publish a report on the results of monitoring at least annually or more often if feasible. The report shall address the quality of service provided for at least the following products if provided as designated products: <ol style="list-style-type: none"> (a) single-piece letter post items sent by (i) the fastest standard category and (ii) the second fastest standard category, if any; (c) parcel post items sent by (i) the fastest standard category and (ii)

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		<p><u>National regulatory authorities shall ensure that independent performance monitoring</u> is carried out in accordance with the fourth subparagraph of Article 16, that the results are justified, and that corrective action is taken where necessary.</p>	<p>the second fastest standard category, if any.</p>
5	Supplemental universal services		
5.1	<p>Measures to ensure universal service</p>	<p>Under the current Directive, the Member State or NRA ensure universal service as follows:</p> <ol style="list-style-type: none"> 1) The Member State or the NRA designates a postal operator (invariably owned wholly or partly by the Member State) as the USP, thus obliging the postal operator to provide all universal services to the entire national territory. 2) The Member State compensates the USP for costs incurred in the provision of universal services that would not otherwise be provided by one or more of three procedures: <ol style="list-style-type: none"> a) the USP is entitled to the financial benefits of a reserved area; b) the USP is compensated for the ‘unfair financial burden’ of universal service from taxes imposed on providers of universal service other than the USP and deposited in a compensation fund; and c) the USP is paid funds from general government revenues. <p>There is no clear relationship between the costs incurred in the provision of universal services that would not otherwise be provided and the compensation provided.</p>	<p>The NRA could be authorized and required to ensure universal service by arranging for specific supplemental universal services wherever basic universal service is not provided voluntarily by postal operators. SRP3: SRP4; SRP5; SRP6; SRP7.</p> <ol style="list-style-type: none"> 1) NRAs should adopt an explicit definition of the criteria of basic universal service and require providers of universal service to provide advance notice of intent to reduce service below minimum levels. 2) NRA should contract with providers of universal services for supplemental universal services. 3) Where necessary, NRA should order providers of universal service to provide supplemental universal services in return for compensation for losses. <p>Whether supplemental universal services are arranged by contract or administrative order, the basis of compensation should be the long run marginal costs incurred and the arrangements should be consistent with the principles of the <i>Altmark</i> judgement.</p>

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		<p><u>Directive</u></p> <p>Art. 4. Each Member State shall ensure that the provision of the universal service is guaranteed and shall notify the Commission of the steps it has taken to fulfill this obligation and, in particular, the identity of its universal service provider(s). Each Member State shall determine in accordance with Community law the obligations and rights assigned to the universal service provider(s) and shall publish them.</p> <p>Art. 7.1. To the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s). . . .</p> <p>Art. 9.4. In order to ensure that the universal service is safeguarded, where a Member State determines that the universal service obligations, as provided for by this Directive, represent an unfair financial burden for the universal service provider, it may establish a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries. In this case, it may make the granting of authorisation subject to an obligation to make a financial contribution to that fund. . . . Only those services set out in Article 3 may be financed in this way.</p>	<p><u>Example</u></p> <p>1. The national regulatory authority shall encourage, and where necessary and appropriate require, postal operators, users, and the general public to provide advance notice of situations in which universal service is not being provided in accordance with standards established pursuant to this directive or there is reason to believe that such a situation may arise.</p> <p>2. Whenever the national regulatory authority determines that provision of letter post and parcel post services in any part of the national territory falls significantly below the standards established by Community legislation or by Member State legislation or regulations, or there is a substantial likelihood of such event in the future, the national regulatory authority shall</p> <p>(a) enter into a contract with one or more postal operators, under such terms as may be mutually agreeable, to provide such services as will ensure the continuous provision of universal service meeting the established standards; or</p> <p>(b) if unable to enter into an appropriate contract, require one or more postal operators to provide such services under such terms as will, in the judgement of the national regulatory authority, ensure the continuous provision of universal service meeting the established standards.</p> <p>3. A contract for supplemental universal services, or an order requiring the provision of supplemental universal services, shall be consistent with the following principles:</p> <p>(a) the postal operator should be obliged to provide universal</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>services under terms of service that are clearly defined in contract or order;</p> <p>(b) the basis of compensation shall be specified beforehand in an objective and transparent manner;</p> <p>(c) the compensation shall not exceed the long run marginal costs incurred in provision of supplemental universal services, taking into account the relevant receipts and a reasonable profit for providing such services.</p> <p>(d) where the postal operator providing supplemental universal services has not been chosen in a public procurement procedure, the level of compensation needed shall be determined on the basis of an analysis of the costs which a typical postal operator, well run and adequately provided with means necessary to provide relevant services, would have incurred in providing such services, taking into account the relevant receipts and a reasonable profit for discharging the obligations.</p> <p>4. A Member State may authorize the national regulatory authority, acting under the terms of this article, to contract with or require providers of universal service to offer additional public services such as, for example, free universal services for the blind and partially sighted persons.</p> <p>5. The national regulatory authority shall provide for supplemental universal services in accordance with this article in an objective, transparent, and non-discriminatory manner. At least once per year, the national regulatory authority shall publish a complete summary of its provision for supplemental services under this article.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
5.2	Funding universal service	<p>Under the Directive, the cost of providing universal services that would not otherwise be provided is funded by one or more of three sources:</p> <ol style="list-style-type: none"> 1) Users of the USP (primarily non-bulk mailers) who send a disproportionate fraction of the mail to urban addresses (and other low cost areas). 2) Users of postal operators, other than the USP, who provide services within the universal service area, regardless of the addresses to which mail is sent. 3) Taxpayers in the case of direct payments from general government revenues to the USP). <p><u>Directive</u></p> <p>[The primary method of funding universal service is the internal cross-subsidy permitted by the reserved area, but details of the cross-subsidy are not specified in the directive. The closest parallel to a universal service fund is the compensation fund, provided by Article 9(4), given below].</p> <p>Art. 9.4. In order to ensure that the universal service is safeguarded, where a Member State determines that the universal service obligations, as provided for by this Directive, represent an unfair financial burden for the universal service provider, it may establish a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries. In this case, it may make the granting of authorisation subject to an obligation to make a financial contribution to that fund. The Member State must ensure that the principles of transparency, non-discrimination and proportionality</p>	<p>The cost of supplemental universal services should be funded by one or both of two sources:</p> <ol style="list-style-type: none"> 1) Users of letter and direct mail services who send a disproportionate fraction of mail (bulk and non-bulk) to addresses other than addresses served by supplemental universal services. 2) Taxpayers in the case of direct payments from general government revenues. <p>For simplicity, an assessment should be expressed as a fixed amount per letter and per direct mail item. Total assessment could be limited as a percentage of revenue earned for products assessed; funds in excess of this limit would have to be paid from general revenues.</p> <p><u>Example</u></p> <ol style="list-style-type: none"> 1. Each Member State shall provide the national regulatory authority sufficient funds to pay for the costs of supplemental universal services. Funds shall be provided from general governmental revenues or from a universal postal service fund established in accordance with paragraph 2. 2. A Member State may establish a universal postal service fund as follows. <ol style="list-style-type: none"> (a) The fund shall be established by and under the direction of the national regulatory authority. (b) The fund shall consist of contributions which the national regulatory authority shall collect from postal operators as follows:

