



ERGP opinion requested by the European Commission
European cross-border e-commerce parcels delivery and
questions related to market analysis

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INTRODUCTION

Background to the work

In its January 2012 communication, *A coherent framework for building trust in the Digital Single Market for e-commerce and online services* (COM (2011) 942 final)¹, the European Commission presented a number of initiatives aimed at, by creating trust in the digital single market, doubling the share of e-commerce in retail sales and that of the internet sector in European GDP by 2015. In the related press release², the Commission notes that it seeks to “*facilitate cross-border access to online products and content, ultimately solve the problems of payment, delivery and consumer protection and information, and assist dispute resolution and the removal of illegal content (...)*” and notes that “*consumers often lack confidence in online trade or services and are concerned about whether their rights will be respected, especially when a problem arises*”.

End November 2012, in a related context, the Commission released for consultation its green paper looking more specifically at delivery, *An integrated parcel delivery market for the growth of e-commerce in the EU*³, noting that delivery “*has a substantial impact on facilitating e-commerce trade and is a key element for building trust between sellers and buyers (...)*” and is “*characterised by a series of complex logistics operations*” in which “*many operators play a role*”. The green paper indicates that “*cross-border delivery is considered to be an obstacle by 57% of retailers*” and that “*delivery concerns and those relating to products returns are the top two concerns of [end-user] consumers in relation to online shopping*”.

The request from the Commission for the current report stems broadly from the same overall aim of creating trust in the integrated market for e-commerce and online services by, in part, ensuring that the delivery of products bought online functions effectively to the benefit of consumers and businesses.

Aim of the work

The aim of the ERGP in this report is to provide advice on how, if this was ever judged necessary, the Commission or national regulators might go about carrying out a market analysis of European cross-border e-commerce parcels delivery from an ex-ante sectoral regulation point of view and to provide advice on related steps as necessary. The work draws notably on information provided by national regulatory authorities via a questionnaire sent to European regulators⁴ in June 2013 and on available literature on market analysis.

To note, the ERGP is not asked to carry out a market analysis, collect data on the market, or define the market and there is no presumption that there is (or is not) a problem with the market that might require an ex-ante regulation solution. Indeed, the mission attributed to the ERGP is without prejudice to the need for market analysis, the conclusion of any such analysis, or the need for ex-ante regulation. Given that e-commerce parcels delivery is not a traditional postal service, the ERGP is asked to “look outside the box” of current regulation

1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF>

2 http://europa.eu/rapid/press-release_IP-12-10_en.htm?locale=en

3 http://ec.europa.eu/internal_market/consultations/docs/2012/parcel-delivery/121129_green-paper-parcel-delivery_en.pdf

4 All references to a particular country in the current report refer to the related regulator.

A report looking at the delivery of European cross-border e-commerce parcels

The work relates to *delivery* of European cross-border e-commerce parcels and not to the e-commerce online selling market per se. As is discussed later on in the report, if necessarily closely linked, they are two distinct markets (or groups of markets), which likely have very different competitive situations. The first involves, generally, a contract being formed by an online seller with a delivery operator for parcels delivery, and the second involves a contract between the private individual buyer and the online seller for a (delivered) product but not for delivery as such.

As a related comment, the group is looking specifically at the market(s) to which delivery of e-commerce parcels belongs, but this does not mean that, for competition law or ex-ante regulation purposes, the market(s) concerned would necessarily be limited to parcels stemming from e-commerce. Finally, the group is looking specifically at cross-border delivery in Europe and not at domestic delivery with no cross-border aspect.

The 2013 questionnaire

The work is based on two main sources: general literature where relevant and an ERGP 2013 questionnaire. The report broadly follows the outline of the questionnaire, which covered notably issues related to the context of ex-ante regulation, market definition, the effectiveness of competition and any potential market barriers or issues concerning European cross-border e-commerce parcels delivery, and possible next steps.

The questionnaire was sent to European national regulatory authorities and the ERGP received 23 replies. A summary of the reply for each country is included in annex to this report. To note, all references in the report to the reply of a particular “country” refer to the reply of the regulator of the country concerned.

The current report

The report firstly (part I) discusses the context of ex-ante regulation: how it relates to competition law, its aims, when it might be put in place, the steps that lead to ex-ante regulation, and what issues it may be adapted to solving. It also looks (part II) at market definition, providing general information on documents and sectors that may be relevant for defining the market(s) to which European cross-border e-commerce parcels delivery belongs, before discussing certain specific issues concerning these market(s), such as substitution and the implications of the “newness” of the market(s) for market definition.

The ERGP notes that it has no indication that there is a specific competition problem on European cross-border e-commerce parcels delivery market(s) that may be best dealt with by ex-ante regulation or that general competition law, national or European, could not resolve any competition issues that may arise. Its work does not indicate a need for full formal market analysis or regulation at the present time, noting of course that there is no mandate for such a task and it would not be a question for NRAs in any case (who do not decide whether to regulate a given sector). It also notes that competition may be effective, or may become so of its own accord.

Bearing these caveats in mind, however, the report broadly discusses (part III) various possible problems that may be present on, or affect, the market(s) concerned as a first step to determining (part IV), of these issues, which might *result from* delivery and be potentially related to the work of an ex-ante regulator.

With the same caveats in mind, the ERGP concludes that it may be useful for the Commission and/ or regulators to better understand the development of the sector, which is still emerging. Indeed, the ERGP recommends that a (limited) collect of further information on the sector be undertaken in 2014 to better understand the sector’s functioning and any possible competition issues, and to ensure that competition

does develop of its own accord. The key messages of the report and detail on the proposed work for 2014 are summed up at the end of the report.

PART I – THE CONTEXT OF EX-ANTE REGULATION

The aims of ex-ante regulation and its role in comparison to ex-post competition law

In the European Union, all undertakings are subject to European Union competition law, and, where applicable, also to additional national competition law. On the other hand, ex-ante regulation applies only to those sectors that have been expressly made subject to such an additional set of rules. Indeed, before ex-ante regulation is applied, a political decision is necessary that a certain sector needs to be governed by an additional set of rules that are aimed at promoting effective competition.

Ex-ante regulation, applied only where competition law alone is held to be insufficient, is usually introduced in a market situation characterized by a manifest absence of effective competition. Such market situations might occur if undertakings individually or jointly control bottle neck infrastructures. As a result, potential new market entrants face high barriers to market entry that in some cases can even discourage market entry at all. Prominent examples are the sectors for electronic communications, electricity and gas, railways as well as the postal services.

The main aim of ex-ante regulation is promoting effective competition to the benefit of consumers. In this respect ex-ante regulation shares commonalities with general competition law. There are, however, important differences. One element that differentiates the two legal frameworks is their starting point for launching procedures that may lead to the imposition of obligations and/or fines. In competition law, enforcement procedures normally start if a dominant undertaking has (allegedly) abused its market power or if an undertaking has (allegedly) engaged in agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within the internal market. Hence, while competition law applies to every undertaking active in the internal market, no undertaking is *per se* subject to competition law (ex-post) enforcement measures, but only if it violates Article 101 or 102 of the TFEU (and/or national competition law). Ex-ante regulatory obligations, on the other hand, are imposed without any present infringement by the undertaking concerned. The starting point for the use of regulatory measures is the absence of effective competition on a relevant market and ex-ante regulatory obligations are imposed, depending on the sector, on all undertakings or only on undertakings with significant market power.

In comparison to competition law, ex-ante regulation can be considered as more intrusive (again, it applies without any infringement of law) and is generally an instrument of last resort. Ex-ante regulation does not supersede competition law; both legal frameworks apply in parallel. As an example, in electronic communications, it is principally sufficient for the imposition of regulatory obligations that the undertaking concerned possesses significant market power on a relevant market that is susceptible to ex-ante regulation.

The three criteria test

Once it has been decided that a sector will be subjected to ex-ante regulation in addition to general competition law, that is once a political decision to this effect has been taken, the actual framework needs to be designed according to the requirements of the respective sector and, particularly, the competition problems at hand. Indeed, ex-ante regulation is not a uniform solution to competition issues in different sectors and the legal regime that sets up a sectoral regulatory framework needs to be adapted to the competitive situation of the sector concerned. As an example, present ex-ante regulatory regimes covering network industries such as electronic communications, postal services and railways are each considerably different.

However, one key question that is common to all regulated sectors is the identification of the starting point for the imposition of ex-ante regulatory measures by NRAs. In this respect, the regulatory framework for

electronic communications provides for a flexible approach that builds on competition law principles and the idea that markets shall become effectively competitive over time. This consideration is set out in recital 5 of directive 2009/140/EC, which provides that “[t]he aim is [to] progressively reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, [...] to be governed by competition law alone”.

To identify which markets within the electronic communications sector are susceptible to ex-ante regulation, the European Commission has developed the so-called “three criteria test”. However, the test was put in place only after a general political decision was taken to apply ex-ante regulation to the sector. Furthermore, as highlighted by a number of NRAs in their reply to the questionnaire, pursuing the three criteria test also first requires the definition of the relevant product market and its geographic scope to which the test is then applied. Indeed, the three criteria test is not a tool that allows for an automatic conclusion that ex-ante regulation will be applied and which undertakings need to be regulated. Instead, the test is one step in an open analytical process that can lead to the imposition of obligations.

The test, set out in point 2 of the Commission recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation⁵, foresees that markets are susceptible to ex-ante regulation if the following three criteria are cumulatively met:

- *“The presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;*
- *A market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry;*
- *The insufficiency of competition law alone to adequately address the market failure(s) concerned”.*

The Commission has used the test for establishing a list of telecoms markets susceptible to ex-ante regulation that must be analysed by all 28 national regulatory authorities (NRAs) of the European Union. The application of the three criteria test is also recommended where NRAs consider identifying additional markets susceptible to ex-ante regulation.

However, that a market cumulatively meets the three criteria of the test, i.e. that a positive conclusion that a certain market is susceptible to ex-ante regulation has been made, is not sufficient for the imposition of regulatory obligations as such. Again, the three criteria test is not a standalone tool but one step in an open analytical process. In telecoms regulation, regulatory obligations may only be imposed, maintained or amended on undertakings where a relevant market is not effectively competitive and the undertaking(s) concerned individually or jointly possess significant market power. The imposition of regulatory obligations therefore requires that any market that is susceptible to ex-ante regulation is further analysed as to the state of effective competition on the market and, more particularly, the presence of undertakings with significant market power. The full analytical process that allows for the imposition of regulatory obligations therefore usually comprises the following steps: (i) definition of the relevant product/service market and of the geographic scope of that market; (ii) performance of the three criteria test (unless the market is listed in the Commission’s recommendation on relevant markets); (iii) finding of absence of effective competition on the relevant market; (iv) identification of the undertaking(s) that individually or jointly have a significant market power; (v) imposition of regulatory obligations.

⁵ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2007/879/EC, OJ L 344 of 28 November 2007, page 65.

The three criteria test therefore helps limit ex-ante regulatory obligations to markets where there is no effective and sustainable competition, but it is not sufficient for a conclusion that ex-ante regulatory measures need to be imposed. Regardless of the result of the three criteria test, ex-ante regulation will not be put in place if no undertaking can be identified as having significant market power.

The three criteria test as a pertinent tool for e-commerce parcels delivery markets

In the electronic communications sector, the three criteria test has been shown to be a tool apt for identifying markets that, in principle, warrant ex-ante regulation. The test has, however, so far not been used in other sectors than electronic communications.

While differing views exist whether the test is pertinent for the European cross-border e-commerce parcels delivery markets, a majority of NRAs confirmed its pertinence. In this respect, and putting aside whether ex-ante regulation is needed, if the test is generally seen as broadly relevant for any sector, it has been noted by five regulatory authorities (the Cypriot, German, Greek, Dutch and Maltese regulators) that the test might, though, have to be adapted to the features of the e-commerce parcel delivery market(s), whereas only two regulatory authorities believed that no adaptation is needed

Finally, ex-ante regulation is not necessarily the best tool for solving all competition problems present on a market. For instance, general competition law is better placed to address anti-competitive behaviour, such as tacit collusion, price rigging, or abuse of a dominant position than ex-ante regulatory tools. That said, ex-ante regulation would not be put in place to address uniquely non-competition issues: where ex-ante regulation is held to be necessary, it may have aims or effects that go beyond competition issues on the regulated market (it could, for example, help improve the fluidity of competition on a related market or the general clarity and enforcement of consumers' purchasing rights) but it would not be put in place for these reasons in the absence of a competition issue.

PART II - MARKET DEFINITION - EXPERIENCE FROM OTHER SECTORS AND PARTICULARITIES OF EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY

Building on the theoretical information of part I, part II of the report looks at market definition from a slightly more practical view point. As noted above, the aim of the group is not to actually define the market(s) concerned, a necessary step to formally determining if there are competition problems on a given market that are pertinent for ex-ante regulation. Rather, whether or not formal market definition is ever necessary, the aim is to indicate how the market could be analysed. The current section provides, firstly, information on what documents and sectors may be relevant for defining, for ex-ante purposes, the relevant market(s) for European cross-border e-commerce parcels delivery. It then looks at issues related specifically to European cross-border e-commerce parcels delivery: what are the implications of the “newness” of the market(s) for market definition or for better understanding the market(s) concerned? What products might be in the relevant market and what questions regarding substitutability could be looked at further to better understand the market’s boundaries? What might be the implications for national regulation if the market(s) concerned were held to be European?

A. EXPERIENCE FROM OTHER SECTORS

Relevant documents

The replies to the questionnaire indicate general agreement that a number of European commission documents could be useful for defining the market(s) to which European cross-border e-commerce parcels delivery belongs. The documents most often mentioned for defining the product and geographical markets are Commission guidelines, notifications and recommendations, be they generic in nature (for example, *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372, 9.12.1997, p. 5–13) or relating specifically to electronic communications (for example, *Commission recommendation on relevant markets for electronic communications* (2007/879/EC) or *Commission guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronics communications networks and services* (2002/C 165/03)). If most countries indicate that the above type of documents is relevant, it is also clear that each sector is specific and no one document will be wholly applicable, as noted by the Czech Republic for example. While documents related to electronic communications or other specific sectors are generally seen as useful insofar as they set out tools and concepts that are relevant to any market, certain countries, notably Cyprus and the United Kingdom (UK) indicate that it may be useful to prefer more generic, not sector-specific documents, such as the above-mentioned generic Commission notice on relevant markets. Germany notes that, in any case, the definition of relevant markets for the purposes of ex-ante regulation presupposes a political decision to impose ex-ante regulation.

Other than Commission documents, both Belgium and Germany note the usefulness of considering European Union case law, be it specific to a given country or not. Case law can provide practical guidance on specific situations as well as detail of market definition and assessment of dominant position. Both France and Germany indicate that general competition law principles are useful for market definition and Malta notes that practices of non-European regulatory authorities may also assist in the definition of the relevant markets. Several countries indicate a variety of other related documents in the public domain: documents relating to merger control and market reviews (UK), statistical reports such as those carried out by Eurostat (Romania), and OECD reports (Germany).

A full list of documents mentioned in the replies to the questionnaire can be found in annex 2.

Whatever the utility of a given document for defining relevant markets for ex-ante regulation purposes, it still remains to determine whether the issues currently faced in the European e-commerce parcels delivery

sector are pertinent for ex-ante regulation or for further general consideration by regulators or the Commission. This question, raised for example by the UK, Poland and France, is discussed in more depth in part IV of the report.

