



ERGP PL (15) 29 – ERGP report on the possible impact of Article 12 application after ECJ C-340/13

An ERGP report on the possible impact of Article 12 application after ECJ C-340/13

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I. INTRODUCTION

Request from the EC to the ERGP on how the EU regulatory Framework applies in relation to special tariffs

The European Court of Justice (ECJ) made a judgement on special tariffs in the case (C-340/13) of *bpost SA v the Belgian Institut for Postal Services and Telecommunications (BIPT)*¹ following a referral for a preliminary ruling by the Cour d'appel de Bruxelles. In the light of this, the European Commission has requested the European Regulatory Group for Post (ERGP) to make a Report on how the EU regulatory framework applies to special tariffs.

The European Commission's request raised the question that, while the ECJ judgement considered specific circumstances attributable to the situation in Belgium and concerns a decision that was subsequently adopted by BIPT, it could have effects beyond the mere national context. Therefore, the European Commission asked ERGP to provide an analysis of the (possible) impacts in the different Member States of the interpretation of Article 12 as put forward in the ECJ case C-340/13.

The ERGP Plenary meeting in June 2015 mandated a Task Force to perform the requested analysis and to produce a report of its findings. The ERGP Task Force (Task Force) consisted of representatives of the NRAs of AT, BG, BE, DE, FR, IT, LT, PT, RO, UK and ES².

The Task Force drafted a questionnaire which it circulated among ERGP members in order to collect information based on the potential impact on the postal markets of the Member States. The Task Force received answers from twenty four countries. After examination of the answers received, the Task Force asked ERGP members a further question on pure volume discounts.

In accordance with its mandate, the Task Force has developed this Report based on an analysis of the background and the answers in the questionnaires.

¹<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130dee6fa5d68ddea423fa0e4d56090da965c.e34KaxiLc3eQc40LaxqMbN4ObxaSe0?text=&docid=162222&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=323047>

² Some of the information provided by the Spanish NRA is confidential at this stage.



I.1. Background

Article 12 of the Postal Directive 97/67/EC, as amended by the Directives 2002/39/EC and 2008/6/EC, sets out the tariff principles that each of the services forming part of the universal service shall comply with at European Union level: affordability; cost-orientation and giving incentives for an efficient universal service provision; transparency; and non-discrimination. Its provisions thus combine both affordability and balanced financial conditions based on the cost orientation principle. Art 12 states:

“Member States shall take steps to ensure that the tariffs for each of the services forming part of the universal service comply with the following principles:

- prices shall be affordable and must be such that all users, independent of geographical location, and, in the light of specific national conditions, have access to the services provided. Member States may maintain or introduce the provision of a free postal service for the use of blind and partially-sighted persons,*
- prices shall be cost-oriented and give incentives for an efficient universal service provision. Whenever necessary for reasons relating to the public interest, Member States may decide that a uniform tariff shall be applied, throughout their national territory and/or cross-border, to services provided at single piece tariff and to other postal items,*
- the application of a uniform tariff shall not exclude the right of the universal service provider(s) to conclude individual agreements on prices with users,*
- tariffs shall be transparent and non-discriminatory,*
- whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions.”*



I.2. Case ECJ C-340/13

Belgian per sender case

The commercial policy of the Belgian universal service provider, bpost, is based on three types of tariffs: single piece tariffs, lowered non-standard tariffs (discount according to deposited volume) and conventional tariffs for the deposit of large quantities of mail according to the conditions set in an individual contract. Standard tariffs take into account quantitative and operational discounts and can relate to transactional mail and direct mail.

In 2009, the bpost standard tariffs made it possible for intermediaries to consolidate volumes from various senders. In 2010, bpost modified the tariff model for standard tariffs preventing intermediaries from grouping items of correspondence emanating from different senders by calculating the quantitative discounts on an individual basis, that is per individual sender, and not on total volume. The so-called ‘per sender’ model is applied for transactional mail and direct mail.

Following complaints from intermediaries the BIPT launched a formal enquiry into the 2010 ‘per sender’ model.

The BIPT enquiry is based on Article 144ter, § 1, 5° of the Belgian postal law, which is a literal transposition of Article 12, 5 of the Postal Services Directive:

“Whenever USPs apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and USPs supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions”.

According to BIPT this article applies to both operational and volume discounts. The BIPT based its assessment on the ECJ judgement on the Vedat Deniz case³ which precludes the universal service provider from discriminating between consolidators, who bundle together mail from several originators, and bulk mailers who post their own mail.

BIPT contracted WIK Consult⁴ in collaboration with CRID⁵ to undertake an economic and legal analysis of the 2010 bpost tariff model for conventional tariffs.

³ The judgment of the European Court of 06/03/2008 in joined cases C-287/06 to C-292/06 (Vedat Deniz).

⁴ German consultancy firm

⁵ The Research Centre in Information, Law and Society (CRIDS) Of the University of Namur is engaged with a wide spectrum of information society-related issues, as e.g. telecommunications.



Regarding discrimination, BIPT identified several elements of discrimination in the 2010 tariff model:

- Different discounts for intermediaries and bulk mailers: for an equal service (same volume and same quality of mail preparation), consolidators receive lower discounts than the discounts bpost grants to its own direct client. This is due to the fact that these discounts are calculated for each of their clients on an individual basis.
- Despite improvements made by bpost during the investigation, intermediaries, unlike the direct clients of bpost, had to pre - finance their volume discounts;
- In order to get the most attractive volume discounts, intermediaries had to identify their own clients to bpost.

BIPT considers that if bpost chooses to apply such discounts, it has to do so in a non-discriminatory and transparent manner and calculate them based on consolidated volumes.

In its decision of 20 July 2011 on the conventional tariffs of bpost for the year 2010, BIPT concluded that bpost violated 144ter, § 1, 5° of the Belgian Postal Act (and thus Article 12.5 of the Postal Directive). The public version (in French and Dutch) of the BIPT decision can be accessed on the BIPT website: [BIPT decision of 20 July 2011](#)

The decision paid special attention to the role of consolidators/intermediaries in the process of liberalisation. Indeed, the BIPT decision refers to a report of the European Commission that points out that consolidators are considered to be potential entrants. Therefore, conditions regarding special/conventional tariffs should stimulate the development of competition in order to allow them to invest progressively in the postal chain and to eventually build up their own distribution network:

“Access can help facilitate market entry for upstream consolidators (...). New competitors who want to establish a delivery network can also use access for a transitional period to build up customer relationships and volumes, before being able to compete end to end with the incumbent. Using this model, consolidators and competitors, as well as major business customers can already carry out part of the value chain process before handing mail over to the incumbent”⁶.

Other than that, the presence of consolidators facilitates market entry by providing access to the mail of many business customers. WIK in its study regarding the role of regulators in a more competitive postal market, states:

⁶ Report from the Commission of 23 March 2005 to the Council and the European Parliament on the application of the Postal Directive (Directive 97/67/EC as amended by Directive 2002/39/EC), COM(2005)102, Annex, p.19.