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>are respected in establishing the compensation fund and when fixing the level of the financial contributions. Only those services set out in Article 3 may be financed in this way.</p>	<p>(i) The national regulatory authority shall fix the assessment as a specific amount letter or per direct mail item. The assessment may reflect a reasonable approximation of any geographical cross-subsidy previously implemented pursuant to Article 12 of Directive 97/67/EC. The assessment may also take into account public policies adopted by the Member State which may imply a rate of assessment that varies by type of product.</p> <p>(ii) Each postal operator providing postal services for letters and direct mail shall collect the assessment on each letter and direct mail item which weighs less than 100 grams and is conveyed for a charge less than three times the average public tariff for a letter in the first weight step of the fastest category, provided that the national regulatory authority may exempt postal operators that convey fewer than a specific number of items.</p> <p>(iii) Postal operators required to collect such assessments shall maintain such records and remit funds as the national regulatory authority shall direct.</p> <p>(c) The fund may be used only to pay the costs of supplemental universal services provided in accordance with Article X.</p> <p>(d) The national regulatory authority shall ensure that the total funds collected in accordance with this article do not exceed Y percent of the total revenues earned by postal operators on the postal items subject to assessment.</p> <p>(e) The national regulatory authority shall respect the principles of objectivity, transparency, non-discrimination, and proportionality in establishing the fund and fixing the level of assessments.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
6	National regulatory authorities		
6.1	Establishment	<p>The Directive requires each Member State to establish an independent NRA, but provides relatively few details on institutional arrangements.</p> <p><u>Directive</u></p> <p>Art. 22. Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. . . .</p> <p>The national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive and shall, where appropriate, establish controls and specific procedures to ensure that the reserved services are respected. They may also be charged with ensuring compliance with competition rules in the postal sector.</p>	<p>The NRA should be established according to provisions requiring institutional independence, including structural separation from ministries where the government owns a public postal operator, and a transparent delegation of authority. SRP5; SRP6; SRP7.</p> <p><u>Example</u></p> <ol style="list-style-type: none"> 1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in the new regulatory model is undertaken by a competent body. 2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing postal services. Member States that retain ownership or control of undertakings providing postal services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control. 3. Member States shall ensure that national regulatory authorities have full legal authority necessary to carry out the tasks assigned to them. 4. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently. 5. Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate consultation and