Relevant sectors⁶

As regards sectors that could be learnt from in terms of defining the market(s) to which European cross-border e-commerce parcels delivery belongs, the telecoms sector is indicated as being most relevant. Belgium indicates, for example, that *“it is clear that in the sector of telecom or energy, a market analysis was necessary and eventually was made (certainly on national level) in order to determine whether the market was competitive enough”*, indicating that the general process of market analysis could be learnt from and France indicates that *“general competition law principles and any network-type sector subject to ex-ante regulation (without saying that e-commerce parcels delivery is a network industry) could be drawn on”* and the Netherlands indicates that *“any sector that is regulated for the purpose of ensuring effective competition may provide useful information or insights”*. A small number of countries (Poland, Romania, Spain) indicate that, in a more general manner, the transport sector may be able to be learnt from. Other countries are sceptical about the relevance of the telecoms, transport or energy sectors: Switzerland does not see that these sectors could be learnt from noting, as does Hungary, that e-commerce is just *“one type of distance selling, just as mail-order selling which consists in buying and selling goods using telephone lines or mail systems”*. For the UK also, *“there appear to be limited similarities between the telecoms and parcel delivery industries. Unlike many fixed telecoms markets, domestic parcel delivery is predominantly an end-to-end operation”* (an operator carries out the collection, sortation and delivery of items itself). Switzerland further notes a need for caution given that *“the market(s) to which European (cross-border) e-commerce parcels delivery belongs is open to competition, oriented towards user need or demand, and not based on resources (such as telecom networks, rail and road infrastructures, ...). Additionally, it is not certain that the increasing returns to scale, or economies of scale, (i.e. savings that may be realised due to an increase in traffic) are as high as in the telecom, transport or energy sectors”*. France and Germany equally reinforce the idea that *“the e-commerce market needs to be analysed on its own merits”* and that there is not currently any established need for regulation.

To note, many countries raise the issue of roaming in the telecoms sector as being possibly pertinent: Germany notes that ex-ante regulation is not suitable for all competition problems and *“has proven not to be suitable for correctly addressing the issue of international roaming”*. Similarly, Norway notes that *“Cross-border services may raise special challenges for NRAs when it comes to addressing the problems in the market. An example from the telecom sector is the market for wholesale international roaming (...)”* and Estonia notes that the *“only comparison (between parcels delivery and other sectors) seems to be with telecom sector, where the fixed roaming fees are being used for international phone call service throughout EU”*, noting though that *“tariffs should remain unregulated”*. The idea that roaming maybe in some ways an analogy for parcels delivery is also raised by Greece and Malta, who notes that *“the remuneration for the distribution of inbound cross-border mail is subject to international agreements (in the case of a Universal Postal Union [UPU] designated operator) or bilateral/multilateral agreements. Consequently, the price, terms and conditions for the delivery of inbound cross-border mail services are not established by the local postal operators but dictated by international negotiations. This could be related to the situation experienced in Telecoms with regard to roaming”*. To note, any such analogy relates more to the cross-border nature of the roaming issue, and not to the “heart” of the situation itself.

⁶ See notably replies to questions 3 and 4 of the group’s 2013 questionnaire.

B. PARTICULARITIES OF EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY

If defining the market(s) to which European cross-border e-commerce parcels delivery belongs could draw on general principles of competition law and a number of market-analysis related documents, generic or from other sectors, a number of particularities setting it apart would need to be considered further.

The “newness” of the market

If parcels delivery and distance buying are not new, the sector has undergone significant change in recent years, due notably to the rapid uptake of the internet greatly facilitating online buying. The market(s) concerned, if not new, are in a stage of rapid change that has likely not yet stabilized. This has implications for understanding the market(s) and any possible competition issues.

Indeed, the wide-spread use of e-commerce is rather recent, which needs to be born in mind when considering the development of competition for delivery of e-commerce parcels: if competition were held to be insufficient today, there could be a competition problem pertinent for ex-ante oversight but this is certainly not necessarily the case. It may be, inter alia, that the market has yet to settle and that competition will develop of its own accord, in which case ex-ante regulation could even harm competition. That said, if competition is insufficient today and noting, for example, the links between e-commerce parcels delivery and traditional mail markets, subject to ex-ante regulation and dominated by historical operators, it could be useful to follow the market to ensure competition does develop appropriately.

To note, the rapid change underway in terms of online buying affects the wider eco-system to which parcels delivery belongs, and may radically change relationships between various actors on all related markets (leading to, for example, big online sellers that make previously large delivery operators look small).

Substitutes⁷

For the purposes of competition law, a market is made up of both a product and a geographical aspect. For example, the relevant product market can be defined as comprising “*all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*” and the relevant geographical market as comprising “*the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*”.⁸

In a related context, via its 2013 questionnaire, the group asked countries to indicate whether they had carried out any analysis into what products are, from the consumer’s point of view substitutes as regards

⁷ See notably replies to questions 5 and 8 of the ERGP 2013 questionnaire.

⁸ The Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), indicates, under the heading *Definition of relevant product market and relevant geographic market* that “*The Regulations based on Article 85 and 86 of the Treaty, in particular in section 6 of Form A/B with respect to Regulation No 17, as well as in section 6 of Form CO with respect to Regulation (EEC) No 4064/89 on the control of concentrations having a Community dimension have laid down the following definitions, 'Relevant product markets' are defined as follows: 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. 'Relevant geographic markets' are defined as follows: 'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area'*”.

European e-commerce (B2C) parcels delivery or whether they had any views on what might be substitutes⁹. It was asked, for example, whether express parcels, more expensive and arriving very quickly, are likely to be a substitute for standard delivery and what might be the geographical limits of the market. To note, annex 1 contains more detailed information on related analysis carried out or planned in member states.

The question of whether or not express services are a substitute for standard services evoked varying replies. A large number indicate that express services are not likely adequate substitutes for the standard parcels offer. Indeed, express delivery is generally significantly more expensive in these countries and quicker than is generally required for online buyers. Hungary indicates that express parcels are not likely to be a substitute because e-commerce buyers are rather delivery fee sensitive. Germany notes, based on assessment of domestic market structures, that *“express services cannot be seen as substitutes for non-express parcel delivery. In line with national administrative practice and jurisprudence the parcel market can be subdivided into a submarket for standard (deferred) parcels and one for express parcels. From the perspective of the demanding clients, the relevant criterion for delineating is the time commitment in terms of the routing time allowed for the conveyance of the items (...)”*. France indicates that it *“is unlikely (at least for the French situation) that express is a substitute for non-express services: it appears that, for private individuals buying online, the express offer would be too expensive and they, in any case, do not generally need the item bought to arrive in 1 day. B2B is unlikely to be the same market as B2C”*. Serbia indicates that express parcels are not likely to be an adequate substitute, given that quick delivery is generally not e-commerce customers’ key concern, while an accessible price is. Hungary agrees, noting however that the market should not be limited to a specific user group, e-merchants being simply one type of parcels sender.

On the other hand, a reasonable number of replies indicate that, in the given country and for at least certain services, express parcels may be a substitute. The Netherlands indicates that this possibility is not inconceivable. Switzerland notes, for example that, depending on the operator and the weight and size of the items, consumers pay a price for express parcels that is comparable to the standard parcel price. Greece notes that this question has to be examined, noting that prices for express services are falling, while services of standard parcels have increased, and Spain notes that the reply may differ from country to country. Serbia indicates that a simple statement that express is not a substitute may be too general.

To note, there is general agreement that C2X, B2B and B2C may be three distinct markets but little definitive information at this stage. The Netherlands, for example, indicates that it is plausible but *“open for discussion”* whether B2B and B2C are separate markets. Malta, being a small island, currently defines C2X, B2B, and B2C as one single market but feels that there is no standard delineation at the current time and that this aspect would need to be examined further, if ever required, to have a definitive answer.

Noting that no decisive answer can be given at this stage (as indicated, for example, by Austria and Sweden), the ERGP’s work shows that any future work, which could involve demand side surveys, should avoid terms such as B2X, which may be useful in a general sense but less appropriate when used to refer to the definition of a market for competition law purposes. For example, France notes that *“As regards the “B2C” group – there is a need to be clear about what “B” is: it may well be that one market would be bulk sender businesses and that (business) parcels senders who send parcels individually fall more into a “C2C” type market. This distinction is important to ensure that, for any problems identified, the appropriate solution is found. C2C (more specifically any parcels sent individually and not in bulk (by a private user or a business seller)) may be unlikely to be in the same market”*. Slovenia likewise indicates a need to perhaps consider the size of the e-seller, indicating that a more useful distinction may be bulk and individual parcels senders. A study carried out (see below) in the UK seems to reinforce this idea. The UK

⁹ To note, the group has not considered whether parcels stemming specifically from e-commerce would form a market independent of parcels stemming from other types of commerce.

study indicates that online sellers' parcel delivery needs would fall into two segments (called "Y2X" (essentially parcels sent individually using a post office) and "B2X" (essentially parcels sent in bulk by the business client and collected by the delivery operator). Furthermore, a German in-depth investigation (see below) indicates, equally, that it is the injection method (individually in a post office or in bulk and collected by the operator), and not the type of sender (business or otherwise), that is a decisive factor.

Finally, Denmark and Slovenia raise other issues that could be looked at when defining the market. It may be useful to consider (Denmark) the degree of substitutability between deliveries of parcels to shops and delivery to the home address and between parcels and letters offers (in Denmark a big part of the e-commerce to consumers is delivered via letters, without the consumer needing to be home at the time of delivery). Slovenia indicates that the value of the parcel may influence the substitutability between express and standard offers ("*if e-buyer buy some articles with low value then we can assume just non-express parcel is an option, but in the other hand with articles with high value there is much broader supply-side substitution*").

The upstream-downstream nature of the sectors concerned¹⁰

As outlined in the introduction, it is important to note that the group is looking at the market(s) to which *delivery* of European cross border e-commerce parcels belong and *not* at the e-commerce market per se. Indeed, e-commerce parcels delivery can be seen as an input to e-commerce. As generally agreed by countries, it is important not to confuse what could broadly be called the "upstream" and "downstream" markets (or groups of markets). For the majority of situations, the first involves a contract between the online seller and the parcels operator for delivery. The second, on the other hand, involves a contractual relationship between the online seller and the (private individual) buyer for a good (delivered) but not for delivery per se, which is usually an ancillary contractual obligation of the seller.

The distinction between these two sectors is important for two reasons. Firstly, and as noted later on in the report, for identifying appropriate solutions for a given problem: ex-ante regulation would not be best placed to address, for example, the e-commerce market as a whole (where competition is *a priori* effective) or questions relating to general consumer law and related regulators, in their ex-ante capacity, have no mandate to do so¹¹. The two markets (e-commerce and delivery of e-commerce parcels) are of course linked and information on potential problems relating more generally to e-commerce and where the solution might lie (for example, in general consumer law) should be included as necessary to guide the Commission, but they are not the focus of an ex-ante regulator or of this report.

Secondly, the distinction between e-commerce parcels *delivery* and e-commerce transactions (transactions for a good, which is to be delivered, but not for delivery per se) is important for determining who is responsible towards whom: the online seller enters into a contractual relationship with the (private individual) e-commerce buyer, towards whom it is generally entirely responsible for the execution of the contractual relationship (including delivery). The delivery operator enters into a contractual relationship with the online seller, who has a right of recourse as necessary against the former party. Generally, for bulk e-commerce parcels, there is no or little relationship between the parcels delivery operator and the private individual consumer (although where a relationship exists, the situation is more complicated and this also would need to be taken into account by the group/ the Commission). To give an example that seems fairly widely the case, French consumer law ("*code de la consommation*", article L. 121-20-3) provides that the "professional" (the online seller for the case of an online purchase) is entirely responsible toward the consumer for the proper execution of a contract formed at distance, whether it executes the obligations

¹⁰ See notably replies to questions 5 and 6 of the ERGP 2013 questionnaire.

¹¹ As noted above, if ex-ante regulation of a given sector may have positive effects on competition on a related market or, for example, help improve the enforcement of consumers' rights, it would not be put in place solely with such aims in the absence of a competition issue.

itself or whether another provider does (noting that the professional has right of recourse against the latter provider).

As exceptions to the general rule, Belgium and Romania note that, when returning a product, the final consumer may deal directly with the postal operator, and in certain circumstances, the final consumer may be able to choose delivery with a specific operator when purchasing a product online.

If it is fairly clear that e-commerce is one market and delivery of e-commerce parcels another, it is less clear whether the market for delivery of e-commerce parcels is a wholesale or a retail market. If certain countries (such as France, the Netherlands, and Sweden) indicate that the market could be wholesale (a large online seller buying capacity for parcels delivery), other countries (such as Switzerland) disagree. In any case, if it is indicated (by the Netherlands, for example) that the use of these terms could be clarified, the issue may be of little practical relevance at this stage (as indicated by Germany).

*The geographical scope of the market and its implications for national regulation*¹²

There is general agreement that, were the market to be held to be European, a situation for which there seems to be few precedents, this could have implications for national regulation and for national regulators.

Belgium notes that *“a national market analysis can always be performed but there is indeed a cross-border aspect, which highly complicates the market analysis on national level. On the other hand, cooperation between the regulators of all Members States will be very difficult as well”* and that *“it is possible that one segment of a market has a sufficient level of competition in country A, but not in country B and therefore the national law of country B might ask for more intervention or more stringent rules”*. Portugal also notes that there may be national particularities that need to be taken into account and the UK notes the general importance of the geographical limits of the market indicating that *“an issue might apply to only two or a limited number of countries rather than at a pan-European level. Generally, a wider geographic market is likely to encompass more players, and therefore be more likely to be competitive. Therefore, considering the market as national may underestimate the extent of competition”*. France indicates that *“if the market were analysed and if it were deemed that there was an e-commerce parcels delivery market of European dimensions, any actions or analysis (and any regulation if ever needed) would need to be somehow coordinated between national operators”*. For the UK, the geographical reach of the market (European or national) resulting from any analysis is *“unlikely to affect the market analysis tools [...but] more likely to have an impact on the remedies (e.g. will need to take into account different regulations/law, different competitive conditions and market structures, etc)”*. The Netherlands has a similar view stating that *“in general regulators will only have jurisdiction within the confines of their national territory. That raises the question what purpose a pan-European market analysis by a national regulator would serve. If the market is to be considered truly European however, it would seem likely that the question whether problems in the functioning of that market need attention, can best be addressed at the European level”*. Germany, likewise, indicates that *“If the geographic scope of the market were to be found as being cross national, European or even wider, the question could arise whether national authorities alone could solve a potentially existing competition problem”* and Austria indicates that *“for the time being national regulators do not have the competence to address cross-border competition problems on the parcel market at all, while this market(s) is subject to competition law enforcement by NCAs and (...) the European Commission”*. Similar issues are discussed in part IV of the report below, as regards potential collect of further information on European cross-border e-commerce parcels delivery.

¹² See notably replies to question 9 of the group’s 2013 questionnaire.

The need, noted above, to clearly distinguish the e-commerce market (end user entering into a contractual relationship with the online seller for a delivered product but not for delivery per se) from the delivery market (online seller entering into a contractual relationship for parcels delivery with an operator) is also important when considering the geographical limits of the delivery market. The Netherlands notes, for example, that whether (delivery) products are substitutes should in general be considered from the point of view of the buyer of the delivery services, *the online seller*, rather than from the point of view of the consumer (the buyer of the online product and not delivery as such), even if end consumers' demand may influence delivery choices. The Netherlands goes on to note that, while there may be for many products no geographical limits to e-commerce (online selling), delivery is subject to more constraints. Notably, a given online seller present in a national market X and requiring a parcel to arrive in country Y will necessarily need an operator physically present in country X. Delivery markets may then be national (online seller contracting with a delivery operator in the same country), but this may vary from product to product and may also be a factor affected by supply-side substitution. Indeed, if limited delivery choice at a reasonable price is not available to a given online seller in country X, it is not inconceivable that, for example, the online seller looks to create other options, perhaps starting delivery itself, or seeking transporters to take products to country Y to be directly injected into a delivery network in the latter country.

Finally, as regards geographical delimitation of markets, and bearing in mind the above comments, two countries indicate specific issues: Malta notes that its being a small island may have implications for market definition and Switzerland indicates that the market might be national, simply due to customs clearance and duties for parcels imported from abroad.