“Such presence of consolidators facilitated entry because access to one consolidator provided access to the mail of many business customers. The (...) market also appeared to be relatively transparent, as [USP] prices and rebates were all publicly available, which reduced the risk that [USP] could have behaved in a discriminatory manner”⁷.

Consolidators can put competitive pressure on the USP. Copenhagen Economics states that consolidators *“have the possibility of increasing efficiency and intensifying competition both in downstream (delivery) as well as upstream (sorting) postal operations.”⁸*

BIPT’s analysis also showed that, compared to the 2009 regime, the per sender model has had a negative impact primarily on the largest intermediaries, i.e. those that could put most competitive pressure upon bpost⁹.

The BIPT decision of 20 July 2011 imposed a fine on bpost for infringing the non-discrimination principle.

Bpost has since taken measures to conform to the tariff scheme for conditional tariffs as in the BIPT decision but they have appealed against this decision which is currently pending at the Cour d’appel de Bruxelles . The appeal is not suspensive.

Bpost has appealed against that decision to the Cour d’appel de Bruxelles, which stayed the proceedings and requested a preliminary ruling on the following questions:

“(1) Is the fifth indent of Article 12 of the Postal Services Directive to be interpreted as imposing an obligation of non-discrimination, particularly in relations between the USP and consolidators, with regard to operational discounts granted by that provider, the pure quantity discounts remaining subject to the application of the fourth indent of Article 12?

(2) If the reply to the first question is in the affirmative, is the system of pure quantity discounts applied by bpost in 2010 consistent with the obligation of non-discrimination set out in the fourth indent of Article 12 where the differentiation in price which it creates is based on an objective factor having regard to the relevant geographical and services market and does it not create an effect of exclusion or of inducing loyalty?

(3) If the reply to the first question is in the negative, does the quantity discount granted to the consolidator breach the principle of non-discrimination under the fifth indent of Article 12 where its level does not equal the discount granted to a sender who posts an equivalent number of items, but equals all the discounts granted to all the senders on the basis of the number of items of each sender which this consolidator has consolidated?”

⁷ WIK-Consult, *“The role of regulators in a more competitive postal market”*, September 2009, p. 186.

⁸ Copenhagen Economics, *“Main developments in the postal sector (2008-2010) ”*, 29 November 2010, blz. 103-104.

⁹ The source of information BIPT.



Process in the European Court of Justice

The European Court of Justice (ECJ) was asked to make a preliminary ruling regarding the questions above. During the proceedings at the ECJ, written observations were submitted by bpost, Belgium, Italy, Sweden and by the Commission and at the hearing on 11 June 2014, bpost, Belgium, France and the Commission made oral submissions.

In her opinion dated 16 October 2014¹⁰, the Advocate General Sharpston opined on the three questions raised by the Belgian Court, as follows:

Question 1: Scope of Article 12, 5 of the Postal Services Directive (ie, does this provision apply only to operational rebates or also to quantity rebates?)

Bpost and the French Government argued that the reference to the ‘avoided costs’ in both the 2002 version of the fifth indent of Article 12 and in the preamble to the 2008 Directive indicated that that indent should be read as applying exclusively to operational discounts, which are granted to reward the preparation of mail prior to its deposit and the ensuing cost savings for the USP. By contrast, the Belgian, Italian and Swedish Governments and the Commission submitted that quantity discounts similarly imply the granting of ‘special tariffs’ by the USP both on operational and quantity discounts departing from ‘normal’ tariffs applicable to the traditional service for letter post.

According to the Advocate General the material scope of the 5th indent of Article 12 of the PSD (*ratione materiae*) is limited to operational discounts only based on the following reasoning:

- No definition of special tariffs in the PSD
- Legislative history (EC proposal of 2000 which refers to USP practices as regards operational discounts)
- The removal of the words “avoided cost” (indicative of operational discounts) in 2008 did not change the scope of “special tariffs” in Art. 12, 5 PSD.

Question 2: The compatibility of the per sender model with the non-discrimination principle under Art. 12, 4th indent PSD

By its second question, the Court sought to ascertain whether the per sender model is consistent with the principle of non-discriminatory treatment set out in the fourth indent of Article 12 of the Postal Services Directive.

The principle of non-discriminatory treatment is settled case law, which means that comparable situations should not be treated differently unless such different treatment is objectively justified, and that situations which are not comparable should not be treated the same way. In assessing the comparability of situations, all the elements which characterise

¹⁰<http://curia.europa.eu/juris/document/document.jsf?text=&docid=158662&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=323194>



them must be taken into account, including the principles and objectives of the field to which the European Union act concerned relates.

Bpost and France emphasised in that regard that only senders actually generate demand for postal services and quantity discounts are intended to stimulate that demand. It is therefore justified to calculate those discounts in such a way that only the sender's decision to send more mail is rewarded, rather than the consolidator's ability to collect large volumes of mail from various senders. By contrast, the Belgian, Italian and Swedish Governments and the Commission argued that senders and consolidators are in a comparable situation since the service supplied to each by bpost is the same.

The Advocate General agreed that the system of quantity discounts does effectively entail a difference of treatment between consolidators of mail and individual bulk senders but not a discriminatory treatment. The Vedat Deniz case does not apply in the current case as the Vedat Deniz case only relates to operational discounts. According to the Advocate General the per sender model has no negative impact on the consolidator but is likely to stimulate demand and avoid the risk of aggregation by consolidators, which could ultimately oblige the USP to abolish its system of quantity discounts altogether in order to ensure its financial viability.

The Advocate General concluded that, since senders and consolidators are objectively in different situations with regard to quantity discounts, the principle of non-discrimination laid down in the fourth indent of Article 12 of the Postal Services Directive must be interpreted as not precluding a USP from calculating the quantity discounts granted to a consolidator on the basis of the volumes of mail of each of the consolidator's clients taken separately during a reference period, rather than on the basis of the aggregated volumes of mail delivered by that consolidator to the USP during that period.

Question 3: Does a quantity rebate restricted to the volume of the sender, as opposed to the volume of the consolidator, breach the non-discrimination principle (ratione personae)

The answer to the second question applies equally to Question 3

Advocate General's Conclusion:

The Advocate General concluded that "In the light of all the foregoing considerations, the advocate general suggests that the Court should rule to the following effect in answer to the questions referred by the "Cour d'appel de Bruxelles" (Belgium):

(1) The fifth indent of Article 12 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended, does not apply to quantity discounts granted by a universal service provider according to the



volume of items delivered to it by a sender in the course of a reference period and intended to create an incentive for senders to increase their demand for postal services.

(2) The principle of non-discrimination laid down in the fourth indent of Article 12 of Directive 97/67 does not preclude a universal service provider from calculating quantity discounts granted to a consolidator on the basis of the volumes of mail of each of the consolidator's clients taken separately during a reference period, rather than on the basis of the aggregated volumes of mail delivered by that consolidator to the universal service provider during that period."