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>cooperation between those authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. Where more than one authority has competence to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.</p> <p>6. National regulatory authorities and national competition authorities shall provide each other with the information necessary for the application of the provisions of this directive. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as the originating authority.</p>
<p>6.2</p>	<p>Power to obtain information</p>	<p>The Directive does not address the authority of the NRA to obtain information generally. Nor does the Directive address the duty of the NRA to share information, except for provisions relating to the duty of the NRA and USP to provide certain accounting information to the Commission (and various notice requirements).</p> <p><u>Directive</u></p> <p>Art 14.6. The national regulatory authority shall keep available, to an adequate level of detail, information on the cost accounting systems applied by a universal service provider, and shall submit such information to the Commission on request.</p> <p>7. On request, detailed accounting information arising from these systems shall be made available in confidence to the national regulatory authority and to the Commission.</p>	<p>The new model should explicitly ensure the authority of the NRA to obtain information necessary to carrying out the tasks assigned to it or require the sharing of appropriate information with the Commission and other NRAs and the publication of appropriate information for the public. SRP5; SRP6; SRP7.</p> <p><u>Example</u></p> <p>1. Member States shall ensure that postal operators shall provide all the information, including financial information, necessary for the national regulatory authority to ensure conformity with the provisions of, or decisions made in accordance with, this directive. These undertakings shall provide such information promptly on request and to the time scales and level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>2. Member States shall ensure that national regulatory authorities provide the Commission, after a reasoned request, with the information necessary for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where the information provided refers to information previously provided by undertakings at the request of the national regulatory authority, such undertakings shall be informed thereof. To the extent necessary, and unless the authority that provides the information has made an explicit and reasoned request to the contrary, the Commission shall make the information provided available to another such authority in another Member State. Subject to the requirements of paragraph 3, Member States shall ensure that the information submitted to one national regulatory authority can be made available to another such authority in the same or different Member State, after a substantiated request, where necessary to allow either authority to fulfil its responsibilities under Community law.</p> <p>3. Where information is considered confidential by a national regulatory authority in accordance with Community and national rules on business confidentiality, the Commission and the national regulatory authorities concerned shall ensure such confidentiality.</p> <p>4. Member States shall ensure that, acting in accordance with national rules on public access to information and subject to Community and national rules on business confidentiality, national regulatory authorities publish such information as would contribute to an open and competitive market.</p> <p>5. National regulatory authorities shall publish the terms of public access to information as referred to in paragraph 4, including procedures for obtaining such access.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
6.3	Consultation with affected parties	<p>The Directive includes no provision on the duty of the NRA to consult with interested users and other parties.</p> <p><u>Directive</u></p> <p>[No provision]</p>	<p>The new model should include a provision obliging the NRA to consult with interested users and other parties and to inform the public of decisions taken. SRP5; SRP7.</p> <p><u>Example</u></p> <ol style="list-style-type: none"> 1. Member States shall ensure that where national regulatory authorities intend to take measures which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. 2. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.
6.4	Right of appeal	<p>The Directive includes no provision on the right of parties to appeal from decisions of the NRA.</p>	<p>The new model should ensure the right of affected parties to appeal a decision of the NRA and require the NRA to provide a written statement of the grounds for decision to facilitate the appeal. SRP5; SRP7.</p> <p><u>Example</u></p> <ol style="list-style-type: none"> 1. Each decision of the national regulatory authority which may adversely affect the rights or interests of a private person shall state in writing the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision. The decision shall