Cross-border parcels delivery and market structures, present and future

A large number of countries note the complexity of e-commerce, an activity involving two different but integrated platforms (electronic and logistic), with the latter (delivery, the focus of the group's work) involving possibly many delivery legs carried out potentially by a number of actors (operator in the origin, country, operator in the destination country, subcontractors, subsidiaries, intermediaries...) in two or more countries.

Equally, there is no one model for sending cross-border parcels, which may be transported in various ways. Traditionally, standard business parcels have often been sent in the context of agreements providing for cooperation between historical operators (parcels are collected from the business, sorted by the operator A in country A for handover at an agreed point in country B for delivery by operator B). In this context, the originating operator makes a payment to the overseas universal service provider to cover the cost of delivering the item.

However, other means can also be used, and may be of growing importance. For example in an international mail study (never published), Ofcom's predecessor Postcomm identified two other ways in which cross-border mail is sent: via an alternative delivery network; and via direct injection in the overseas (generally incumbent) operator's network at domestic retail prices. Information from French parcels alternative operators looking to work on the European market indicates equally that bulk parcels solutions involving direct injection of parcels into the destination country may be more widely used in the future.

Finally, as e-commerce grows in importance and as online sellers grow in size, the development of in-house delivery solutions could be an important source of competitive pressure.

PART III – EFFECTIVENESS OF COMPETITION, POSSIBLE BARRIERS TO COMPETITION, AND OTHER FACTORS DIRECTLY OR INDIRECTLY INFLUENCING EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY

Part III of the report broadly discusses various potential problems that may exist on the European cross-border e-commerce parcels delivery sector, or that may influence demand or competition on this sector along with ways to identify their presence in the market(s) concerned. It is, however, a general discussion and does not allow to conclude whether or to what extent each issue is present (which could only be decided through formal market analysis) or to predetermine that the issues stem from delivery or could best be addressed by ex-ante regulatory solutions.

A. A NEED FOR CAUTION

Currently, there is no provision or established need for ex-ante regulation of European cross-border e-commerce parcels delivery, and it is not clear:

- That the sector would be appropriate for such regulation: many countries indicate a strong need for caution. For example, the UK notes that “*Unlike many fixed telecoms markets, domestic parcel delivery is predominantly an end-to-end operation*” (that is, an operator carries out the collection, sortation and delivery of items itself), and Switzerland notes that “*the market(s) to which European (cross-border) e-commerce parcels delivery belongs is open to competition, oriented towards user need or demand, and not based on resources (such as telecom networks, rail and road infrastructures, ...). Additionally, it is not certain that the increasing returns to scale, or economies of scale, (i.e. savings that may be realised due to an increase in traffic) are as high as in the telecom, transport or energy sectors*”.

- That competition is not effective, or, if not effective today, that it will not become so of its own accord: this issue relates generally to the need to bear in mind, as discussed above, that the market is “new” in a sense. For example, the Polish regulator states that demand for delivery services is determined by end users, that is the private individual buying online, and argued, as a consequence, that e-commerce cross-border parcels delivery is not well developed since only a small proportion of consumers buy cross-border, while the majority (around 90%) buy only from domestic e-retailers. Indeed, for Poland, the main reason that postal operators have not yet focused on *cross-border* e-commerce is due to the limited traffic so far but there are signs that the focus of operators is now moving towards cross-border e-commerce opportunities.¹³ France, for example, has also noted a start to interest by national delivery operators for the European market, as demand for cross-border e-commerce grows.

B. EFFECTIVENESS OF COMPETITION

As regards whether or not there is effective competition for European cross-border e-commerce parcels delivery, any possible barriers to competition, and any factors that may simply limit demand or competition on the market(s) concerned, the responses to the ERGP questionnaire showed some common themes, which are ranked below, but did not always explain the type of evidence that would be needed to reach a more definitive view on the presence of such factors or their relevance for the competition on the parcels *delivery* market. All responses appeared to accept that the delivery relationship involved was

¹³ In addition, its response highlighted a press release by the International Post Corporation (IPC) that emphasises the key role of postal operators in driving the e-commerce growth by providing reliable cross-border delivery networks.

between the online seller and the delivery operator rather than between the delivery operator and the private end-user consumer.

The most common theme concerned the need for market analysis in order to determine concretely (if required) whether there were any competition issues that needed to be addressed either at a European or individual NRA level.

In particular, Germany, in responding to the question concerning whether NRAs considered competition to be effective for European e-commerce parcels delivery, considered that a response to this question first required establishing a common understanding of the term “effective competition”. It highlighted the definition of this term in recital 27 of the framework directive for the electronic communications sector (2002/21/EC), which sets out that effective competition is absent “*in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem*”. It argues that, according to this definition, a market can only be considered as not effectively competitive after an analysis comprising the following steps: (i) delineation of the relevant market; (ii) analysis of the relevant market (to determine, for example, if there are one or more undertakings with significant market power); (iii) the finding of an existing competition problem; (iv) the conclusion that competition law enforcement alone is not sufficient to address the problem.

Barriers to competition and other factors potentially limiting demand or competition for European cross-border e-commerce parcels delivery

Returning to the question asking whether any competition issues might need to be addressed, fourteen NRAs indicated certain factors that could possibly be present on the market(s) concerned, but these replies also often indicated that this was not sure and that further analysis would need to be carried out first.

A further six NRAs observed that there were no barriers to the cross-border e-commerce delivery market including observations in some cases that there were multiple cross-border delivery operators and in one case that the market worked well nationally.

Of those NRAs that identified barriers to competition, the following issues were highlighted in order of number of responses.

1. Dominant operator(s), advantage of incumbency

The existence of dominant incumbents with high domestic market shares, ubiquity and established networks was cited by seven respondents. In particular, one comment reflected the view that large incumbent operators offering end-to-end cross-border services are in a position to dictate their terms on how items are delivered and the associated prices. It was also pointed out, however, that larger e-commerce sellers probably had more leverage when negotiating delivery tariffs, resulting in smaller e-commerce sellers finding it hard to compete with them but equally enabling customers of larger e-commerce entities indirectly to benefit from lower prices. The evidence to show the dominance of operators could include the market shares of the incumbents and other delivery operators and measuring brand awareness.

As a related issue, a further two respondents discussed the issue of high pricing, especially in respect of *cross-border* services. While not a barrier to entry in itself, the replies imply that high prices may exist as operators present on the market had some power in the market to keep prices high. Evidence to show this would need to comprise a combination of regulatory accounting which identified the true costs of delivery.

2. High costs to serve the market

Three respondents identified a related factor that they saw as disadvantaging small operators in particular. It is not clear whether high costs to enter the market are fixed in nature or are prohibitive, but evidence to clarify this could include identifying the areas in which costs were most apparent. Although performance indicators are mentioned, and could theoretically be useful tools for the private sector, it is not clear how in practice they would be implemented, given the very large number of actors, countries, and offers concerned, or that they would influence any cost-related factors.

3. Legislative differences

Differences in national legislation, for example in relation to returns, customs or transport, were seen as important by four NRAs. It was also noted that legislative difference from country to country is an example of a factor generally related to e-commerce (consumer purchasing rights...), but not to delivery specifically, but that could have an impact on the delivery market.

4. Customs/tax

Two respondents identified the presence of border taxes and customs treatment, often unpredictable from the consumers' point of view and variable from one operator to another. These aspects are less relevant for the majority of respondents, who form part of the European Union market.

5. VAT exemption for universal postal services

Two respondents saw the VAT exemption as an issue while recognising that USO services probably only accounted for a fraction or at least a relatively small part of total e-commerce delivery services.

6. Information gaps/lack of transparency

Two respondents saw such issues, but more particularly concerning the relationship between the e-seller and end consumers and there was a view, as such, that the issues fell outside NRA competencies.

7. Absence of trust

Two respondents saw a lack of trust by the final consumer (private individual online buyer) in the online seller and its arrangements with the delivery operator as key.

8. UPU codes and terminal dues arrangements not aligned to costs

The use of UPU codes to privilege incumbent operators and a mismatch between agreed terminal dues and actual costs were viewed as a barrier by two NRAs in each case but no view was given as to the evidence that would be needed to demonstrate this. As regards the first point, to note, during later discussions of the group, it was indicated that it may be possible to register more than one operator under UPU rules.

9. Other factors

Remaining ad hoc factors, mentioned by only one NRA in each case, included:

- Geographic barriers: not serving certain geographic areas (postal operators may impose restrictions on sellers with regard to the delivery of parcels to destinations which may require air transport (although this may be cost-base, it may result in higher delivery prices)).
- The perceived lack of an adequate choice of delivery services.

- IT and logistics standards where specification and quantification of appropriate indicators was needed.
- Romania noted a possible lack of interconnection between small and medium operators, on one hand, and the “Reims-group” on the other.
- Differences in the delivery service specification across member states (examples of these included differences in delivery confirmation, pre-advice of delivery, range of delivery locations, choice of delivery date and time, track and trace, ability to change delivery preferences, returns procedures and compensation for loss/damage).
- Factors on other related markets (notably electronic communications penetration, transport infrastructure...) could have an impact on e-commerce buying and so on demand for delivery. Cultural and linguistic barriers could also be relevant. They are not necessarily barriers to entry but factors that slow uptake of e-commerce – or simply mean that individuals do not wish or choose to buy online – and so decrease (or do not increase) demand for delivery.

Finally, if various possible issues were identified, there was also mention that competition for certain types of cross-border delivery services was improving.

PART IV – THE EXTENT TO WHICH CERTAIN POTENTIAL PROBLEMS MAY INDICATE A COMPETITION ISSUE ON EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY MARKET(S) AND COLLECT OF FURTHER INFORMATION

As noted in the introduction, the work relates to *delivery* of European cross-border e-commerce parcels and not to e-commerce per se. Likewise, the work relates naturally to issues that may be best addressed by ex-ante regulation tools. The distinction is important in terms of finding the appropriate solution to any identified problems, and to ensure they are addressed by the parties best placed to do so. Bearing this in mind, section IV of the report follows on from the broad discussion of various possible problems concerning European e-commerce parcels delivery discussed in part III of the report. It addresses the main issues identified to determine which might result from delivery and be competition related and which not. Part IV then turns to the potential utility of collecting more information on the market to better understand its functioning and any possible problems that may be relevant for an ex-ante regulator. It discusses what kind of information could be collected, who holds the information, and the legitimacy and the feasibility of gathering it.

A. AREAS OF CONCERN POTENTIALLY STEMMING FROM EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY

As noted in part III of the report, countries have identified various possible problems that may concern European cross-border e-commerce parcels delivery. The ERGP has looked further at these issues to have a better idea of whether the problems might not only concern but *result* from European cross-border e-commerce parcels delivery, and in particular a competition issue on the related markets. As discussed below, having a better idea of the competition issues that may be present is a useful preliminary step to deciding if there is a need to collect further information and, if so, what kinds of data.

Dominant historical operators on traditional mail market: these operators are, as regards traditional mail markets, subject to ex-ante regulation. Regulation extends to certain, but by no means all, parcels activities (generally limited to a basic universal service offer). While there is no clear indication that the dominance of these operators (on the mail market) extends to or poses a problem for e-commerce parcels delivery or will necessarily limit the development of effective (parcels) competition, it is not inconceivable that these operators could use their dominant position on the mail market to restrict competition for e-commerce parcels delivery, and their dominance (and interaction) could make it more difficult for smaller players to enter the market. For the present time, there is no indication that general competition law could not resolve any such issues, but as the market is still emerging, it may be useful for a regulator to follow the development of competition to ensure it does develop effectively.

High prices: For example, the German regulator notes that “*an indication for lack of competition is the fact that the prices for cross-border package services (...) exceed the equivalent rates for national services. The gap between national and cross-border package carriage cannot be explained with diverging cost-differences*”. Furthermore, for the German regulator, “*a key factor for the observed differences might be partially caused by the international agreements (in the case of UPU designated operator) or bilateral/ multilateral commitments. Accordingly, the tariffs, terms and conditions for the cross-border delivery services are largely based on the above mentioned international agreements. In order to improve the situation in the cross-border segment it could be favourable to replace the existing in-transparent coordinated international commitments and agreements such as the UPU-system by a more cost-oriented system also predominantly applicable to the national segment*”. Information from interviews held in France in the context of the Commission’s green paper with interested parties also indicates that prices for cross-border parcels delivery seem higher than for national delivery without clearly identifiable factors justifying the price difference. If this is the case, it could indicate that there is a competition problem on the cross-border delivery market. However, this is by no means necessarily the

case. High prices could equally result from high costs, or could, more particularly, be due to a lack of competition on the delivery market but which is behavioural and not structural in nature (that is, which results from the market being in a sense new, and from competition not *yet* having reached acceptable, stabilised levels). Finally, it is important to distinguish, as noted above, the delivery market from the e-commerce online selling market: the price charged by the online seller is by no means necessarily the price charged by the delivery operator and paid by the online seller. Indeed, the former may often be a simple form of marketing and it is the latter that is the focus of the group's work (the price for delivery of bulk e-commerce parcels, purchased from the delivery operator by the online seller), being a more accurate indication of competition conditions on the delivery market. Bearing the above comments in mind, the currently apparently high prices (relative to costs) for cross-border delivery may be a reason to follow competition to ensure it does develop effectively. As regards specifically the UPU or other bilateral or multilateral agreements, it is not inconceivable that the interaction between historical operators in this context could limit the possibilities for smaller operators to break into the delivery market but there is no information to indicate that this interaction poses an insurmountable barrier to entry, noting also that such agreements have historically facilitated the exchange of mail.

Transparency (delivery terms and conditions): There seem to be concerns as regards the information available to the private individual consumer from the online seller, on delivery terms and conditions, such as price, delivery times, possibility to return goods, and the consumer's rights in case of a delivery problem. It seems reasonable to assume that consumers should have access to clear and precise information on these points and, given the strong development of e-commerce, it seems in the interest of online sellers to facilitate consumers' access to all such information. In this context, there may be a need for clarification of consumers' rights and their harmonisation at a European level, but the group is not expert on these questions, which do not appear to relate to the delivery market, at least for the majority of e-commerce purchases where the private individual consumer does not enter into a contractual relationship with the delivery operator. Indeed, when a consumer purchases a delivered product online, he or she enters into a contractual relationship with the online seller, who is responsible for the execution of the entire contract, including any aspects (such as delivery) that may be subcontracted. The online seller can, of course, seek recourse if necessary against the delivery operator, and any issues at this level may be (theoretically) pertinent for a regulator. However, there is no strong information indicating that bulk parcels delivery buying online sellers face significant problems in this respect. Small sellers sending individual parcels may face difficulties to have correct information, but their needs seem to correspond more to those of individual private senders (the "C2C" segment), and may be better dealt with through traditional mail market regulation (universal service offers). To resume, if the transparency of online selling sites may be an issue, it does not appear to be a problem resulting from the delivery market and is less pertinent for the group's work at this stage. Any such problems may be better dealt with by parties dealing with general consumer law. To note, online selling appearing rather competitive, it is in the interest of the online seller to ensure its website is as clear as possible and, noting the above caveats on clarification and harmonisation of consumers' rights at a European level, issues regarding transparency may also be improved by self-regulation as the market develops.

Lack of innovation: Static markets are certainly one sign that there may be a competition issue. Although there are certain signs of innovation as regards parcels delivery (such as development of delivery to small shops, and new means of informing consumers of delivery, such as by text message), there do not seem to be very large initiatives. At the current time, it is difficult to say if any lack of innovation will last, but again this could be a reason to better understand and to monitor the market to ensure competition does develop.