Judgement of the Court of 11 February 2015 relating to Case ECJ C-340/13¹¹

The Judgement of the European Court of 11 February 2015 describes the EU and Belgian law and also the dispute, namely the scope of the fifth indent of Article 12 and the interpretation which the Court has made of that provision in the Vedat Deniz judgment. The Court stated, as a preliminary remark, that the assessment of the compatibility of quantity discounts with the principle of non-discrimination is not affected by the fact that those discounts fall under the fourth indent rather than the fifth indent of Article 12 of Directive 97/67, or vice versa. The stricter non-discrimination rule enshrined in the fifth indent only applies to operational discounts.

It is therefore only necessary to ascertain whether quantity discounts follow the established case-law of the Court, pursuant to which the principle of non-discriminatory treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified

The Court concluded that there is a different treatment between large senders and consolidators but based on the case law of the Court, that difference in treatment will constitute discrimination only if:

- Firstly, the senders and consolidators are in comparable situations
- Secondly, there is no objective justification for that difference in treatment.

According to bpost and the French Government the quantity discounts are meant to stimulate demand and the senders are the only ones to increase demand as they are originating the postal items. In the period before 2010 such discounts were granted to consolidators and the receivers were granted the discount indirectly but the system did not encourage more mail. There was even the danger that bpost might restrict or withdraw the quantity discounts to safeguard its financial stability.

¹¹<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130dee6fa5d68ddea423fa0e4d56090da965c.e34KaxiLc3eQc40LaxqMbN4ObxaSe0?text=&docid=162222&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=323047>



But the Belgian, Italian and Swedish Governments and the European Commission argued that this was not in line with the case law and more specifically with the Vedat Deniz judgement.

The Court stated that the Vedat Deniz case law is not applicable to the main proceeding and only applies to operational discounts based on the fact that special tariffs take into account 'avoided costs' as compared to the standard services and do not affect the financial stability of the USP.

In the Vedat Veniz case, the discounts were based on avoided costs but were excessive compared to avoided costs and did not affect the financial stability of the USP (DP AG). So bulk mailers and consolidators could be in comparable situations as regards operational discounts based on the Vedat Deniz case but that is not necessarily the case as regards quantity discounts.

The Court also stated that senders are the only ones in a position to increase the demand since they are responsible for originating postal items, contrary to the consolidators handing on to bpost the mail which they have already collected from different senders. According to the Court, consolidation does not have the effect of increasing the overall volume of mail. It follows therefore that, except to the limited extent that those consolidators are themselves senders, their activity does not, of itself, contribute to the increase in the volume of mailings handed on to bpost. The Court added that the application of quantity discounts to consolidators on the basis of the total volume of mail they send to bpost is likely to compromise the objective of increasing the demand for postal services and could lead bpost to restrict or even withdraw that system in order to safeguard its financial stability. Based on the foregoing considerations, the Court concluded that bulk mailers and consolidators were not in comparable situations for the purposes of quantity discounts which aim to stimulate demand, as it is senders who are in the position to encourage volumes.

On those grounds, the Court ruled that: *"The principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, must be interpreted as not precluding a system of quantity discounts per sender, such as that at issue in the main proceedings."*

The Belgian Court of Appeal has not issued the final judgement on the national case for the date of issuing of this report.



II. OVERVIEW OF THE DISCOUNTS PRACTICE IN EUROPE

II.1. Different pricing models in Europe

In 2012 ERGP analysed discount models applied in Europe (ERGP Access and end-to-end competition sub-group report¹², thereafter - Report). The Task Force considers that the reference to previous work of ERGP is important and also fulfils the purpose of providing background information on discount and rebate schemes in Europe.

The discount schemes which follow are discussed separately even though the rebates for worksharing and volumes are commonly offered in combination. In general, the volume-based rebates illustrated under the section below, 'Retail-minus-model' are conditioned to specific contractually defined mail preparation. In order to obtain a volume-discount, bulk mailers as well as other postal operators have to perform specific mail processing activities. Accordingly, volume-based discount schemes are closely linked with elements attributed to worksharing tariffs.

1. Worksharing discounts

The worksharing discounts charged by postal operators can be classified as a price scheme which rewards the cost savings resulting from the preparatory work done by the bulk mailer or other competitor. A typical case is where the customer does a part of the total service, such as collection and sorting activities. For calculating the worksharing discounts the incumbent generally applies the concept of avoided costs usually using a bottom-up model based on the concept of long run incremental cost standard (LRIC) or a top-down approach (retail-minus approach).

LRIC model

The LRIC model refers to the incremental costs incurred in the long run which are related to the provision of access and which would be incurred by an incumbent using the most efficient current technology to provide such access. Such a bottom-up model might increase the potential for promoting competition by new entrants in the downstream market. Under LRIC, the incumbent receives no compensation for the profits which might be lost if new entrants use its postal facilities to take away some of its customers. It will have high incentives to engage in exclusionary conduct to drive downstream competitors out of the market. Hence the risks that the incumbent will engage in exclusionary behaviour are significant.

Retail-minus-model

Under the retail-minus approach the discounts are based on the prices which the incumbent

¹² [ERGP \(12\) 36](http://ec.europa.eu/internal_market/ergp/docs/documentation/2012/121130_ergp-12-36-access-postal-network-report_en.pdf) – ERGP Report on "access" to the postal network and elements of postal infrastructure (2012)
http://ec.europa.eu/internal_market/ergp/docs/documentation/2012/121130_ergp-12-36-access-postal-network-report_en.pdf



charges for provided end-user services subtracting the avoided costs for parts of the mail processing activities such as the sorting of the letters which will be carried out by clients. A retail-minus approach which implicitly creates a link between the end-user price and the rate for the partial service reduces the risk of a price squeeze as the incumbent charges worksharing tariffs that undercut the end-user prices. However, in the absence of retail price regulation, it is not able to bring down excessive wholesale prices to a cost-oriented level. As the wholesale price is calculated as the retail price minus the costs of the incumbent, an excessive retail price will automatically be translated into an excessive wholesale price.

2. Quantity rebates

Rebate schemes based on quantities and volumes are commonly proposed features granted by the incumbent to bulk mailers taking into account the mailers` need and willingness to pay for postal services. The rationale behind this scheme and the economic justification is that the economies of scale in the delivery processes resulting from larger volumes shall be passed on to the sender. If the sender delivers higher mail volumes this would improve the utilization of the letter infrastructure and, consequently, reduce the production costs of the operators. With liberalization some incumbents have abandoned the previously cost-based pricing policies and develop under pressure from alternative postal operators, demand-based pricing policies.

Bulk mailers have been granted rebates compared to the regular price by defining volume thresholds required for access to bulk mail services. In order to meet the contractual requirements to obtain the volume rebates in question, clients had to deliver a minimum number of letter post items.

In its 2012 Report the ERGP indicated an impact of quantity and operational discounts to the competition in the postal market.