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.</p> <p>2. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing postal services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. The appeal body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the national regulatory authority or the appeal body decides otherwise.</p> <p>3. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.</p>
7	Community-level institutions		
7.1	Committee of Member States	<p>The Directive provides for establishment of a committee of Member States (usually called the 'Postal Directive Committee') to assist the Commission generally. The Commission and the committee, acting together, are authorized to adjust two key regulatory standards in the Directive:</p> <p>1) the quality of service standards for cross-border universal services; and</p>	<p>The new model should provide for establishment of a committee of Member States to assist the Commission in matters of postal policy, while establishing a committee of NRAs to address more technical, regulatory issues. SRP6. In addition to providing general assistance, the committee, acting with the Commission according to accepted procedures, may be authorized to adjust key <i>policy</i> parameters of the new model, such as.</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>2) standardized procedures for independent monitoring of the quality of service of universal services.</p> <p><u>Directive</u></p> <p>Art. 16. . . . [Quality of service] standards shall be set by:</p> <ul style="list-style-type: none"> - the Member States in the case of national services, - the European Parliament and the Council in the case of intra-Community cross-border services (see Annex). Future adjustment of these standards to technical progress or market developments shall be made <u>in accordance with the procedure laid down in Article 21</u>. <p>Independent performance monitoring shall be carried out at least once a year by external bodies having no links with the universal service providers under standardized conditions to be specified <u>in accordance with the procedure laid down in Article 21</u> and shall be the subject of reports published at least once a year.</p> <p>Art. 21. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by a representative of the Commission. The committee shall establish its own rules of procedure.</p> <p>The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be</p>	<p>1) the reliability standard for universal service; and</p> <p>2) the maximum level of assessment for funding supplemental universal services</p> <p><u>Example</u></p> <p>1. The Commission shall be assisted by a committee, to be called the Postal Policy Committee, composed of representatives of the Member States and chaired by a representative of the Commission.</p> <p>2. The committee shall be composed of the officials of Member States responsible to the development of policy towards the postal sector or their representatives. Experts from EEA States and those states that are candidates for accession to the European Union may participate as observers in the committee. The committee may invite other experts and observers to attend its meetings. The Commission shall provide the secretariat to the Group.</p> <p>3. The committee shall advise and assist the Commission in all matters relating to the implementation of Community policy towards to the postal sector and its future development.</p> <p>4. The Commission and the committee may, pursuant to the procedures established by Articles 5 and 7 of Decision 99/468/EC and having regard to the provisions of Article 8 thereof, adopt such decisions as may be appropriate to —</p> <p>(a) adjust the reliability standard established in Article X of this directive; and</p> <p>(b) adjust the maximum level of assessment for funding supplemental</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p>delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.</p> <p>The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.</p> <p>If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken.</p> <p>The Council shall act by a qualified majority.</p> <p>If, upon the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.</p>	<p>universal services provided in Article Y of this directive.</p> <p>5. The committee shall adopt its own rules of procedure.</p> <p>6. The Commission shall provide the committee with all relevant information on the outcome of regular consultations with the representatives of postal operators, users, consumers, manufacturers and trade unions, as well as third countries and international organizations.</p> <p>7. The committee shall, taking account of the Community's postal policy, foster the exchange of information between the Member States and between the Member States and the Commission on the situation and the development of activities regarding postal services.</p>
<p>7.2</p>	<p>Committee of NRAs</p>	<p>The Directive does not provide for a Community level institution for directly coordinating the work of the NRAs. CERP provides a level of coordination although it includes non-Community members and lacks formal authority under the Directive.</p>	<p>The new model should provide for a Community level committee of NRAs to assist the Commission in matters relating to the tasks committed to NRAs under the new model. SRP6; SRP7. In addition to providing general assistance, the committee, acting with the Commission according to accepted procedures, adjusts key <i>regulatory</i> parameters of the new model, such as matters relating to:</p> <ol style="list-style-type: none"> 1) measurement and monitoring of the quality of service; 2) a uniform system of accounts for postal operators with market dominant power;

Item	Topic	Current Regulatory Model	New Regulatory Model
		<p><u>Directive</u></p> <p>No provision.</p>	<p>3) authorization of postal operators;</p> <p>4) market statistics.</p> <p>The committee could also be authorized to assist NRAS by performing such tasks as Member States may delegate to it.</p> <p><u>Example</u></p> <p>1. The Commission shall be assisted by a committee, to be called the Postal Regulatory Committee, composed of representatives of national regulatory authorities and chaired by a representative of the Commission.</p> <p>2. The committee shall be composed of the heads of the national regulatory authority in each Member State primarily responsible for implementation of this directive, as determined by the Commission, or their representatives. Experts from EEA States and those states that are candidates for accession to the European Union may participate as observers in the committee. The committee may invite other experts and observers to attend its meetings.</p> <p>3. The committee shall advise and assist the Commission in all matters relating to the regulation of the postal sector.</p> <p>4. The Commission and the committee may, pursuant to the procedures established by Articles 5 and 7 of Decision 1999/468/EC and having regard to the provisions of Article 8 thereof, establish common rules for:</p> <p>(a) the measurement and monitoring of the quality of service of universal services;</p>

Item	Topic	Current Regulatory Model	New Regulatory Model
			<p>(b) a uniform system of accounts for postal operators with market dominant power;</p> <p>(c) simple and consistent procedures for authorization of postal operators;</p> <p>(d) a system of market statistics that will provide government officials and the general public with adequate and consistent data about the sector without inhibiting competition or imposing an undue burden on postal operators.</p> <p>5. The committee may, pursuant to a request or delegation of authority from a Member State, assist a national regulatory authority in respect to any tasks committed to it under this directive.</p> <p>6. The committee shall adopt its own rules of procedure and arrange for its own secretariat.</p>
7.3	Harmonization of technical standards	The Directive establishes a procedure whereby the Commission may entrust CEN with drawing up technical standards applicable in the postal sector.	The new model should retain the same provisions and employ them primarily for standardization of operating standards for postal operators.

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