VAT exemptions: VAT exemptions regarding universal provision have been dealt with in many postal sector documents and are often cited as a potential barrier to entry. The current report will not go into detail on these issues, but simply note that, while different tax structures applied to similar services could create distortions in any market and while the means of application of the postal VAT exemption varies

from country to country, the exemption seems less important for parcels delivery, which for the most part sits outside universal service offers.

Operational standards: Operational standards regarding delivery could potentially limit entry onto the market by alternative providers, particularly if essential to the activity concerned and monopolised by dominant operators. While not the focus of its work, the ERGP is not, however, aware of a specific standard that creates a strong barrier to entry or may be an essential facility. Obligatory harmonisation regarding non-essential elements would be less relevant for the work of a regulator.

Economies of scale and network effects: Noting certain advantages that dominant incumbent operators on the traditional mail market may have for parcels delivery, the ERGP does not have any information (and this was not the focus of its work) to indicate particularly high barriers to entry in the form of strong network effects on the latter market.

Differences between legislation from one country to another: As with transparency of delivery terms and conditions on the online seller's site, legislation differences regarding, for example, consumers' online purchasing rights may limit the uptake and fluidity of e-commerce buying. Even once any actual related issues are rectified, consumers' *perceptions* on the ease of buying online may need attention. The group is not aware of specific legislation problems concerning the *delivery* market.

Cultural and linguistic barriers: cultural and linguistic issues, particularly relevant in the European Union made up of a large number of countries generally speaking different languages, could certainly limit the development of e-commerce. Such factors are also related to a general issue of trust in e-commerce and may simply be resolved by time (e-commerce buying is still a rather new concept for many and requires a mind shift of sorts) and as any issues regarding transparency and consumer protection are resolved on the online selling market. Such factors may limit in the short term e-commerce demand and so demand for delivery, which may have consequences for costs and for entry on the market. They do not, however, appear relevant for an ex-ante regulator at this stage.

Other issues on related markets: There may be a number of other issues regarding related markets having an impact on the uptake of online buying and so on the development of the related delivery markets. These issues would not be best addressed by ex-ante regulators, but are useful to note here due to their potential implications for e-commerce delivery demand. Other than legislation differences, confidence in online buying (due to actual or perceived issues), and cultural and linguistic factors, discussed above and relating directly to e-commerce buying, other related markets (notably electronic communications penetration and transports) could have an impact. For example, the Greek regulator notes its view that "*a wide application of "web services" will significantly promote competition and transparency in the e-commerce delivery market and should be promoted by NRAs or the Commission*".

Other country-specific issues: certain countries face barriers to entry related to their particular geographical (Malta) or other (customs clearance issues for Serbia and Switzerland) situation.

B. THE COLLECT OF FURTHER INFORMATION ON EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY

There is currently no mandate for ex-ante regulation of European cross-border e-commerce parcels delivery and no established need for regulation. Moreover, the market is not well understood and the ERGP's work indicates a strong view from countries that any imposition of remedies would be inappropriate at the current time, and could even harm the sector's development. That said, there a general view that it could be useful to better understand the market(s) concerned, notably to ensure that there are no particular competition issues.

A large number of regulators are of the view that the market(s) concerned are somewhat understood, but that the postal regulator is not an expert on them and that European e-commerce parcels delivery is a new market in a sense (due to technological change). These countries generally agree that, with no prejudice to the result and without indicating that there is necessarily a competition problem, it would be useful to look at the market further. Gathering and analysing information is seen as important particularly as the market is new and the risks of its development being hampered by unnecessary or inappropriate regulation are high. More generally, and again without prejudice to the need for ex-ante regulation, 17 countries are of the view that it is appropriate for the Commission and/ or the regulator to collect more data on the market¹⁴. The French regulator notes that *“it would be useful to look at the market further – not necessarily by formal market analysis (for which there is no power at this stage), but more to better understand it. Notably, a lot of “problems” may be talked about as regards the market, but there is a need to be clear about whether they relate to delivery or e-commerce more generally, to the work of a sectoral regulator or not, to another sector or not, are just general dissatisfaction as regards the market”*. Greece adds that *“additional regulation might put a limit to innovation and create additional barriers to market entry and competition”*. The general tendency of these countries is not to regulate but to better understand the market and any problems that may be present, noting that it is linked to a sector dominated by historical operators and subject to ex-ante regulation. The Netherlands notes that the market *“is a relatively new market with growth potential. There is some evidence that the regular postal markets are in decline and participants struggle to retain market share. This may affect their position towards parcel delivery. It is therefore prudent at least to monitor the parcels delivery market in order to identify potential problems that may arise”*.

If it is seen as useful to collect information, the collect should be well-targeted and there should be an outline of why the information is being collected (the potential problems that could be present on the market). Indeed, the UK regulator, Ofcom, indicates that it is *“highly desirable to have an understanding of the possible competition issues before engaging in such a data collection exercise”*, that is *“any data collection regarding cross-border e-commerce should be targeted on areas which are of concern. If there is an area of concern which falls within the remit of the NRAs, then data collection and other investigation would be wholly appropriate”*. The Dutch regulator indicates that collecting further information may be appropriate *“if it is conceivable that in the parcels market competition will not function properly in the sense that it ultimately provides consumers with enough choice and best value for money. If this is not conceivable the question becomes what purpose data collection would otherwise serve”*. France, Germany, Malta and Switzerland indicate that the aim at this stage should be simply to better understand the market to determine if there are any ex-ante related issues.

Any collect should, indeed, aim to confirm or not the presence of possible competition issues and their relevance for ex-ante regulation. Portugal indicates, for example, the need, when considering problems, to determine if they are structural or merely cyclical as well as the best combination, where necessary, of ex-ante measures by sectoral regulators, ex-post measures by national competition authorities and measures to safeguard the rights of users. Finally, the UK indicates that *“before defining the market it is important to consider the issue at hand. If this is poor customer service in e-commerce parcels delivery, the cause could be related to market failures either in the [e-commerce markets] being considered or in the [delivery] markets in which the parcels services sit”*.

14 One (Estonia) does not see the need for collect of information (*“E-commerce does not need ex-ante regulation. Delivery of on-line shop items is already functioning”*), Hungary and Portugal have no specific position at this stage, and the UK note that it is *“for the organisation to decide”* and that *“the nature of the data to collect should be the individual decision of regulators”*.

When collecting information, it is essential to bear in mind that the market has not yet stabilised. Malta indicates that, while the collect of information could be useful, the market is “*still emerging and in the main seems to be working to the benefit of consumers. Therefore at the moment there does not appear to be the need to impose strict ex-ante measures*”¹⁵. Germany has a similar view, noting that the sector “*is still emerging and (...) presently there does not appear the need to establish a rigid ex-ante regulation. The focus of the NRA should be to intensify the market monitoring process in order to obtain more detailed information on the market situation (...)*”, as does Spain. The UK indicates a slightly more nuanced view to better define what the competition issues may be before proceeding to collect of information: the regulator is “*not aware of any strong evidence indicating a need for ex-ante regulation. If there were an indication there were competitive issues in this market, more information should be gathered and analysed before it could be decided if ex-ante regulation is required*”.

To note, not all countries are in favour of looking further at the market: the Czech Republic, Estonia, Italy, Romania and Switzerland are of the view that, whether the market is well understood or not, it is open to competition and/ or competitive and there is no need (certainly for the postal regulator in any case) to look at it further. For Slovenia, the problem is not in the delivery operator and online seller relationship but in the relationship between the online seller and the end consumer, due to a strong information gap.

Given a general view that it would be useful to better understand the market, it is necessary to consider what information to focus on and how it could best be collected. As a first step, it seems most useful and feasible to focus on publically-available information on market structures (notably: the different types of actors involved (supply and demand); their relative “weight”; how operators interact; factors limiting interaction; current delivery models (delivery chain structures); and, particularly, possible future delivery models (and future competition)). It would also be useful to gather, from similar publically-available sources, further information on substitutability. While interviews could be held with operators and/ or large online sellers, given the wide variety of countries and actors concerned, the data collection exercise could be very resource intensive¹⁶. Consumer surveys could also be useful but, again, given the wide variety of countries concerned, risk being a very resource intensive exercise. As noted earlier on in the report, certain case law, national or European, could also be useful.

Volume, revenue, cost and pricing information could be useful but it is difficult to imagine regulators having access to quality, comparable data as it is dispersed in multiple countries, and held by a very large range of private sector operators that are under no uniform obligation to provide it to regulators or the Commission. Such information, in any case, is not necessarily required for current purposes.

15 Malta also states that “*European e-Commerce delivery is deemed to be competitive due to the fact that there exist a number of operators offering standard and express services*” but notes that this statement only refers to inbound cross-border e-commerce delivery (goods purchased from other European countries over the web and delivered to a Maltese address). With regard to outbound delivery of e-commerce Malta is currently carrying out an analysis to determine what competitive issues exist if any.

16 As noted by the UK regulator, “*the kind of information needed would depend on the identified area of concern. If a general understanding of cross-border e-commerce was desired, desk research of currently available analyst reports is likely to be a more affordable and less resource-intensive way of achieving this goal than a data collection exercise involving multiple countries and potentially thousands of operators. Many third-party reports are already available*”¹⁶.

PART V – ANALYSIS AND CONCLUSION

As noted above, the aim of the work is to provide advice on how, if this was ever judged necessary, the Commission or national regulators might go about analysing European cross-border e-commerce parcels delivery market(s) from an ex-ante perspective. The group has aimed to provide preliminary advice on this question, and, given the results of its 2013 questionnaire, also on the necessity of such analysis at the present time and on other related steps that may be appropriate.

Key messages of the report

The work relates to cross-border *delivery* of e-commerce parcels in Europe, and not to e-commerce per se. These two groups of markets are governed by two separate contractual relationships: a relationship between the delivery operator and the (bulk parcels sending) online seller in the former case (the focus of the group's work) and between the online seller and the private individual buyer in the latter.

At this stage, the ERGP has no indication of a specific competition problem on European cross-border e-commerce parcels delivery market(s) that may be best dealt with by ex-ante regulation. If the report identifies broadly how a market analysis could be carried out if a specific problem were reasonably held to be present, the work does not indicate a need for full formal market analysis or regulation at the present time, noting of course that there is no mandate for such a task and it would not be a question for NRAs in any case (who do not decide whether to regulate a given sector).

However, the report broadly discussed various possible problems, as a first step to determining what issues may be present on the market(s) concerned and which might be “delivery and competition” related.

- On the one hand, issues such as transparency of delivery terms and conditions (on the online seller's website for the end user) and legislation differences from country to country regarding, for example, consumers' online purchasing rights may certainly limit the uptake and fluidity of e-commerce buying. If they relate to the e-commerce market (and not to the delivery market per se) and to general consumer law, e-commerce specific or not, and would be most appropriately considered by actors on the e-commerce market and, as appropriate, consumer law experts (and not by ex-ante regulators), they may influence the delivery market. Likewise, e-commerce delivery and related competition may be affected by other factors affecting the e-commerce market (such as trust, based on actual or perceived factors, cultural and linguistic factors, and factors on related markets, such as internet penetration), even if, again, these issues are not in and of themselves pertinent for ex-ante (delivery related) regulation¹⁷. These issues, broadly related to online selling but not to delivery per se, may need to be examined further by the relevant areas of the Commission, and their consideration would certainly need to complement any future consideration of the delivery market. To the extent that there are transparency problems on online sellers' website, they may also be improved by online sellers themselves.

- On the other hand, while by no means necessarily indicating a competition problem (the ERGP does not dispose of elements to this effect), and noting that ex-ante regulators are not competent to address all competition issues, certain other issues may provide reason for *ex-ante regulatory authorities* and/ or the Commission to look further at the *delivery* sector, to better understand its functioning and to ensure that competition develops effectively. Indeed, European cross-border parcels delivery has links to a sector (traditional mail markets) dominated by historical operators and subject to ex-ante regulation, regulators in certain countries have received indication that cross-border prices for European parcels delivery may be higher than what would be justified by cost differences related to domestic prices, and there is perhaps limited innovation in parcels delivery at the European cross-border level.

¹⁷ Of course, electronic communications markets, with links to internet penetration, are subject to ex-ante regulation, but independent from any delivery-related question.

The possibility to look further at European cross border e-commerce parcels delivery should be considered with a number of caveats:

- The ERGP does not have information to show that there are (or are not) high fixed costs or essential facilities that prohibit or greatly limit entry onto the market and this has not been the focus of its work.
- It is not clear that any potential competition issues could not be effectively dealt with by ex-post structures, be they at a European or a national level.
- There is currently neither formal market definition nor an idea of what actor(s), if any, hold significant market power and so there cannot be a formal view on what problems are or are not present from a competition point of view.
- The sector is part of an eco-system and its proper functioning depends on a number of factors: other than possible competition or consumer purchasing issues, general confidence in online buying, cultural and linguistic factors, electronic communications penetration and even transport infrastructures.
- The cross-border delivery market(s) concerned, dependant on e-commerce, if not new, are in a stage of rapid change that has likely not yet stabilized. This has implications for understanding the market and any possible competition issues. Indeed, if competition were held to not be sufficient today, it is not inconceivable that the market will self-regulate in the medium term (as demand for e-commerce, and so related delivery, increases).

Collect of information on the sector

If replies to the questionnaire generally indicate that ex-ante regulation would be inappropriate at the current time, and could even harm the sector's on-going development, there is a general view that collecting information on the market to better understand its functioning and any possible competition problems could be useful. If the ERGP then recommends to the Commission that it collect information in 2014, certain points should be born in mind:

- Any collect should be focussed on delivery and situations potentially relevant for sectoral regulation (and not on other related sectors (e-commerce directly for example), issues that have no direct competition or regulation aspect or general dissatisfaction as regards the market). Again, the issues noted above that could potentially, but by no means necessarily, indicate or lead to a competition issue on the delivery market are the presence of operators dominant on a related market, possible relatively high cross-border prices, and potentially limited innovation.
- E-commerce parcels delivery is only one aspect of an eco-system (including, for example, online selling, consumer law, payment, delivery, and internet penetration) subject also to "cultural" factors. The ERGP is not best placed to advise the Commission on identifying or addressing any issues in non-delivery aspects, but notes the necessity that all parts of an eco-system need to be considered if it is to function effectively.
- Ex-ante regulation generally addresses issues that are structural, and not cyclical, in nature, or that could create structural issues. As noted above, European cross-border e-commerce parcels delivery is a sector that has not yet stabilised, and competition could significantly evolve going forward.
- There is a need to be realistic about what data would be useful, what data could reasonably be collected in a cost-benefit sense, and what parties may be well placed (or not) to collect the information (see note on resourcing below). If interviews with operators and/ or large online sellers and consumer surveys could be

useful, given the wide variety of countries and actors concerned, they could be very resource intensive and are not necessarily justified at the present time. Except possibly in a limited number of test countries, the ERGP does not recommend such interviews or surveys. Equally, detailed cost and volume information may be useful in an ideal context, but would be very widely spread, is not likely to be in the public domain and actors are under no uniform obligation to provide it. The ERGP does not recommend, as such, specific efforts to collect such data in 2014, which would likely not yield results on par with the cost of collection.

Bearing in mind the above comments, the ERGP recommends that the aim of the collect at this stage be to “map” the market from a fairly qualitative point of view (and, again, not to have precise information on costs and volumes, which may be confidential, highly dispersed information that is not uniformly held by or reasonably available to regulators, and which is not necessarily needed). The most appropriate sources, again in a cost-benefit logic, appear to be publically-available information (such as analysis of public documents, ready to purchase analysis, and case law), although a limited number of interviews could be held in test countries if feasible. More specifically, the collect would focus on two aspects:

- **Market structures:** for example, the different types of actors involved (in the supply and demand of European cross-border bulk parcels delivery for e-commerce purposes and relative “power”), how delivery operators interact, factors limiting interaction, delivery chain structure(s) (the ways in which a parcel can go from a point a to a point b), and potential sources of future (delivery) competition). This information should give a broad idea of current competition, potential (or likely) future sources, and related timeframes.¹⁸

- **Substitutability:** Linked to market structures, information on substitutability is particularly important as it defines the context in which competition takes place. The work should aim to broadly identify what products may be substitutable for bulk cross-border e-commerce parcels delivery in Europe, noting that the ERGP has not considered whether parcels stemming specifically from e-commerce would form a market(s) in their own right. It would also look further at the geographical limits of the market(s) concerned.