Quantity based rebates can take many forms based on market segmentation with different discounts for direct and transactional mails, but it must be ensured that there is a link between the extent of economies of scale and the discount scheme. As long as the quantity rebates are cost-oriented and reflect the cost savings achieved and the discount will be granted to all customers in the same way, the price scheme has no negative effect on competition. However, there is no link between the price-scheme and costs, this discount scheme will be viewed as an abusive pricing policy with pull effect on bulk mailers.

Nevertheless such price schemes contain an element of (secondary) discrimination with potentially distorting effects on the demand side. They are usually considered acceptable if they are applied equally to all customers without containing hidden fidelity elements. While the discounts are predominantly designed to gain and retain large mailers by passing on economies of scale there is the further aspect of strengthening the incumbent`s dominant position thus leaving little room for new entrants.



Secondly there is the problem that the economic advantage of a discount might disappear if it is granted to large mailers and consolidators alike. The discount, however, could clash with the principle of non-discrimination if incumbents use a per sender model that calculates the level of discounts on the basis of the volume of mails posted by each sender, irrespective of whether the latter has used the service of a consolidator (who bundles together mails from several originators) to avoid that consolidators benefit from bigger volume discounts or certain operational discounts.

3. Turnover-related rebates

Turnover-related rebates can be classified as those discounts which are conditioned to the achievement of a specific target with the dominant undertaking, ie the incumbent. These discounts are related to the turnover granted on the basis of the turnover either for a single specific product or for the entire turnover for all products of the incumbent. For obtaining such a discount the client is contractually required to realize a defined amount of revenue (which is specified in advance) within a certain period. Bulk mailers purchasing all products or services from the incumbent achieve a higher total rebate compared to buying a single product. Such rebates tend to have a strong pull effect on the business partners of the dominant undertaking. As the customer qualifies for the discounts after the achievement of an ex-ante specified threshold this induces an incentive for customers to expand their demand above the threshold and to extent purchase products for which they have no preference or no need or which they would buy from other companies. Conversely the motivation for the client to purchase products or use services from other competitors is very low until the targeted value is achieved. Depending on the pre-defined targets the pull effect on large clients and the resulting exclusionary impacts on competition would be significant. A pricing strategy based on fidelity could lead to a complete exclusion of competition. As a consequence the incumbent is able to fortify the dominant position and leverage its market-dominant position into other competitive segments. By such tying, the clients to the dominant undertaking competitors can successfully kept out of the relevant market.

4. Fidelity rebates

Typically this type of rebate focuses on the customers` entire demand of product or service and not on a predefined volume. Customers receive a rebate only if they cover their total (or a high share of their total) need with the seller. This has an anti-competitive effect as the rebate ties the customer to the granting company. Furthermore this kind of rebate can have a discriminatory effect. Customers with different needs get the same rebate even though their different volumes cause different economies of scale.



II.2. The Vedat Deniz case law (operational discounts)

The ECJ judgement in case C-340/13 (bpost) reflects in several paragraphs the ECJ judgement in *Deutsche Post and Others* (joined cases C-287/06 to C-292/06; EU:C:2008:141) (the Vedat Deniz case) as this judgement concerns questions arising around the business model of consolidators as well. In *Deutsche Post and others*, the court found that the fifth indent of Article 12 of Directive 97/67 was applicable and precludes refusal to apply to businesses which consolidate postal items from various senders the special tariffs which the national universal service provider grants to business customers for the same set of services, i.e. depositing minimum quantities of pre-sorted mail at the USPs sorting offices¹³. In its recent ruling in case C-340/13, the ECJ made clear that the previous judgement in *Deutsche Post and Others* did not involve pure volume discounts but referred to operational discounts. According to the ECJ, this difference is decisive for the application of the fifth indent of Article 12 of Directive 97/67.

The results of the ERGP questionnaire (see II.3 below) show that the set of discount models is manifold and operational rebates are in place in many countries. Therefore it is regarded important to also give a detailed background of the earlier judgement in *Deutsche Post and Others* to provide a full picture of the jurisdiction having evolved around the matter of discount systems in providing postal services.

In *Deutsche Post (DPAG) and Others* the ECJ had to decide on the application of the fifth indent of Article 12 of Directive 97/67 in the case of special tariffs provided by DPAG to business customers but not to intermediaries consolidating postal items. Activities of the intermediaries included the collection of postal items from the premises of various senders as well as the pre-sorting and transport of those postal items to access points such as DPAG's sorting offices. While DPAG offered special tariffs to business customers for depositing minimum quantities of pre-sorted mail at its sorting offices, those rebates were refused to consolidators for their activities around collecting, pre-sorting and depositing postal items at DPAG's sorting offices.

The fifth indent of Article 12 of Directive 97/67 stipulates that, "*whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different customers, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions.*" For the ECJ it is clear from that provision that, in order to observe the principles of transparency and non-discrimination, special tariffs provided by the universal service provider need to be

¹³ *Deutsche Post and Others*, EU:C:2008:141, recital 41.



applied equally in particular as between third parties¹⁴. Thus, as soon as a universal service provider offers special tariffs to business customers or bulk mailers respectively, intermediaries consolidating mail from different customers are “entitled to enjoy the same tariffs under the same conditions”¹⁵.

DPAG and the German Government argued that the fifth indent of Article 12 of Directive 97/67 does not oblige the universal service provider to treat consolidators and business customers equally¹⁶. According to their arguments consolidators were not authorized to offer the services for which they requested special tariffs since those services (clearing, transport and sorting of correspondence) were reserved in the public interest by German legislature to Deutsche Post¹⁷. In contrast, business customers would not fall under this reservation because they act as ‘self-providers’. With regard to these arguments, the ECJ found that the consolidation services in question do not belong to the field which may be subject to reservation in the public interest, because the sorting offices of Deutsche Post have to be regarded as access points and the services which may be reserved to the universal service provider only start with clearance after depositing consolidated mail at access points¹⁸.

The ECJ also dealt with the argument of DPAG and the German Government that permitting consolidators access to sorting facilities and corresponding rebates for a partial service handling postal items which fall under Deutsche Post’s exclusive licence would threaten the company’s financial stability¹⁹. In this context the court held that granting special tariffs does not affect the financial stability of the universal service provider because those special tariffs can be calculated in such a way that they include specific costs linked to the provision of the universal service and do not differ from the normal tariffs except for the fact that avoided costs are deducted from the latter tariffs²⁰.

Approving a further argument of DPAG and the German Government, the court found that, in principle, a universal service provider is not obliged under Article 12, fifth indent, of Directive 97/67 “to grant access to the postal chain under conditions and at points different from those which apply to the traditional service for letter post”²¹. However, according to the ECJ, a strict obligation of the Member States to apply the principles of transparency and

¹⁴ *Deutsche Post and Others*, EU:C:2008:141, recital 28.

¹⁵ *Deutsche Post and Others*, EU:C:2008:141, recital 28.

¹⁶ *Deutsche Post and Others*, EU:C:2008:141, recital 29.

¹⁷ *Deutsche Post and Others*, EU:C:2008:141, recital 30.

¹⁸ *Deutsche Post and Others*, EU:C:2008:141, recitals 32- 35.

¹⁹ *Deutsche Post and Others*, EU:C:2008:141, recital 36.

²⁰ *Deutsche Post and Others*, EU:C:2008:141, recital 37.

²¹ *Deutsche Post and Others*, EU:C:2008:141, recital 41.



non-discrimination exists where such access to special tariffs is offered by that provider²². In this line, the fifth indent of Article 12 of Directive 97/67 must be respected in a situation where a universal service operator grants business customers “*access to its postal network at points other than the traditional access points and offers special tariffs for them on that basis*”, as was conceded by DPAG and the German Government²³. Thus, special tariffs offered to businesses, bulk mailers or consolidators of mail as well as the associated conditions need to be applied equally as between third parties in particular²⁴.

Following this reasoning the ECJ decided that the interpretation of the fifth indent of Article 12 of Directive 97/67 precludes a refusal by the USP to apply to intermediaries, which consolidate postal items from various senders, the special tariffs which are granted to business customers for depositing pre-sorted mail at its sorting offices²⁵. Thus, as soon as a USP applies special tariffs, it must grant the same tariffs and conditions to business customers and to consolidators of presorted mail.

²² *Deutsche Post and Others*, EU:C:2008:141, recitals 41.

²³ *Deutsche Post and Others*, EU:C:2008:141, recitals 42, 43.

²⁴ *Deutsche Post and Others*, EU:C:2008:141, recital 43.

²⁵ *Deutsche Post and Others*, EU:C:2008:141, recital 44.



II.3. Analysis of the results of the questionnaire

1. The replies to the Task Force questionnaire: initial overview

On 8th of May, the ERGP Task Force formulated a questionnaire and circulated among ERGP members in order to collect information, based on which the trends of impact on the postal markets of the Member States would be preliminary framed. The deadline for answers was 21st of May.

TF received answers from the following countries: EE, IE, PL, PT, MT, BG, AT, GR, CZ, SK, UK, LT, DE, FR, RO, SE, HR, NL, BE, IT, LU, SI, CY, ES (overall from 24 countries).

The current overview is based on the analysis of the replies to the questionnaire.

1 Does your designated Universal Service Provider²⁶ offer discount for single piece mail and/or bulk mail (e.g. administrative mail and direct mail)? If yes, please briefly describe the contractual offer of the designated Universal Service Provider and indicate if the tariffs are publically available to all or individually negotiated?

The majority of EU countries (all positive replies out of 24 countries) apply discounts models. 19 countries apply discounts models for bulk mail (EE, IE, PL, PT, MT, AT, GR, SK, UK, LT, DE, FR, SE, NL, IT, BE, LU, CY, [redacted]), 10 for single piece mail (IE, BG, GR, CZ, UK, DE, HR, SI, [redacted], PT), 3 for direct mail (BG, CZ, SK) and 5 for other (registered items, postal parcels, administrative, insured, 1st class 2nd class, second class domestic letter mail services weighing up to 2 kg and second class domestic registered letter mail services weighing up to 2 kg) (PL, PT, CZ, SK, RO)).

Usually USPs offer two types of discounts: operational and quantity discounts. In some countries the discount may depend on delivery D+N requirement (IE), franking method (FR, CZ), volume and category (mixed, small, large or special postal items) (NL, MT), [redacted]

In most cases (21 out of 24) discounts for universal postal services are publically available on the websites of the USPs. Few countries state that individually negotiated contractual tariffs are not publically available.

	USPs' discounts models	Publically available
EE	Bulk mail (non-universal letter service)	Yes
IE	Single piece and bulk mail	Yes

²⁶ If there is no designated Universal Service Provider, the reference to designated Universal Service Provider refers to dominant incumbent operator in this questionnaire



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PL	All mail (unrecorded items, registered items, postal parcels, bulk mail)	Yes
PT	Discounts to contractual tariffs	Yes
MT	Bulk mail	Yes
BG	Discounts for single piece mail and direct mail	Yes
AT	Discounts for letters (bulk mail)	Yes
GR	Discounts for single piece mail and/or bulk mail	Yes
CZ	Discounts for single piece mail, administrative mail and direct mail	Yes
SK	Discounts for bulk mail (1class letter, 2 class letter, administrative mail, registered letter, insured letter, direct mail and parcels)	Yes
UK	Discounts for single piece mail and for bulk mail	Yes
LT	Discounts to contractual customers for bulk mail	Yes
DE	Discounts for single piece mail and bulk mail	Yes
FR	Discounts for bulk mail	Yes
RO	Discounts for second class domestic letter mail services weighing up to 2 kg and second class domestic registered letter mail services weighing up to 2 kg	Yes
SE	Discounts on bulk mail products	Yes
HR	Discounts for universal service (including single piece mail) and discounts for other postal services	Yes
NL	Discounts for bulk mail	Partially
IT	Discounts for bulk mail	N/ A
BE	Discounts to contractual customers for bulk mail	Yes
LU	Discounts for bulk mail	Yes
SI	Discounts for single piece mail (letters)	N/ A
CY	Discounts for bulk mail and direct mail	Yes
█	█	█

Operational Discounts

2° Does the discount scheme/policy offered by the designated Universal Service Provider include operational discounts (discounts which seek to reward/reflect costs avoided by the USP linked to operational activities, e.g. presorting, use of trays, use of electronic data, etc.) in the contractual tariffs? If yes, please sum up and briefly describe the operational discounts scheme/policy and also indicate the percentage of the discount (minimal and maximum discount rate in %) and/or the range of the discount for the different categories of operational discounts. Where these tariffs are public, please provide the link.

Out of the 24 replies received to the questionnaire, 23 NRAs informed that operational discounts are in use, 1 NRA indicated that there are neither operational nor volume discounts offered. A very similar picture applies to the volume discounts as also 23 NRAs state that volume discounts are offered either as a component/threshold within the



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operational discount or as a pure volume discount. One country made the remark that the volume discount is offered as a part of the operational discount and therefore it does not stand alone as a volume discount.