Noting there is no formal market definition, the aim of the work would be to better understand the development of European cross-border e-commerce parcels delivery: to broadly describe how competition functions on the market(s) concerned and *how it will likely develop*. Without any preconceived idea that there is a specific problem, the entity undertaking the work will naturally be vigilant to any potential competition issues and their evolution during this process. The ERGP does not recommend formally defining the market(s) concerned, which are in a state of rapid change that has likely not yet stabilised, noting again that, in any case, there is no mandate for such an exercise.

As a final comment, the ERGP proposes that the collect be limited to a one-off exercise in 2014, for which the ERGP could be solicited, if necessary, to assist the Commission. More generally, however, the ERGP underlines that regulators are not currently set up, resourced, or mandated to analyse, or even to collect detailed information on, European cross-border e-commerce parcels delivery. Without any preconception that an on-going collect or a market analysis would be needed, if ever an issue were identified that required broader or more on-going collect or analysis, the response, to be effective, would likely require specific resourcing and mandating of either regulators or a related entity charged with this mission.

¹⁸ As an example of a related comment, the UK notes that, “*were such an analysis to be needed it could be of benefit to map the value chain and operations involved in terms of the diverse origins of parcels, the different ways in which they enter the mail flow, the ways they are processed for export, how they are transported cross-border, how they enter the destination country and all of the different ways they would be inducted into the domestic mail flow in the destination country, the various ways they are delivered to the end customer and the different processes for returns of goods. Outlining the contractual relationship between the various stakeholders in this system (for example, the consumer and the retailer, the retailer and the postal provider, each postal provider and other postal providers, for example) would also help in flagging the elements in which cross-border e-commerce differs from other sectors*”.

Relevant market(s) - European cross-border e-commerce parcels delivery – a preliminary indication

If express services are most often not seen as adequate substitutes for standard parcels offers, being significantly more expensive and arriving more quickly than is generally required for private individual online buyers, a reasonable number of countries indicate that, at least for certain services in certain countries, express parcels may be a substitute.

If there is general agreement that C2X, B2B and B2C may be three distinct markets, there is little definitive information at this stage. Whatever the case, it seems that, going forward, terms such as “B2X” may be less appropriate for market definition in a competition and ex-ante regulation context, and that a more useful distinction may be parcels sent in bulk (the focus of the group’s work) and individually using, for example, a post-office.

Whatever the limits of the market(s), whether certain (delivery) products are substitutes would need to be considered from the point of view of the buyer of the delivery services (the online seller), rather than from the point of view of the (private individual) online buyer (the buyer of the product online to be delivered and not delivery as such). Indeed, the work of regulators touches on (European cross-border e-commerce parcels) delivery but regulators would not be competent to deal with e-commerce per se. For the majority of situations, the first group of markets involves a contract between the online seller (and not the private individual online buyer) and the parcels operator for delivery and the second group of markets involves a contractual relationship between the online seller and the (private individual) buyer.

If, in geographical terms, the market was held to be European, this could have implications for regulation that takes place at a national level, notably at the stage of application of remedies (different countries may have different laws, have only power in their own market, and it is the Commission that is competent to act at a European level).

It may be, however, that the market is not European, and competitive conditions and market structures may change from country to country. Delivery markets may be national (or at most “country-to-country”, given that a sender in country A with a customer in country B will, at least in the short term, require an A to B delivery solution) but this may vary from product to product and may also be a factor affected by supply-side substitution. Indeed, if limited delivery choice at a reasonable price is not available, it is not inconceivable that, for example, the online seller looks to create other options (starting delivery itself, or for example, seeking transporters to take products to country B to be directly injected into the destination delivery network).

ANNEX 1: ANALYSIS CARRIED OUT OR PLANNED IN MEMBERS STATES THAT MAY HELP IN TERMS OF DEFINING OR ANALYSING THE MARKET(S) TO WHICH EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY BELONGS¹⁹

The Danish competition and consumer authority is finalising an analysis of competition on the national e-commerce parcels delivery market. The authority is happy to share the report, in Danish, with the Commission once published. The same authority has carried out a survey of on-line sellers, indicating that price, security in delivery and speed are the most important criteria for choosing a delivery operator.

The French regulator has not examined either the cross-border or the domestic parcels delivery market but the French competition authority released a decision on preliminary measures following an allegation of abuse of dominance made by a parcels delivery operator (Kiala) against the historical operator, La Poste. As regards market definition, the decision indicates that home delivery and delivery to small businesses where the end consumer can pick up its parcel are one and the same market, dominated by La Poste. Secondly, in the context of the Commission's 2012 green paper, the French regulator carried out interviews with stakeholders (online sellers, parcel delivery operators, La Poste). Parties generally agreed that:

- In terms of substitution from the demand point of view, express parcels are not generally a substitute for standard delivery in France (they are more expensive and arriving more quickly than required);
- In terms of possible supply-side substitution (new standard delivery supply), express operators are not currently able to provide a standard delivery offer (notably as they do not have the means to redeliver parcels in case of absence at the address) and, while the market is being followed, there is no immediate intention for express operators to provide a standard offer;
- In terms of development of competition at a European level, two alternative French operators indicate an intention to provide a European offer (they indicate that it is not generally possible to sign an agreement with historical operators, grouped together as UPU operators, but that implantation on a European level is possible with alternative solutions, such as collecting parcels in the origin country for injection in the destination country).

The German regulator has not carried out analysis of the cross-border segment, but has looked at the national parcels delivery market. The NRA defined separate markets for standard and express parcels. The standard parcels market was further divided into two markets, based largely on the type of injection: C2X (standardised service provision targeting a large number of customers with similar needs who generally bring their packages to post offices) and B2X (parcels of business clients that are generally picked up by the carrier). As noted earlier on in the report, and as for the UK study described below, the German in-depth investigation tends to indicate that bulk (business) parcels and individually-sent parcels (be it by businesses or private individuals), rather than B2X and C2X per se, may be more pertinent distinctions. The investigation showed that the B2X market, as opposed to the C2X market, is made up of rather heterogeneous needs (B2B senders typically require faster transit times and supplementary service features than B2C senders and business offers are often "tailor-made") and the issue of further segmentation of the business market is subject to controversial discussions.

The Greek regulator has recently sent a questionnaire including questions on e-commerce to postal operators. The study will be completed in autumn 2013.

The Maltese regulator is currently carrying out market analysis for the entire postal sector, including parcel post. The regulator will define a domestic and outbound market but deems that regulatory intervention is not required for the inbound cross-border markets as the incumbent is not able to leverage any market power with pan-European providers. A national consultation is expected in the third quarter of 2013 and will be published on the MCA website.

¹⁹ See notably replies to question 7 of the group's 2013 questionnaire.

The Netherlands have not carried out any market analysis but a revision of the 2009 postal act, which would allow the NRA to remedy potential competition problems following an analysis of the relevant market and if a provider has significant market power, is currently being discussed in parliament. The regulatory instrument provided for is comparable to the telecoms regulatory framework, and could possibly lead to a partial analysis of the parcels market in the near future.

Analysis carried out in the UK

Ofcom has not considered market definition relating to C2X, B2X, B2B and B2C, but an analysis of markets carried out by its predecessor, Postcomm, in 2010²⁰ suggests that the online sellers parcel delivery needs would sit within two market segments:

- “Y2X” (an individual, private or business, sending parcels using a pillar box or post office): characterized by very high barriers to entry given the need to have an extensive collection point network, Y2X services are generally only economically viable for the incumbent, which has lower unit costs as it can use its USO network;

- “B2X” (postal operator collecting parcels from the sending business): B2X was segmented into “express” (same or next day) and “deferred” markets, mainly for demand side reasons. Express services were considered to be effectively competitive. Deferred B2X services were further segmented into “light” (up to 2kg) and “heavy” (above 2Kg) parcels markets. Competitive conditions for B2X deferred appear to vary according to weight (operators found it difficult to compete with Royal Mail for lower weight packets, particularly below 500g, and Postcomm’s view was that Royal Mail had cost advantages at lower weights as its USO letters network could be used for delivery of lightweight parcels). Volume was also found to be a relevant consideration for market definition, due to economies of scale stemming from larger contracts. To resume, Royal Mail was found to have significant market power for B2X “deferred” “light” offers, but contracts with higher volumes and weights were deemed to be increasingly competitive.

The results of the Postcomm study seem to indicate, as mentioned earlier in the report, that there may be separate markets for “individually-sent” and “bulk” e-commerce parcels, and that these latter terms may be more appropriate than “B2C” and “C2C” terminology when discussing markets from a regulatory point of view. To give an example, the needs (and related costs generated) of a seller of jewellery online that sends one or two items a month, individually using a post office would be more similar to a private individual consumer sending parcels individually using a post office than to large online seller buying parcels delivery in bulk.

A number of countries have not carried out any sort of analysis and Cyprus, Estonia, Slovenia and Hungary indicate in particular there is no intention, or no need, to do so in the near future.

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<http://stakeholders.ofcom.org.uk/search?search.title=analysis+of+markets&search.fromMonth=&search.fromYear=&search.toMonth=&search.toYear=&search.itemType=&search.sector=Post&submit=Search&x=21&y=16>

ANNEX 2: DOCUMENTS THAT MAY ASSIST IN DEFINING THE MARKET(S) TO WHICH EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY BELONGS

Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03)

Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

Commission recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC) and related explanatory note (SEC(2007) 1483 final, 07.02.2008).

Communication from the Commission - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01)

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

E-commerce and Delivery – an IPC Strategic Perspective, International Post Corporation, February 2013 (<http://www.ipc.be/~media/Documents/PUBLIC/Brochures/IPC%20ECommerce%20and%20Delivery%20%2021022013.pdf>)

European Commission Green Paper - An integrated parcel delivery market for the growth of e-commerce in the EU, (COM(2012) 698 final)

European Commission Guidelines on Vertical Restraints (2010/C 130/01)

OECD Policy Roundtables - Market Definition 2012, Organisation for Economic Co-operation and Development, Directorate for financial and enterprise affairs, Competition Committee, DAF/COMP(2012)19, 11 October 2012

State of play of the EU parcel market with particular emphasis on E-commerce, Copenhagen Economics (study to be finalised in 2013)

Strategic Perspectives on the Postal Market 2011, International Post Corporation, 2011 (<http://www.ipc.be/~media/Documents/PUBLIC/Markets/SP2011-public.pdf>)

2013 Rutgers Conference papers (*Re-regulation for Parcel Delivery in the E-Commerce Context?*, Joost Vantomme; *The Growing Interaction between the E-commerce and the Parcels Markets*, Filipa Silva and Carlos Costa; *Market Analysis and Segmentation for Parcel Markets in Times of Emerging E-Commerce*, Annegret Groebel, Martin Balzer, Tobias Katzschmann, Alex Kalevi Dieke and Antonia Niederprüm; *Delivering the Goods to Households – Would Regulation Help or Hinder?*, John Hearn).

Various third party reports (such as *Europe e-commerce Logistics 2013* (http://www.researchandmarkets.com/reports/2484000/europe_ecommerce_logistics_2013) or those found on http://www.ystats.com/en/fullaccess/Full%20Access%20Global%20E-Commerce%20Reports_yStats.com.pdf)

Various examples of European case law such as *Hoffmann-La Roche & Co. AG v Commission of the European Communities - Dominant position*, Court of Justice of the European Communities, Case 85/76, 13 February 1979.

ANNEX 3: COUNTRY CASE STUDIES (SUMMARIES OF REPLIES TO THE GROUP’S QUESTIONNAIRE REGARDING EUROPEAN CROSS-BORDER E-COMMERCE PARCELS DELIVERY AND MARKET ANALYSIS)

Austria

I. When ex-ante regulation is pertinent
Pertinence of the three criteria test: the test is pertinent and does not need to be adapted.

II. Market definition and relevant experience from other sectors
Relevant documents and sectors: A relevant legal document could be the “COMMISSION RECOMMENDATION on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic networks and services” http://ec.europa.eu/information_society/policy/ecomm/doc/library/proposals/rec_markets_en.pdf No alternative non-telecoms sector(s) are considered useful to examine. Market analysis: With regard to market analysis, RTR does not have ex-ante powers in regulating post and therefore did not carry out its own market analyses so it cannot express a view on the identification of specific markets (e.g. B2X) or on whether non-express parcel services are substitutes for express services. It would need to carry out demand side surveys and test whether these kind of products are substitutes for consumers.

III. Possible signs of a lack of effective competition and identifying barriers to competition
Effective competition: Given that RTR did not carry out any studies, it is not able to assert whether the market for e-commerce parcels is competitive or not. Possible barriers to entry: UPU codes; VAT exemption; terminal dues - but there is insufficient evidence to assess their potential importance. For the VAT exemption, for example, one would need first to demonstrate that prices of other operators than the USP are higher because they have to charge for VAT.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities
b) The market is somewhat understood but more information is needed in order to decide whether ex ante regulation is appropriate.

Belgium

The Belgium regulator notes, for all questions, that it has not carried out any analysis yet of the parcel delivery market and so is not in position to provide verified answers. Its answers are indicative only.

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: The test was elaborated for the electronic communications sector but could be relevant for the assessment of any market. Adapting the test to sectoral specificities could create discrimination between different EU markets.

II. Market definition and relevant experience from other sectors

Relevant documents/ sectors: Several Commission guidelines, notifications and recommendations²¹ and case law from the European Court of Justice. Any sectors (telecoms, energy...) where a market analysis has been carried out may be helpful.

Particularities of cross-border e-commerce parcels delivery: The above documents apply to national contexts but cross-border parcels delivery is necessarily international. It is possible, also, that there is, for example, a sufficient level of competition in country A, but not in country B.

Substitutability: C2X, B2B and B2C are likely different markets in a competition law sense. Express services are not likely substitutes for standard parcel delivery, as they are too expensive and the consumer may not need a parcel to arrive in 1 day.

Upstream and downstream markets: it is important not to confuse what could broadly be called the “upstream” and “downstream” aspects of the market (one contract between the online seller and the parcels operator for *delivery* (the group’s focus) and another between the online seller and the (private individual) buyer for a delivered good and not for delivery per se (noting exceptions such as for returns, where there may be a relationship between the final consumer and the parcel delivery operator)).

The structure of the delivery market: the market can be rather complicated (a large international operator may carry out all the delivery while a smaller operator may work with subcontractors) and the size of the parcels buyer (online seller) and the number of competitors will influence prices (simple supply and demand rules).

²¹ Commission guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronics communications networks and services (2002/C 165/03), Commission Notice on the definition of relevant market for the purpose of Community competition law (OJ C 372, 9.12.1997, p. 5 – 13), Guidelines on the applicability of Article 101 of the Treaty on the functioning of the European Union in horizontal co-operation agreements (2011/C11/01), Guidelines on Vertical Restraints (2010/C130/01).

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: A collective reply from sector representatives (but not including BIPT) to the Commission's 2012 green paper on an integrated parcels delivery market indicated that the level of competition was sufficient and there was no need for ex-ante regulation.

Barriers to entry or problems affecting the delivery market: Generally speaking, barriers to entry could be dominant incumbent operators, high fixed costs, operational standards, and differences in legislation from country to country. However, BIPT is of the view that competition is prima facie effective (no analysis was performed so far) and notes that problems seem not necessarily to be related to a lack of effective competition for parcels delivery but rather related to issues on the e-commerce selling market, such as transparency in consumer rights. Only a full analysis could say for sure.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collecting further information on the market: No apparent need for ex-ante regulation but gathering and analysing information (any market analysis data (volumes and revenues, types of actors, substitutability...)) will help to determine whether the issue relates to delivery or consumer law or something else and may also help avoid future problems.