	Operational discounts	minimal and maximum discount rate in %	Volume discounts	minimal and maximum discount rate in %
EE	Yes	from 5% to 20%	Yes	from 5% to 19,5%
IE	Yes		Yes	
PL	Yes	4% (irrespective of the volume)	Yes	from 3% to 39%
PT	Yes	from 0,3% to 11,5%*	Yes	from 0,3% to 11,5%*
MT	No		No	
BG	Yes	from 0,5% to 57%	Yes	from 0,5% to 15%
AT	Yes	from 3,75% to 7,5%	Yes	from 3,75% to 7,5%
GR	Yes	from 0,5% to 5%	Yes	from 2% to 15%
CZ	Yes		Yes	From 1% to 22%
SK	Yes	from 1% to 10%	Yes	from 1% to 10%
UK	Yes	up to 50%	Yes	up to 50%
LT	Yes	from 4% to 5 %	Yes	from 12% to 26%
DE	Yes	from 22% to 40%	Yes ²⁷	
FR	Yes		Yes	
RO	Yes	from 1% to 49% (cumulative with volume discounts)	Yes	from 1% to 49% (cumulative with operational discounts)
SE	Yes	up to 44%	Yes	From 1% to 15%
HR	Yes		Yes	
NL	Yes	confidential	Yes	confidential
IT	Yes		Yes	
BE	Yes	from 0,5% to 35%	Yes	up to 8% but some operational discount includes also an volume discount till 29%
LU	Yes		Yes	
SI	Yes		Yes	From 3% to 12%
CY	Yes	From 2% to 22%	Yes	From 1% to 30%

* Discounts depend on the service. The discounts presented in this table refer to bulk mail dispatches of domestic non-priority standard mail (D+3 service).

Operational discounts: When analysing the amounts of the discounts offered the survey shows a wide variety. The range offered starts with 0,3% and goes up to a maximum of 57%.

²⁷ As a component in the operational discount, but not as a stand alone volume discount.





Also some countries show that the range between the minimum and the maximum discount offered is a rather wide (0,5%-57%, 1%-49%, 0,5%-35 and 2% -22%).

Volume discounts: the range is between 0,3% and up to 60%.

Two NRAs reported that operational and volume discounts are offered but the numbers and percentages are confidential.

The conditions for the various discounts and the types are quite different and may be summarized as follows. In a high number of cases the two types (operational and volume) of discounts are combined. On the conditions side various pre-requirements are in use in order to qualify for the discount such as presorting, bulk mail or unrecorded mail. Also planned posting in advance is required as a pre-requirement in one country. The use of franking machines; a handover protocol in a unique number of barcodes labels; or a special weight discount are used as requirements for discounts to be provided. In one country the combined match of various types of pre-requirements may accumulate various types of discounts so that a maximum discount rate of 57% may be achieved. Another country requires certain volume/revenue related thresholds. In another country, technological discounts; bonuses; and a bonus for long term cooperation is provided. Also the presorting of mail into municipalities or the own delivery to certain county centres is set as a pre-requirement for discounts, also called in some cases as discounts for avoided costs, whereas the similar effect this also may be achieved by applying regime the access to the network. Also certain weight discounts are provided. There is also a distinction in one country for bulk mail fully sorted and non-sorted bulk mail. One country also has a distinction between administrative and direct mail with reflection to data quality, time of deposit and address databases. In one country volume discounts are different depending on the concentration of addressees in bigger or smaller cities.

3° Are different discounts applicable for operational discounts based on the nature of the sender/body that deposits the mail (e.g. direct customer versus mailhandler/consolidator/router)? If yes, please explain briefly how the discount system functions for the different categories of clients.

The aforesaid question refers to the practical application of the principle that the tariffs for each of the services forming part of the provision of the universal service must be transparent and non-discriminatory. The analysis of the responses received by the NRA is particularly important in relation to recent ECJ C-340/13.



The summarized data shows that the majority of countries (21 out of 24) affirm that operational discounts for the different categories of clients are applied with the same discounts and conditions. Furthermore, 19 out of 24 countries also stated that if the mail handler/consolidator/router deposits mail from different senders (in the same expedition or reference period), it receives operational discounts based on total volumes deposited.

Most NRAs responded that different discounts are not applicable (IE, PL, BG, AT, LT, FR, RO, SE, HR, IT, LU). In other countries, this result is achieved through other approaches such as: the consolidator is treated as sender based (EE); universal services tariffs are provided uniformly in comparable situations (GR); all discounts are published and publically available for direct customers and mailhandlers (CZ); sender and consolidators receive the same discounts and conditions (SK); on a non-discrimination basis (DE); [REDACTED]

[REDACTED] same discounts for all senders, but different one depending of the nature of the mail (e.g. advertising versus transactional (UK), etc. In SI, all discounts are applicable for all clients. But in the case of consolidation of mail from different clients, the mail can sum up (consolidate) if the companies are in a joint venture. For the access to the network, the discounts are available only with the contract between USP and providers of substitute USO services. The Portuguese NRA informs that mail handlers act solely as subcontractors of the sender without contractual relation with the USP.

Only three NRAs answered negatively to the question, either because there is no such information, or because there is no mailhandler/consolidator/router and the discounts are offered for all retail customers (CY, MT).

The NL regulator informed that the USP (PostNL) stipulates that bulk mail conditions and discounts apply only to batches consisting of postal items that have the same sender address. By definition this affects the position of customers (in particular other postal operators) that combine batches of different senders (and therefore with different sender addresses), comparable to the recent bPost/BIPT ECJ case. Additionally, Belgium informed that the per sender model was used, but due to the BIPT decision taken on 20th July 2011 on the per sender model, bpost was obliged to withdraw the per sender model.

4° If the mail handler/consolidator/router deposits mail from different senders (in the same expedition or reference period), does he receive operational discounts based on total volumes deposited or based only on the specific volumes for each sender?

The majority of countries (19 out of 24) stated that if the mail handler/consolidator/router deposits mail from different senders (in the same expedition or reference period), he receives operational discounts based on total volumes deposited. In two countries the operational account are in function of the specific volume of each sender. Five countries indicated that there is no information or the situation is not applicable to the country.



One of the countries stressed that the USP has from the beginning of 2014 introduced the stipulation that each batch has to consist of postal items with the same sender address. A customer may still deliver batches with different sender addresses, but in that case higher rates will apply.

The UK mentioned that a consolidator can benefit from a higher discount. A consolidator can merge mail from say multiple advertisers into a single posting for a greater discount if this is operationally practical.

Belgium has still to wait for the final judgement of the Belgian Court based on the recent ECJ judgement on 11 February 2015 due to prejudicial question of the Belgian Court at the ECJ.

Volume (quantity) Discounts

5° If yes on 1°, does the discount scheme/policy include volume (quantity) discounts (e.g. per drop, per year, etc.) in its contractual tariffs? If yes, please sum up and briefly describe the volume discounts scheme/policy and also indicate the percentage of the discount (minimal and maximum discount rate in %) and/or the range of the discount for the different categories of volume discounts. Where these tariffs are public, please provide us with the link.

Most of the countries indicated that there is a volume threshold to have the possibility to use operational discounts. The operational discount may be given to larger volumes as larger volumes means less costs (in this case volume discounts are not stand alone discounts but a volume component of the operational discount in conjunction with the 'avoided cost'). On the other hand the pure volume discounts are stand alone discounts which are not based on avoided costs but may be used to reward high demand (based on, for example, annual spend with the operator).

The range of percentage of volume discounts varies from 0,3% to 60%.

The main conclusion of the analysis of the 24 answers received to this question, correlated with the answers to Q1 and Q2, is that **volume discounts are available in all but one of the responding countries, and the rebates range from 0,3% to 60%**³⁰.