Further cooperation between NRAs: Sharing of information could be useful and would be legitimate based on the cooperation that is set out in the EU treaties but is not able to solve all issues (for example, as was the case for roaming, where the Commission used its right set out in article 5 of the treaty to impose regulation). Cooperation at Commission level (DGs concerned by e-commerce) could also be useful.

Cyprus

I. When ex-ante regulation is pertinent

The three test criteria would to be adapted to the specific context of European e-commerce parcel delivery. The specific market must first be defined before the three criteria can be applied for examination whether the market is susceptible to ex-ante regulation.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: The Commission notice on the definition of relevant market for the purpose of Community competition law is considered to be relevant. No comment on sectors from which could be learnt from.

Elements specific to e-commerce parcels delivery: Agreement with the arguments and statements put forward in Q5 of the questionnaire.

Substitutes: Express delivery could in some cases be considered as substitute to European e-commerce (B2C) parcels delivery, although no market analysis has been carried out.

Geographic market: The finding of the geographic scope of the market(s) should take into account delivery practices, such as door to door delivery in rural areas.

Upstream and downstream market(s): Agreement that the online-seller's client is the final consumer who buys the delivered product. In this case, the final consumer does not generally choose the delivery operator. It is the online-seller that makes agreements with the delivery operator to ship the products. In this framework the market of e-commerce delivery could be considered as wholesale.

Analysis: No market analysis related to national or cross-border e-commerce parcels delivery has been carried out. No intention to carry out such an analysis in the near future.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: Because there are many delivery networks available which supply European e-commerce parcel delivery services the market is considered to be relatively competitive.

Barriers to entry: Limited client base due to small size market and high shipping costs.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies/ need for ex-ante regulation: Reply “b”. The market is somewhat understood, but the postal regulator is not an expert on this market, which is new. More information needs to be gathered and analysed before it could be decided if ex-ante regulation were appropriate and therefore before any remedies were introduced. This is particularly important as the market is new and the risks of its development being hampered by unnecessary or inappropriate regulation are high. With no prejudice to the result, it would be useful to look at the market further.

Collecting further data: Appropriate for the Commission and/ or the regulator to collect statistical data on volumes and revenues; data on quality of service; cost data; information on different types of actors, substitutability...). Information may be held by the postal operators and can be found in statistics on e-commerce services. A tool that monitors cross border delivery prices should be at the disposal of the NRA. The legal basis for the collection of data could be established by a European Directive.

Cooperation between authorities: Cooperation between NRAs is considered appropriate for data validation, investigation issues, experience sharing, informal exchange of data, formal implementation of consultation and notification procedures. Such sharing would be legitimate in the case of market monitoring issues. Reinforced cooperation would be sufficient to overcome possible problems resulting from regulating at a national level a market which is possibly European in the competition law sense. Homogeneity of national regulations across Europe can be achieved if NRAs agree on a common framework for regulation.

Czech Republic

I. When ex-ante regulation is pertinent

The NRA considers the judgement of these standards as premature if the market has not been defined. In general, the NRA does not consider there are any substantial and non-transitory barriers to market entry. As the market is free, it is not necessary to apply any ex-ante measures.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: Relevant documents for the purpose of comprehensive ex-ante regulation of the entire sector are not available. The NRA does not see any similarities with other sectors.

Substitutes: Express services can be considered a substitute of non-express parcel delivery. Geographical limits might be for example mountains or islands. There can be influenced speed or frequency of delivery.

Analysis: The Czech NRA did not carry out any analysis. The NRA is authorized to monitor only postal services. Analysis could be made, but entities outside of postal markets are not legally obliged to provide statistical data to the NRA. It is possible that some analysis exists into what products are, from the consumer's point of view, substitutes as regards European e-commerce (B2C) parcels delivery, but made by the private-commercial sector.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Barriers to entry: Barriers cannot be determined if the market is not defined.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies/ need for ex-ante regulation: The answer d): The market is not well understood but there is no need to consider in further and it is not the role of the postal regulator. The NRA does not have the authority to intervention in other market expects for postal service markets.

Collecting further data: If collection of data is need, entities would have to be authorized to collect the statistical data concerned.

Estonia

I. When ex-ante regulation is pertinent

No comment on the pertinence of the “three criteria” test.

II. Market definition and relevant experience from other sectors

Relevant sectors: the energy sector, as an example, is not relevant because there a client is bound to a given network. The only comparison seems to be with telecom sector, where the fixed roaming fees are being used for EU services (not be a good idea for delivery). The UPU system is evoked (fixed fees and the intention to change them rather into cost based fees). For e-commerce, tariffs should remain unregulated.

Substitutability: Express and standard delivery are not likely to be the same market (although noted later that they could be).

Upstream and downstream markets: Whether the sender is on-line seller or not, it would still be considered as a postal service and there is no need to differentiate between wholesale and retail markets.

Analysis: There has been no reason to carry out a study and there is no intention to do so in the near future.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: General view that competition exists (especially for express parcels). There is no need to distinguish e-commerce items from other parcels. Appears to indicate that express may be a substitute for standard parcels.

Barriers to entry: Presence of historical operators, high costs for new entrants (local newcomers would like struggle against big (courier) companies to establish global or regional operations), different legislation in different countries.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies and ex-ante regulation: (d) e-commerce items do not require specific regulation and are already covered by existing postal services (ordinary and express parcels).

Collecting more information on the market(s): There is no need to collect more data and e-commerce parcels delivery does not need ex-ante regulation. To note, national law allows collecting data from companies registered in Estonia, whether they are domestic or cross-border providers.

Cooperation: The ERGP is sufficient for NRA cooperation.

France

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: no particular comment. More generally, need to bear in mind that:

- The market is “new” in a sense (parcels delivery is not new but the market(s) are evolving significantly due to technological developments (internet) (if problems, market may autocorrect with time).
- The group is looking at the *delivery* market, for e-commerce parcels delivery, not at e-commerce itself (important for finding right solution to any problems and for determining relevance for an ex-ante regulator).
- Smaller sellers buying parcels individually may not have the same needs and may not be in the same market as bulk parcels buying online sellers (the focus of the group’s work).
- Ex-ante regulation should be a last resort.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: Various Commission (and other) documents related to market definition and analysis and general competition law could be drawn on.

Particularities of delivery to bear in mind and substitutability: if there is a European market, there are national regulators ; it is unlikely (at least for the French situation) that express is a substitute for non-express services; B2B is unlikely to be the same market as B2C; a “bulk” or “individually-sent” distinction seems more appropriate than the terms “B2C” and “C2C”.

The “upstream” and “downstream” markets: the consumer who buys online buys a delivered product, but not delivery per se. The ERGP group’s work concerns the delivery leg, which is a market between the online seller and the delivery operator, and not the e-commerce buying leg per se, between the individual online buyer and the online seller. There are generally distinct contractual relationships for both legs (and no or little relationship between the parcels delivery operator and the private individual consumer). This distinction is important for identifying solutions that are appropriate for a given problem.

Analysis carried out in France: one semi-related competition case (indicating that, nationally, delivery to small shops and home delivery is the same market and that the market is for standard delivery); informal interviews with stakeholders (online sellers, parcel delivery operators, La Poste) in the context of the green paper indicate that express is not a substitute for standard delivery and that two alternative operators aim to provide an offer at European level (if they indicate that they face difficulties to sign an agreement with historical UPU operators, they also indicate that they can likely find alternative solutions).

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: Without formal analysis, it would be risky to say it is or it is not effective. The market (cross-border bulk parcels delivery for distance selling) has recently undergone a number of

changes (notably due to the development of the internet and so the widespread possibility for e-commerce) and, as with any market, may have “teething” issues. There seems to be a start to competition for delivery (such as alternative French players entering the European market), which could well continue, notably due to the strong growth of e-commerce. That said:

- It is a market related to postal markets, where there are dominant historical operators that often work together.
- There are perhaps at this stage not a large number of players in the market, and prices seem to be high for cross-border delivery but this may change with competition - even if formal intervention is not necessary, it may be useful for regulators to follow the market to a certain degree to ensure effective competition does develop (of its own accord).

Possible barriers to entry/ issues :

- Presence of historical operators that dominate the national (mail) markets
- Possible economies of scale or network effects (although not clear network industry)
- Barriers in related sectors: e-commerce (and not delivery specifically) (legislation differences between countries that dissuade online buying, difficulties for returning goods); related to other markets (such as electronic communications penetration, transports); cultural and linguistic factors.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collect of information: to ensure that there is not a specific competition issue pertinent for ex-ante regulation and that competition is, or will be, effective of its own accord, it could be useful to gather certain qualitative information to better understand market structures and the functioning (actual and likely future state) of competition. More generally, it could be useful to put in place a means of passive surveillance (volume and revenue data for example) of the market, which is growing quickly. Such surveillance could be carried out by the Commission directly or by regulatory authorities, given of course that they have the proper legal mandate to do so.

Germany

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: More generally comments, emphasizing that

- A discussion of criteria to establish the pertinence of ex-ante regulation is not meaningful without a prior political decision that the parcel delivery sector is to be governed by ex-ante regulation.
- The three criteria test alone cannot answer the question whether ex ante regulation is pertinent. The test is part of a wider analytical process which comprises (i) the definition of the relevant product/service market and of the geographic scope of the market; (ii) the examination of the relevant market as regards to the cumulatively fulfilment of three criteria; (v) the identification of undertakings that individually or jointly have a significant market power; (v) and imposition of regulatory measures.
- The three criteria test does not necessarily answer the question whether competition in a given market is distorted or not.
- The three criteria test, where applied correctly, has proven to be a useful tool for answering the question whether a certain telecoms market principally warrants ex-ante regulation. Before the test is applied to non-telecoms markets it should however be analysed whether the different criteria need to be adapted.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: Commission Notice on the definition of relevant market for the purpose of Community competition law (OJ C 372, 9.12.1997, p. 5 – 13); precedents derived from EC cases and CoJ case law such as for example the *Hoffman-La Roche* case (Judgment of the Court of 13 February 1979 in case 85/76 - *Hoffmann-La Roche & Co. AG v Commission of the European Communities*) as well as academic papers and reports. Experience from other sectors is not necessarily considered to be helpful. The e-commerce market should be analysed on its own merits on basis of the established principles of competition law.

Elements which are specific to European e-commerce parcels delivery and that would need to be taken into account for market definition: For reason of market delimitation the German NRA differentiates between two types of business transactions. In the context of e-commerce there exists the contractual relationship between the parcel operator and the on-seller as the demanding party for the delivery services and the relationship between the online seller and its final customers.

Substitutes: Basically express services cannot be seen as substitutes for non-express parcel delivery. In line with national administrative practice and jurisprudence the parcel market can be subdivided into a submarket for standard (deferred) parcels and one for express parcels. The submarket for standard parcels can be further divided into C2X segment and a business segment. Whether the B2X-segment shall be treated as a common market is subject to controversial discussion.

The “upstream” and “downstream” markets: In relation to the contractual situation and the customer relationship we agree with the statement that a contract is concluded between the online seller and the parcel operator on one side and between the online seller and the (individual private) buyer for a delivered good. The reference to retail and wholesale in context of e-commerce activities is, however, misleading.

Analysis carried out in Germany: The German regulator did not conduct analysis for the cross-border

segment, but there are results for the national parcel market. According to these evaluations, the NRA defined a market for standard parcels as well as for express parcel. Within the market for standard parcels, the German NRA divided the market for standard parcels into two sub-markets (B2X and C2X) or three segments (C2X, B2B and B2C).

Implications if the defined markets were to be cross-border in scope: If the geographic market were found to be wider than national, the question would be whether national authorities alone can solve a potential competition problem. For the times being national regulators do not have the competence to address cross-border competition problems on the parcel markets, while this market(s) is subject to competition law enforcement by NCAs and DG Competition of the European Commission DG.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: General comment that a common understanding of the term “effective competition” needs to be developed. The definition of this term in recital 27 of the (electronic communications) framework directive (2002/21/EC) might be helpful: effective competition is absent “*in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem*”.

Potential competition problems: An indication for potential lack of competition is that prices for cross-border package services charged by the parcel operators exceed the equivalent rates for national services. The gap between national and cross-border package carriage cannot be explained with diverging cost-differences. A key factor for the observed differences might be partially caused by international agreements (in the case of UPU designated operator) or bilateral/ multilateral commitments. The tariffs, terms and conditions for cross-border delivery services are largely based on the above mentioned international agreements. To improve the situation in the cross-border segment, it could be favourable to replace the existing opaque coordinated international agreements such as the UPU-system by a more cost-oriented system also predominantly applicable to the national segment.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies: As the e-commerce sector is still emerging and expanding, presently there does not appear the need to establish rigid ex-ante regulation. The focus should be to intensify the market monitoring process in order to obtain more detailed information on the market situation and its main players. Depending on the outcome of this empirical stocktaking-process member states shall evaluate and/ or calibrate their regulation regime in place.

Usefulness of collecting further information: Due to a lack of information concerning cross-border markets it could be useful to gather more data to understand the development and enable adequate regulation

Types of information and holder of information: Survey on the market players and their services as well as comprehensive information on the tariff structures, terms and conditions, quality issues might be helpful. Such information could possibly be derived from organisations/ associations and market players such as the online sellers, the incumbents/ USP, multinational operating parcel providers and consumer associations. Other non-remedial” regulatory monitoring tools could allow sophisticated market investigations and monitoring in relation to the tariffs, conditions and quality issues, establishing a standardization improving the interoperability among the players

Cooperation: Co-operation between NRAs is considered helpful for developing best practice, if legally possible according to national law. Reinforced co-operation is, however, not necessarily sufficient to overcome potential issues arising from a geographic market scope which is wider than national.

Greece

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: The test would need to be adapted to the specific context of European e-commerce parcels delivery.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: *An integrated parcel delivery market for the growth of e-commerce in the EU*, European Commission, 29-11-2012, *Strategic perspectives on the Postal Market*, International Post Corporation, 2011; *E-commerce and Delivery – An IPC Strategic Perspective*, International Post Corporation, February 2013. “Roaming” from the telecoms sector might offer a good example (there are relevant agreements among providers of member states, imposed by Commission).

The “upstream” and “downstream” markets: It is important not to confuse the delivery market (online-seller – delivery operator relationship) with the downstream e-commerce market (online seller – private individual buyer relationship for a delivered product but not for delivery per se). However, with the advancement of web services, sometimes the consumer can choose the delivery operator directly.

Substitutes: Generally, C2X, B2B, and B2C are likely different markets in a competition law sense. As regards express parcels, they could be a substitute for standard parcels for e-commerce purposes (the two types of offers are much more similar than previously).

Analysis carried out: A market survey is conducted every year with market data collected by questionnaires from postal operators. A 2012 study, including more specific questions about e-commerce, will be completed in autumn 2013

National regulation – European markets: Regulators themselves could not have powers for a pan-European market analysis; such an analysis could be performed for instance, on the behalf of Commission

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: Competition may not be as effective as it could be (evidenced by high and varying delivery prices for a service with perhaps limited “features”). Both online sellers and end consumers need more transparency as regards delivery information. However, belief that the main reason delivery operators have not yet focused on cross-border e-commerce delivery is that there has been limited (cross-border) buying to date. The market is open to competition and, if market entry represents a significant investment for small players, it seems that operators are starting to focus on cross-border delivery as volumes increase. Adherence to general competition law needs to be monitored to ensure that dominant delivery operators do not prohibit market entry. Finally, wide application of web services should promote competition and transparency in the e-commerce market (and so in the related delivery market) and should be promoted by NRAs or the Commission.