In addition **volume discounts are identifiable as stand-alone in more than a half of the cases, alongside the other instances when volume discounts being correlated with operational criteria and in some cases even certain volume thresholds being a condition for application of operational discounts.** It is also apparent that some NRAs do not have all

³⁰ Please refer to the table of Question 2.



the information regarding the discount levels and the conditions applied by the USPs, especially for the services outside USO.

The volume discounts are related either to the number of items per month/year, the number of items per drop (posting) or to the monthly, half-year or yearly invoices. One country links the volumes to the total weight of the items in kg (LU), another links volumes with concentration of addressees in bigger or smaller cities and others require a minimum monthly (SK, LU), yearly (CY) or per drop volume (LU).

Monthly discounts are practiced in EE, PT, BG (but they are mostly operational), as well as in AT, SK, LT, RO, LU and CY where they are correlated to other policies for awarding discounts (operational, yearly discount or some requirements for presentation of the postal items or depending on the method of payment).

Per year discounts are reported by: ■, PL, CZ, CY, FR, SE, HR, NL and SI.

Discounts per drop were reported by: EE, IE, GR (combined with 6 months revenues), UK, BE (combined with yearly volumes), LU.

The length of the contract might be another criterion used to qualify certain items for awarding the discount (in addition to the volume).

Irrespective of the specifics of the volume discounts, these are usually correlated with other factors such as the type of service, the weight, the value added services, the zone of delivery, the time of presentation, the priority level, the format and size, whether the items are national or international.

Usually the discounts are awarded for shipments of items with the same basic characteristics (e.g. size, weight, format etc.).

In some countries there are clear thresholds with regard to the maximum dimensions and weight accepted.

The operational criteria and associated conditions are also wide-ranging, e.g.: printing the barcode, delivering to specific sorting centres, early deposit terms, the method of processing (e.g. automated) etc.

The payment method is also an additional criterion used in order to qualify for the discount (e.g. franking machine).

Some of the countries refer to the need of a written agreement.



Some NRAs state that the volume discounts are based on the avoided costs, in this case the volume and operational discounts being nonetheless closely correlated.

Some NRAs state that the volume discount is only available to the sender, not to consolidators.

The link to the prices for access to the network and services of the USP was also underlined by some countries, as the relation to upstream and downstream costs is important for the maintenance of the competition.

Specifically, the countries who indicate operational requirements for discounts are: IE (presentation and delivery D+N requirement), PT (pre-sorting and method of payment), MT (a single requirement: over 50 postal items of the same size, weight and format), GR, CZ (for users of the franking machine), LT (according to a written agreement consisting in a kind of engagement, as an “ex-ante” measure), NL (each batch of items shall have the same sender address), DE (presorting, delivery, destination of the items, format). Discounts per area are noted in EE (exception for volume requirement for registered letters), revenue discounts (money spent with the USP) in AT, CY, FR, GR. Different other requirements or eligible categories for granting the discounts were reported in CZ (special tariffs for owners of a customer card), SK, CY (system of bonus), LT (according to a written agreement meaning an engagement).

6° Are different discounts applicable for volume discounts based on the nature of the sender/body that deposits the mail (e.g. direct customer versus mailhandler/consolidator/router)? If yes, please explain briefly how the discount system functions for the different categories of clients.

For the analysis of the ECJ judgement in case C-340/13 (bpost) and its possible impact in the Member States, it is important to know whether the volume discounts in the Member States differ depending on the nature of the undertaking depositing the postal items. Thus, the questionnaire issued by the Task Force asked if different volume discount schemes apply for business customers on the one hand and consolidators or other intermediaries generating larger volumes from different senders on the other. The vast majority of replies to the questionnaire confirmed that the volume discounts (or discounts influenced by volumes³¹) apply for business customers and consolidators without any differentiation based on the nature of the sender or body that deposits the mail.

³¹ For the necessity of this clarification see the last paragraph of the analysis of question 6.



However, one country confirmed that the volume discounts introduced by the USP only apply for direct senders and not for consolidators. The limited applicability was based on the argument that the volume discount aims at stimulating demand – an argument which has also been subject to a detailed consideration by the ECJ in case C-340/13 (bpost). The discount scheme in this country was subject to national jurisprudence concluding that the limited applicability was not discriminatory as business customers and consolidators were not like parties in like circumstances with regard to the aim of stimulating demand. Furthermore, the NCA concluded in an Opinion that the limited applicability *per se* did not show anti-competitive characteristics.

Another country stated that the current volume discounts are applied for both direct customers as well as consolidators. This country, however, also indicated that there might be a change in the applicability of the volume discounts as a response to the ECJ judgement in case C-340/13 (bpost). According to the NRA's information, the USP plans to introduce a volume discount similar to the model which was subject to the recent judgement.

Belgium confirmed that, in line with NRA's decision on the per-sender-model, there is currently no differentiation according to the nature of the sender. However, the final decision of the Belgian Court following the ECJ judgement in case C-340/13 (bpost) is expected and might lead to the re-introduction of the per sender model.

Finally, the differentiation between pure volume discounts and volume components of an operational discount has to be considered when looking into the question whether different discounts are applicable based on the nature of the sender/body that deposits the mail (business customer versus consolidator). In the logic of the recent ECJ judgement in case C-340/13 (bpost) different discounts based on the nature of the sender (business customers or consolidators) are admissible only in the case of pure volume discounts (those used to stimulate demand and based, for example, on the amount spent with the operator annually) while volume components within operational discounts would still have to comply with the fifth indent of Article 12 of Directive 97/67 and the ECJ judgement in *Deutsche Post and Others* (EU:C:2008:141). The answers to the questionnaire indicate that pure volume discounts are in place in around half of Member States which responded to the questionnaire. In some Member States those volume discounts are offered in addition to operational discounts, e.g. in Belgium, Sweden and France. A little less than half of the countries which replied to the questionnaire indicated that a volume component or a volume threshold exists within the operational discount. In those countries a different discount based on the nature of the sender would not be in line with the requirements of the fifth indent of Article 12 of Directive 97/67 and the ECJ judgement in *Deutsche Post and*



Others (EU:C:2008:141). Therefore, the discount policy in close to half of the countries applies the rebates for business customers and consolidators without any differentiation based on the nature of the sender. Those circumstances also reflect in the vast majority of responses confirming that discounts influenced by volumes apply for business customers and consolidators irrespective of the nature of the sender.

7° If the mail handler/consolidator/router deposits mail from different senders (in the same expedition or reference period), does he receive volume discounts based on total volumes deposited or based only on the specific volumes for each sender?

Of the 24 replies received to the questionnaire, 12 NRAs indicate that the volume discounts would be based on total volumes deposited while 4 NRAs indicated that they would be based on the specific volumes for each sender. A further 8 NRAs gave a ‘not applicable’, or similar, reply.