Barriers to entry: differences in legislation, operational standards, high fixed costs, high prices.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Usefulness of collecting further information: (b) is the most appropriate answer. The market is liberalised and additional regulation might put a limit to innovation. A market analysis needs to be performed in national and European level to demonstrate any problems and any need for regulation.

Types of information: Information on volumes, actors, substitutes...and also on consumer complaints.

Cooperation: Cooperation, for example via the ERGP, could be useful as a first step but any problems should be confronted at a pan-European level. To be effective, extensive consultation with the market would be needed and the ERGP is not in a position to do this.

Hungary

I. When ex-ante regulation is pertinent

Ex-ante regulation is generally held to be not necessary at present on the basis of the “three criteria” test. The three criteria are perceived as not met because of the absence of barriers to market entry.

II. Market definition and relevant experience from other sectors

Relevant documents: The Commission guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronics communications networks and services (2002/C 165/03) and the Commission Notice on the definition of relevant market for the purpose of Community competition law (OJ C 372, 9.12.1997, p. 5 – 13).

Relevant sectors aside from the telecommunications sector: The traditional network merchants could be relevant, which also often uses postal services to send goods to customers. Their main difference between e-merchants and traditional merchants is that latter collect orders by traditional way, e.g. by DM letters.

Elements specific to e-commerce parcels delivery: Yes, (i) “C2X, B2X, and B2B and B2C are likely different ...”; (ii) “it is important not to confuse what could broadly be called the “upstream” and “downstream”/ “bulk” and “retail” aspects of the market to be defined”; and (iii) “the delivery market is very complicated and not all delivery legs are carried out by one actors”.

Product market definition: Yes, for e-commerce parcels, the client of the delivery operators is the online seller and the online seller’s client is the final consumer, who buys a delivered product.

Substitutes: Express parcels (more expensive and arriving very quickly) likely not to be a substitute.

Upstream and downstream market(s): The need to differentiate between wholesale and retail markets in the e-commerce parcels market depends on whether such kind of differentiation is needed in the postal delivery markets. If postal markets were defined for a user group, the definition would be according to general customer categories (e.g. bulk or single mailers) and not according to user groups formed by the job of senders (e.g. e-merchants, traditional network merchants, local governments, tax and other authorities, hospitals, etc.)

Analysis: No market analysis related to national or cross-border e-commerce parcels delivery has been carried out. No intention to carry out such an analysis in the near future.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: Competition for European e-commerce parcels delivery is as effective as the competition for European parcels delivery because e-merchants are only a sender’s group in this respect.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collecting further data: It is not appropriate for the Commission and/ or the regulator to collect more data on the market. But if it will be necessary on EU level, the data will be collected. In case of a data collection, the volume of items posted by e-merchants would be needed. Domestic and outgoing cross-border data could be collected but incoming not (to avoid duplication). Revenues and cost data of the e-commerce parcel delivery would not really be expectable from the postal service providers. The required data are may be held by e-merchant.

Cooperation between authorities: Cooperation between NRAs is appropriate in general but not only on a sub-cluster of the postal flow generated by a senders' group formed by their job as being e-merchants.

Any other important points raised?

E-commerce parcels delivery is provided as postal service when an e-merchant avail postal service and send its goods by post (and do not use any other opportunity for that, e.g. transporting by own employees). E-merchants could post their goods e.g. as registered letter post item, postal parcel (generally US), other parcel (regularly non-US), express or courier item.

Creating a better and cheaper service facility for a distinguished senders' group may be a contradiction with the Article 5 of the postal directive requirement for US: "Each Member State shall take steps to ensure that universal service provision meets the following requirements: "[...] it shall offer an identical service to users under comparable conditions".

Malta

I. When ex-ante regulation is pertinent

At this stage, it is difficult to say whether the ‘three criteria’ test could be applied to the European (cross-border) e-commerce parcels delivery. The test would likely need to be adapted to the specific context of European e-commerce parcels delivery.

II. Market definition and relevant experience from other sectors

Relevant documents/ sectors: Commission guidelines on market analysis and the assessment of SMP under the community regulatory framework for the EC network and service; practices of non-European regulatory authorities may also assist; CERP Recommendation on best practice for price regulation also includes tools for defining postal markets.

Particularities of cross-border e-commerce parcels delivery: remuneration between domestic operators for delivery is subject to international agreements (for UPU designated operators) or bilateral/multilateral agreements. The prices and conditions for the delivery of inbound cross-border mail services are not established by the local postal operators but dictated by international agreements / negotiations. This could be related to the situation experienced in telecoms with regards to roaming whereby the Commission had to intervene to establish pan-European roaming tariffs and conditions. To this effect it may be difficult to analyse such a market. On the other hand the price, terms and conditions of outbound cross-border mail services are established in the main domestically by the operator, who could leverage its market position over the local user of the postal outbound service. This could be deemed to be similar to certain situations in the telecoms sector such as when defining an international market.

Substitutability: express services (when marketed as express services and not as deferred express services which are deemed to be standard parcel post) are not likely to be substitutes for non-express delivery. Express service, apart from additional speed, include additional value compared to the universal services for which customers are prepared to pay an extra price. They are time-sensitive, guaranteed and have as a delivery time a specific day and/or a specific time.

There may be instances when a market needs to be split into segments such as C2X, B2X, and B2B and B2C. However, this is not necessarily required for market analysis. In the case of Malta being a small island, all markets are defined as national in scope on the domestic front.

Upstream and downstream markets: In the e-commerce parcel delivery market(s) there may be a contract between the online seller and the parcels operator for delivery and another between the online seller and the (individual private) buyer for a delivered good and not for the delivery per se. The delivery market is very complicated and not all delivery legs are carried out by one actor. It would be difficult to distinguish between wholesale and retail markets as there are many different situations (in the case of ‘returned goods’ the buyer becomes the client of the delivery operator, there could be intermediaries...).

Analysis: The Maltese NRA is carrying out a market analysis for the postal sector, including parcel post. For parcel post, the NRA intends to define a domestic and outbound market. However, the NRA deems that regulatory intervention is not required for the inbound cross-border mail markets since the incumbent is not able to leverage any market power with pan-European international providers. In the case of an

inbound market, NRAs do not have the powers to carry out a pan-European market analysis.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: European e-commerce delivery is deemed to be competitive. There are a number of operators offering standard parcels and express services. Larger e-commerce sellers would probably have more leverage when negotiating tariffs. It is recognised that although this may result in small e-commerce sellers finding it difficult to compete, the leverage of large e-commerce sellers is likely to be beneficial to the buyer (lower delivery charges / charges may be absorbed in the cost of the goods).

Barriers to entry: multinational dominant actors, or a priori dominant domestic actors having international agreements, (very present on the market), it would be difficult for (national) regulators to take action; geographical barriers (restrictions where air transport is required to reach the destination).

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies and ex-ante regulation: The market is still emerging and in the main seems to be working to the benefit of consumers. At the moment, there does not appear to be the need to impose strict ex-ante measures. However, this statement is made with reference to inbound cross-border e-commerce delivery (goods purchased from other European countries over the web and delivered to a Maltese address). With regards to outbound delivery of e-commerce parcels, Malta is currently carrying out an analysis to determine what competitive issues exist if any. **Collecting further information on the market:** It would be useful for the European Commission to collect more data (on actors, volumes and revenues, service terms and conditions including quality of service, type of service (ordinary parcels, express, deferred express etc)). Information would be held by sellers, universal service postal operators, multinational cross-border operators, and consumers. The legal basis may be the European directive in the case of postal operators.

Further cooperation: Cooperation between NRAs is already enshrined in the directive. Cooperation would assist in understanding possible European issues, but would not be sufficient to overcome possible competition problems.

Netherlands

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: the test is pertinent and is designed to ensure that ex-ante regulation is only put in place if and when the three criteria are met, while not requiring it. The test is complementary to the recommendation of the Commission on telecoms markets in which a certain set of markets is predefined. In that context, a three criteria test would only seem to be useful if different markets were to be distinguished within the cross-border delivery market, subject to a deeper analysis of the market.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: The two documents mentioned in the questionnaire are probably relevant. Further analysis of the cross-border parcels market may show whether adaptation of these documents is needed. In principle, any sector that is regulated for the purpose of ensuring effective competition may provide useful information or insights on the regulatory concepts to be applied to the cross-border parcel market, subject to further detailed study.

Market analysis: Whether B2B and B2C are separate markets is open for discussion. It might be, for example, that the difference between these categories is mainly determined by the speed of delivery rather than whether the parcels are sent to businesses or consumers. Many online sellers offer a next day service in response to consumer demand. On the other hand it is possible that the demand profile for businesses and consumers may vary to such an extent as to make them separate markets.

It would be useful to acknowledge that “upstream vs. downstream”, “bulk vs. single piece”, and “wholesale versus retail” are aspects of the market that merit specific attention. It is also important to analyse whether e-commerce and delivery are part of the same market or whether each can be distinguished as a separate market.

OPTA has not so far carried out any studies in this field. Mirroring the telecom framework, legislation is currently being considered in the Netherlands which would authorise the NRA to remedy potential competition problems in the postal market following an analysis of the relevant market and where a postal service has significant market power.

With regard to product substitutes, this topic should be considered from the point of view of the buyer of the delivery services, in this case the online seller, rather than from the point of view of the consumer (in this case the buyer of the online product and not of the delivery as such). Consumer demand will determine what the online seller considers to be substitutes. Given the prevalence of next day delivery, it is possible that express services might be found to be substitutes for regular parcel delivery. While there are no geographical limits to e-commerce, the delivery will be subject to certain constraints e.g. cost and geography. In that sense there would be a geographical determination of markets. Finally any market analysis should be conducted at a pan-European level and national regulators may only be empowered to collect data within their national territories.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: OPTA does not feel sufficiently equipped to address these issues , given it did not do any research in these areas

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collect of information: The market is somewhat understood but more information is needed. The e-commerce parcels delivery market is a relatively new market with growth potential. It is prudent to monitor it in the light of this fact and the fact that regular postal markets are in decline. Therefore OPTA favours data collection on this market if it is conceivable that the parcels market might not function properly providing consumers with sufficient choice and value for money. But the nature of the data collection needs to relate to the actual or potential problems that could arise. And any demand by the regulator for information and data from third parties will need a legal basis.

Cooperation between NRAs: may be helpful so as to uncover market imperfections or to solve consumer issues provided there is a legal basis to do so. A system of cooperation comparable to that which exists in telecoms would need further justification given the administrative costs involved.

Norway

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: the “three criteria” test seems relevant. It is difficult to say whether the test would need to be adapted to the specific context of European parcels delivery without undertaking deeper analysis.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: Only the examples mentioned (Commission market analysis documents) – no other documents spring to mind.

Market analysis: More lessons can be learned from the energy sector than the transport sector (not aware of ex-ante regulation in the transport sector) but most lessons can be learned from the telecom sector. An example from the telecom sector is the market for wholesale international roaming (see background information for instance in “Commission staff working document. Explanatory note” SEC(2007)1483 final).

Substitutes: C2X, B2B and B2C are likely to be different markets in the competition law sense and express parcels are likely to be a substitute for standard parcel services.

Upstream and downstream markets: it is important not to confuse the “upstream” and “downstream” aspects of the market to be defined, noting that the end user of the delivery service is the online seller.

Analysis: no market analysis related to national or cross-border e-commerce parcels delivery was carried out to-date in Norway.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Possible barriers to entry: Terminal dues/remuneration systems in Europe when compared with production costs may represent a disturbance of the competition framework.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collect of data: The market is somewhat understood but more information is needed in order to decide whether ex ante regulation is appropriate. It could be useful for the Commission/national NRAs to collect more market data recognising that some countries may have constraints when collecting data from non-USP delivery operators (e.g. express operators). Enhanced co-operation between NRAs, as was successfully done in the telecom sector, could be useful.

Poland

I. When ex-ante regulation is pertinent

No need to adapt the three criteria test but no need for further regulation either. However, there is a need for enhanced consumer rights directive and harmonised rules on information provision.

II. Market definition and relevant experience from other sectors

Relevant documents/ sectors: Some experience from the telecoms sector (Commission guidelines...) might help in regulation terms (without saying regulation is needed) and the sector has some similarities to transport but also has differences.

Particularities of cross-border e-commerce parcels delivery: To note, small goods may be sent by letter mail, not as parcels. The market is not yet fully developed (as only a small part of consumers buy cross-border (circa 10%), cross-border e-commerce parcels delivery has not yet developed either).

Analysis: No analysis carried out.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Consumer protection on the “downstream” market: The main issues are on the e-commerce selling market (online seller – end consumer relationship) - lack of adequate information about delivery, terms and conditions and returns, prices too high and lack of choice, lack of trust.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies and ex-ante regulation: It could be useful to look further at the market (cost data...), notably to determine, for example, what issues relate to delivery and which to consumer law (...) and informal cooperation between NRAs could be helpful. However, under regulators' current mandates, there is not much room for possible intervention as supervision is limited to universal services, which constitute only a fragment of the parcels market.

Portugal

I. When ex-ante regulation is pertinent

The three criteria test is a useful tool for identifying relevant markets in any sector, but there is no view that ex-ante regulation is necessarily needed for European cross-border e-commerce parcels delivery.

II. Market definition and relevant experience from other sectors

Relevant documents: Commission guidelines on market analysis and, for example, the 2013 Commission study *State of play of the EU parcel market with particular emphasis on E-commerce* (Copenhagen Economics).

Substitutes: Basing the answer on the national legal framework, it does not appear that express services (faster and possibly with other value added features) are likely to be pure substitutes for standard delivery but this is a question that deserves further analysis.

Upstream and downstream markets: E-commerce involves two markets - wholesale (the purchase of cross-border parcels with possible interconnection between networks of different operators) and retail (the act of buying online a product to be delivered, noting that in some cases the end user may directly choose the delivery). It is important to separate the two to clarify, for example, the limitations of liability of the various parties in case of a problem in the delivery.

Analysis: No analysis carried out.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: No information that the market is not competitive.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collecting further information on the market: More information would need to be collected to determine if there were a need for regulation. Without prejudice to the result and noting the market is new, it might be useful to continue to collect and update this (information on how the market functions and may develop). It is important to consider if any problems/market failures are structural, or merely cyclical and to ensure the issues are dealt with by the entity best placed to do so (sectoral regulators, competition authorities, entities safeguarding the rights of buyers...).

Further cooperation between NRAs: Enhanced cooperation could be useful.

Romania

I. When ex-ante regulation is pertinent

In legal terms, there are not barriers to entry on the e-commerce parcel delivery. This market is subject of regulations in the field of postal services, and also subject of competition and consumer protection laws, when appropriate. ANCOM believe that a healthy environment in terms of competition is sufficient to optimize the delivery of e-commerce packages.

Regarding specifically the three criteria, ANCOM does not consider that their application reveals the need for an ex-ante regulation.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: ANCOM considers relevant all community law documents on competition, the postal directive, all statistical reports conducted by Eurostat in the last years on in e-commerce and postal services, and any community comparative study on monitoring end-to-end transit-times of international parcels. There are no similarities between parcels delivery and the telecoms sector. The parcel's delivery can be connected to the transport sector.

Elements specific to e-commerce parcels delivery: One specific element of e-commerce parcels delivery is that the distribution process can be optimized only with better speed of transit times.

Substitutes: In B2B/B2C/B2X relations, the express service providers can be selected prior to the standard service providers, because the sale-interest of trader, or the time-interest of the buyer. Otherwise, the two dimensions of e-commerce (the electronic booking and the second, involves physical delivery of the product) should be more integrated for future.

Analysis: ANCOM have not carried out any market analyses on this market, and in not going to perform any studies on this. The regulators could not have powers for some pan-European analysis but if the conduct of such studies will become mandatory, the NRAs, by cooperation, should develop the market analysis at continental level.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: There is specific competition on this market as long we can talk about multi-operator environment.

Barriers to entry: The lack of international interconnectivity between postal operators (a small/medium postal provider will not be able to provide a small shipping price) and the high costs of delivery.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies/ need for ex-ante regulation: Reply *d*). The market is not well understood, but certainly is a free market. Based on this, is not necessary to come up with additional regulations in an environment in which the principles of free trade proved that is working fast.

Collecting further data: Before a possible regulation act on this market, the Commission should collect more data within a joint-action of the general directorates (involved) through bodies like ERGP. If this will become mandatory, all regulators will need to develop a pan-European dimension of the process. Will be needed to collect, among other, data on volumes, revenues, the length of delivery distances that need to be covered more often, customers and their origin country etc. In present, nobody have statistical data on this specific market at this level of statistical acuity.

Serbia

I. When ex-ante regulation is pertinent

Minimum, well-targeted and well-structured ex-ante regulation is rather necessary.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: no comment on relevant document (Serbia is not an EU member). Commenting that the consumer should have the same level of options and protection as in any other traditional trade transaction, the answer doesn't contain a specific comment on delivery market per se. A relevant sector would be the sector of electronic communication (the possibility to redefine universal service by including broadband Internet access into the USO, so that the "e" part of e-commerce will offer maximum reliance and accessibility).

Elements specific to e-commerce parcels delivery: E-commerce delivery may need its own terms and conditions, as the expectations and preferences of an e-consumer in relation to delivery are somewhat different than those of an "ordinary" postal service consumer.

Substitutes: agreeing that the express services are not likely seen as substitutes for non-express parcel delivery by e-commerce online buyers, because of their expectation of price and transit time.

Analysis: No specific analysis focused on the national or cross-border e-commerce parcels delivery but in Serbia has been observed an increase of e-commerce activity due to Pay Pal on line merchant platforms.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: No specific comment on cross-border e-commerce parcels delivery. The answer reveals that there exists a rather strong competition in the domain of express delivery and parcels over 10 kg.

Barriers to entry: As not being an EU Member State, the most important barrier to competition seen by representatives from Serbia are represented by custom procedure and certain tax related costs for inbound goods.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies/ need for ex-ante regulation: Reply *b*). The market is new in the sense that it combines different but already known market and communication segments. This combination is simultaneously the cause and the result of a new economic culture that most certainly deserves closer attention.

Collecting further data: Serbia agrees with the collection of more data on the market, in order to receive a closer examination of it, prior to its possible ex-ante regulation. The information in Serbia will be held by the Ministry of Foreign and Internal Trade and Telecommunication, Ministry of Finance and NRA.

Slovenia

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: The test is too loose for proper assessment (it can only be used as part of a wider process). The first step should be definition of the relevant market (what exactly is “European e-commerce parcels delivery”). The relevant market should cover all products or services that are substitutes in the consumer’s opinion taking in account product characteristics, prices and intended use (“consumers” being here the e-business parcels senders). To note, companies on the market face three sources of competitive constraints: demand-side substitutability; supply-side substitutability; potential competition in the relevant market. The following elements would also need to be defined: barriers to entry; the relevant geographic market; the time frame. Only after definition of the relevant market can it be assessed if there is market failure and if ex-ante regulation is even a possible solution.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: *Commission Notice on the definition of relevant market for the purpose of Community competition law* (OJ C 372, 9.12.1997, p. 5 – 13) and appropriate EU competition law cases.

Substitutes: A statement that express parcels are too expensive seems to general. There may be different markets depending on: the value of the goods in the parcel (for example, if e-buyer buys low value articles, only standard parcels may be an option, on the other hand for articles with high value there may be much broader substitution); the size of e-sellers (for example, sellers buying a lot of parcels will have better options than small sellers). Again, the relevant market depends on the consumer’s point of view. Geographical limits maybe shown by any zonal pricing inside EU.

Upstream-downstream markets: Agreement that the delivery operator’s client is the online seller (and not the private individual online buyer). The delivery market may well be a wholesale market in the case of e-sellers with big amounts of parcels and variety of possibilities.

Market analysis: No analysis has been carried out and there is currently no perceived need for analysis.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: Competition is seen as effective (the e-seller can choose from a variety of operators). The relevant problem is not really in the relation consumer (online seller) - delivery operator (the delivery market) but mainly in the relation e-seller- (private individual) consumer (the online buying market). There is a great informational gap when buying online: is the seller really trustworthy; will the items be sent; it the delivery service used that for which payment was made.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Again, the problem is not in the online seller-delivery operator relationship, but in the e-seller - consumer relationship, because of the great informational gap when the consumer buys online.

Collect of information: In principle, it could be useful (statistical data on volumes, cost data) if it is not too much of an additional administrative burden. However, in some cases, it may be almost impossible to locate the holder of complete information especially if there are different operators in the delivery value chain. Also, the information is likely to be confidential with no obligation to provide it.

Spain

I. When ex-ante regulation is pertinent

The 'three criteria' test seems pertinent for European (cross-border) e-commerce parcels delivery.

II. Market definition and relevant experience from other sectors

Relevant documents/ sectors: Commission market analysis documents. More generally, information from the transport sector may help understand the parcels delivery sector.

Substitutability: Express parcels could be a substitute for standard delivery in certain markets.

Upstream and downstream markets: It is important to distinguish e-commerce parcels *delivery*, where there is generally a contract between the online seller and the parcels operator, from online selling markets (contract between the online seller and the (private individual) buyer for a delivered good but not for the delivery per se), noting that there may be exceptions.

Analysis: No analysis carried out.

III. Possible signs of a lack of effective competition and identifying barriers to competition

No specific views.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Collecting further information on the market: More information needs to be gathered and analysed before it could be decided if ex-ante regulation were appropriate and therefore before any remedies were introduced. To note, in Spain, this may be done nationally by the new regulator (CNMC)

Sweden

I. When ex-ante regulation is pertinent

The criteria seem relevant but the test appears to be complicated.

II. Market definition and relevant experience from other sectors

Analysis: No analysis has been carried out. If any market analyses will be carried out it may be necessary for regulators to coordinate their analysis to be able to present a pan-European analysis and/or to assist each other on the national levels by exchanging information and experience on methodology.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: No opinion as regards the European e-commerce parcels delivery. The Swedish domestic parcel market B2C is quite competitive with at least three major actors.

Barriers to entry: The market has to be defined and a market analysis has to be carried out before barriers could be identified.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies/ need for ex-ante regulation: Reply b) ... The market is somewhat understood, but the postal regulator is not an expert on this market, which is new. More information needs to be gathered and analysed before it could be decided if ex-ante regulation were appropriate and therefore before any remedies were introduced. This is particularly important *as* the market is new and the risks of its development being hampered by unnecessary or inappropriate regulation are high. With no prejudice to the result, it would be useful to look at the market further. However, so far no strong evidence has been presented indicating the need for ex-ante regulation.

Collecting further data: It would be relevant to collect more data on the market (statistical data on volumes and revenues; data on quality of service; cost data; information on different types of actors, substitutability, pricing etc).

Switzerland

I. When ex-ante regulation is pertinent

No comment on the pertinence of the “three criteria” test.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: no comment on relevant documents (Switzerland is not an EU member). The telecoms, energy, transport sectors cannot really be learnt from. No comment on delivery market per se, but indication that e-commerce is simply another type of distance selling.

Elements specific to e-commerce parcels delivery: the market(s) are open to competition, not based on resources, and it is not certain that the increasing returns to scale, or economies of scale are as high as in the telecom, transport or energy sectors.

Substitutes: Express services may be seen as substitutes for non-express parcel delivery by e-commerce online (private individual) buyers (depends on value for buyer of various services – in Switzerland, price and quality are similar to the parcels offer, depending on the operator and the weight and size of the item). It is important to consider whether the e-commerce/ delivery market(s) are a seller’s market or a buyer’s market.

Upstream and downstream market(s): It is important not to confuse the market for delivery (contract between the online seller and the parcel operator) and the market for goods (contract between the online seller and the buyer for the delivered good). There are two distinct markets. The e-commerce parcels delivery market is competitive and fragmented. To note, the market for the delivery of e-commerce parcels is not a wholesale market (unless delivery capacity is somehow mobilised by the online seller).

Analysis: No intention or reason to study these markets in the near future (they are fully liberalised and competitive). The market might be geographically limited to Switzerland because of the customs clearance and payment of duty for parcels containing goods imported from abroad.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: Yes (see above).

Barriers to entry: Dominant historical operator (would be shown by ubiquity and strong brand awareness for example); customs clearances and duty.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

Remedies/ need for ex-ante regulation: Reply “d”. The market is not well understood but there is no need to consider it further. The markets are fully liberalised, they are not based on resources and it is not certain that the economies of scale are so high that they constitute a powerful barrier to entry. There is no need to impose ex-ante regulation.

Collecting further data: This could be useful to understand the market better: statistical data on volumes and revenues, information on different types of actors (postal services providers, express delivery providers, ...) and substitutability, concerning domestic and cross-border (incoming and outbound) e-commerce parcels delivery. Information may be held by the national statistical office, the national regulatory authority, the national competition authority, the national price monitoring agency.

Summary of reply to questionnaire – UK

I. When ex-ante regulation is pertinent

Pertinence of the three criteria test: The three criteria seem applicable to intervention in relation to European (cross-border) e-commerce parcels if a potential issue in the competitive process is identified. However, it would not be appropriate to intervene if no such issues had been identified. If intervention was deemed appropriate, given its primary duty to secure the provision of the universal postal service, We would also have to consider the impact on the USP's ability to provide the universal service.

II. Market definition and relevant experience from other sectors

Relevant documents and sectors: In addition to the documents mentioned, generic documents such as the Commission notice on relevant markets could be more relevant than sector specific ones. The documents cited, while relating to a different sector, would be relevant insofar as they set out tools and concepts that are relevant to any market. If there are issues in this sector which are related to SMP, there may be other documents of relevance e.g. in relation to merger control and market reviews or in relation to competition or merger enquiries in the postal sector.

Market analysis: Ofcom did not undertake any assessment of this market. There appear to be limited similarities between the telecoms and parcel delivery industries. Unlike many fixed telecoms markets, domestic parcel delivery is predominantly an end-to-end operation i.e. an operator carries out the collection, sortation and delivery of items itself.

Ofcom's predecessor body, Postcomm, carried out an analysis of markets in 2010, which indicated that in the Y2X and C2X market segments, the universal service provider carries out all activities in the postal pipeline (except for heavyweight C2X). It considered that there was no prospect for competition in the collection or delivery parts of the value chain the USP has unmatched cost advantages due to economies of scope and density achieved by blending its parcels operation with its universal service letter activities (for example, Royal Mail collects parcels at post offices and delivers them along with letters on its normal delivery routes). Postcomm concluded that ex-ante regulation, such as for example mandating access, would therefore be inappropriate for those market segments.

Some separation was found between upstream and downstream activities in the deferred B2X market segment but much less so than in letters – in the UK, most operators predominantly offered end-to-end parcels services (particularly at higher weights). Royal Mail did, voluntarily, offer wholesale parcels services where it provided access to inward sortation and delivery via its nationwide delivery network. In this respect it was considered to be similar to some fixed telecom markets where upstream activities (e.g. core and trunk activities) are carried out by various operators while local access (i.e. "the final mile") is provided on a wholesale basis by the incumbent operator via its network of local exchanges. As in the telecoms market, Ofcom's approach to promoting competition in postal markets is to impose ex ante regulation at the highest level of the value chain where effective competition is not possible (e.g. imposing access conditions for inward sortation and delivery subject to applying the relevant tests in the Postal Services Act).

National regulation – European markets: From an economic point of view, national/European considerations would be reflected in the market definition analysis (geographic reach of market).

National/European considerations are unlikely to affect the market analysis tools. They are more likely to have an impact on the remedies (e.g. they will need to take into account different regulations/laws, different competitive conditions and market structures etc). Were such an analysis to be needed it could be of benefit to map the value chain and operations involved in terms of the diverse origin of parcels, the different ways in which they enter the mail flow, the ways they are processed for export, how they are transported cross-border, how they enter the destination country, the various ways they are delivered to the end customer and the different processes for returns of goods. Outlining the contractual relationship between the various stakeholders in this system (for example, the consumer and the retailer, the retailer and the postal provider, each postal provider and other postal providers, etc) would also help in flagging the elements in which cross-border e-commerce differs from other sectors.

Upstream and downstream markets: likely that there is a retail market which brings together e-tailers on the one side and consumers on the other side. In this market, a consumer enters a contractual arrangement with an e-tailer for the delivery of a good (good+delivery to consumer). The consumers only need to know the price of the good (including delivery) and the conditions. This appears to be the predominant model of e-tailing in the UK. A variant of this model is where the e-tailer proposes a choice of postal providers (with different terms and conditions) and the consumer chooses their provider; if consumers genuinely contract with the postal operator the postal market sits between the postal operators and end consumers and can be seen as a complement to the retail market, rather than an input to it.

Substitutes: If the issue relates to the *delivery* supply chain, it may be necessary to consider the different product markets that exist within that. Ofcom did not consider market definitions relating to C2X, B2X, B2B and B2C. However, Postcomm's analysis of markets suggested that the postal services e-tailers use would sit within the Y2X and B2X market. These market segments have very different characteristics: Y2X (i.e. an individual sending parcels using a pillar box or post office) where there are very high barriers to entry given the need to have an extensive collection point network; B2X (i.e. a postal operator collecting parcels from the sending business), which Postcomm segmented into express (same or next day) and deferred, mainly for demand side reasons.

The two main characteristics considered in Postcomm's competitive assessment were weight and volume. Postcomm considered express services to be effectively competitive and further segmented deferred B2X into "light" (up to 2kgs) and "heavy" (above 2kgs). Postcomm's view was that Royal Mail had cost advantages at lower weights due to the size and scope of its operations (i.e. Royal Mail's USO network could be used for delivery of lightweight parcels). Volume was also found to be a relevant consideration for market definition. Postcomm considered that there would be economies of scale involved with larger contracts, in particular in collection and administration costs, as well as benefits to delivery drop density.

Although not reflected in the market definitions, Postcomm's SMP assessment considered volumes in combination with weight e.g. Royal Mail was found to have SMP for B2X deferred light but contracts with higher volumes and weights were deemed to be increasingly competitive. Finally it might also be possible to segment different stages of the cross-border parcel delivery supply chain.

III. Possible signs of a lack of effective competition and identifying barriers to competition

Effective competition: While Ofcom did not consider competition in the market for European e-commerce parcels delivery, in general signs of uncompetitive markets are lack of value for money e.g. prices above cost, low customer satisfaction, lack of innovation as well as structural indicators such as few market players or static market shares.

These issues would affect both the online seller and the end-user buyer. The parcels buyer (online seller)

may choose to absorb some of the impact of high prices itself (and is more likely to in less competitive markets) and its sales may be affected by low quality of service from the parcels operator.

Possible barriers to entry: These issues might be relevant. However it would be first necessary to identify the problem and define the market, before considering barriers. There is also the question of whether regulators have vires to take decisions in terms of ex ante regulatory intervention and supervision for competition reasons in the postal sector. Depending on the issue, its causes and impacts, vires may exist. However the postal services directive does not contain the system of market review leading to SMP findings and regulation that is to be found in the electronic communications regulatory framework.

IV. Remedies, intermediary steps, and enhanced cooperation between authorities

b) There is some understanding of this market within the national territory. However, Ofcom is not aware of any strong evidence indicating a need for ex-ante regulation. If there were an indication that there were competitive issues in this market, more information should be gathered and analysed before it could be decided if ex-ante regulation is required. If there was evidence that cross-border e-commerce was hampered by differences in national regulations/laws, there could be value in such co-operation.