Summary of the answers to the question 7	
Based on total volumes deposited	AT, BE, CZ, GR, SK, LT, LU, NL, RO, SE, UK, ■
Based on the specific volumes for each sender	EE, FR, PL, SI
NA or no reply	CY, DE, HR, IE, IT, MT, PT, BG

Three countries replying that the volume discounts would be granted based on total volumes indicated however that this may change. Sweden noted that this will change on 1 January 2016 when the volume discounts will be accorded based on each sender’s volumes and not on total volumes. The Netherlands indicated that the situation may change in their country, partially in response to the jurisprudence related to the bpost case, and Belgium indicated that the situation could change depending on the final judgement of the Belgian court following the 11 February 2015 ECJ decision in reply to the Belgian court’s request for a preliminary decision.

As regards the four countries where volume discounts are based on each sender’s volumes, the French NRA provided some comments. Notably, while the operational discounts reward



avoided costs and so are applied cumulatively to all volumes irrespective of the party depositing them, the volume discounts, a much smaller part of all discounts, aim to stimulate demand. In France, they have been the subject of jurisprudence and also of an 'Opinion' by the competition authority (NCA) in 2007 (Avis n° 07-A-17). The NCA concluded that granting the volume (demand) based discounts only to senders (and not to consolidators) was not *per se*, given the analysis at hand, anti-competitive (roughly translated - did not show "characteristics generally seen as anti-competitive") and it would not have the effect of encouraging senders to avoid mail houses and was not discriminatory. Also, the Supreme Court concluded that the discounts were not discriminatory (according to this, there can only be discrimination between like parties in like circumstances and mail houses and senders were not like parties in like circumstances – mail houses not being the same source of demand). The related jurisprudence is summed up in the 2012 ERGP report.

Finally, it should be kept in mind that, NRAs may have had two distinct ideas in mind when replying to the question:

- Some simply indicating that there was a volume threshold to have access to the operational discounts (which is different from a volume based discount for the purposes of the current document – that is a discount purely to stimulate demand and not based on avoided costs);
- Volume discounts used to stimulate demand (that is independent of a volume threshold to have access to avoided cost discounts), more relevant for the current report.

The key distinction would be that the (operational) discount may be given to larger volumes *but* simply because larger volumes mean less costs (they are 'avoided cost' or operational discounts). The (volume) discounts are *not* based on avoided costs but are those simply used to reward high demand.

Legal Framework and NRA role

8° Can you briefly describe how article 12 of the Directive has been transposed in the relevant law of your country?

All 24 countries have transposed article 12 of the directive literally or similarly in the relevant law of their country.

Some countries extend the requirement to specific tariffs (the principles of transparency and non-discrimination).



9° Do you monitor/verify/approve the discount policy (operational and volume discounts) on the contractual tariffs? If yes, please explain briefly how this monitoring/verifying/approving system functions. If yes, please explain if it is an ex ante or ex post system?

This section of the report examines the extent to which NRAs approve (*ex ante*) or monitor (*ex post*) operational and volume discounts applied by the USP.

According to the principles in the Postal Services Directive, the prices for universal postal services (including discounts) have to be cost oriented, affordable and non-discriminatory. With regard to special tariffs outside the universal service area, the Directive requires these to be transparent and non-discriminatory and they may also be subject to other *ex post* controls.

The results of the questionnaire show that eleven³² NRAs rely wholly or mainly on *ex post* control to assess such discounts. Of these, one, NL, notes that separately it also undertakes analysis of the USP's discount policy and tariffs under its *ex ante* SMP procedure. Six³³ NRAs rely on *ex ante* scrutiny of volume and operational discounts

The majority of these NRAs undertake systematic monitoring of applied discounts (eight out of ten cases³⁴), two monitor solely in response to competitor complaints³⁵ with one undertaking both systematic monitoring and responding to complaints being applied³⁶.

For remaining NRAs, seven make a split between those services for which *ex ante* regulation is used and those for which *ex post* regulation is deemed sufficient. Two of these seven NRAs³⁷ make a distinction between USO services, making them subject to *ex ante* regulation, and non USO services, which are subject to *ex post* regulation. Two other NRAs derive the split in another way: MT uses *ex-ante* regulation in those cases where the USP has Significant Market Power (SMP) in a particular postal services market falling within the scope of the Universal Service (US); and SI uses *ex ante* regulation for retail volume discounts and *ex post* for network access contracts. The remaining NRA (HR) sets an *ex ante* price control mechanism related to its model of cost accounting while it reports that monitoring discounts *ex post* is a task given to its national competition authority. In ES, the NRA reviews the prices of US and other public service obligations (such as services rendered in the context of election processes) *ex ante*. Moreover, the national Postal Act entitles the NRA to require

³² EE, IE, BG,CZ, SK, SE, NL, IT, BE, DE and LU

³³ PL, AT, GR, UK, RO and CY

³⁴ CZ, SK, SE, IT, LU, IE, DE and BG

³⁵ NL, EE

³⁶ BE

³⁷ LT, and FR



individual contracts in order to check whether special tariffs (and other service conditions) have been applied on a non-discriminatory basis to all clients. The national Postal Act also states that special tariffs shall not give rise to greater net costs of the US. In PT, discount policy applied to special tariffs within the universal service is subject to an *ex post* system. Discount policy applied to prices of other universal services is subject to an *ex ante* system.

The nature of *ex ante* regulation varies between Member States: for example, GR undertakes a specific calculation for all universal service products to ensure that taken together they result in a positive return (in relation to costs based on an approved costing system). UK uses a margin squeeze test which compares Royal Mail's bulk retail contract prices with its charges for access services setting related criteria. LT imposes *ex ante* tariff ceilings by weight step for USO services only. RO allows the USP to put forward for approval its proposed criteria and conditions applicable to special tariffs. AT applies the *ex ante* control to universal service prices, rather than the discounts applied to them, requiring such prices to be cost-oriented, affordable and non-discriminatory.

10° Has your designated Universal Service Provider introduced a per sender model (which allows differentiation on volume or operational discounts based on the nature of the sender/body that deposits the mail) or does your designated Universal Service Provider have the intention to introduce a per sender model (which allows differentiation on volume or operational discounts based on the nature of the sender/body that deposits the mail)?

1. Actual 'per sender' model:

No per sender model has been adopted by USPs of 12 countries: IE (that would not be possible in the context of US), DE (that would not be possible under the Postal Act), AT (as far as the NRA knows), [REDACTED] UK (though the USP treats differently different mail, eg advertising vs transactional), CZ, SK, LT, RO, HR and LU.

Three NRAs report that in their countries no consolidators exist: SI (although if senders consolidate in 'joint venture', they would have access to bigger discounts), BG, and CY. USPs have introduced per sender models in 2 countries: EE and PL. In FR, 'real' volume discounts are only offered per sender (they are a small part of all discounts, used to stimulate demand and given to big clients). Operational discounts (granted based on avoided costs) are given to consolidated volumes for mail houses (that is not per sender). In SE a per sender model is planned for 1st January 2016 (for volume discounts).



In GR a 2013 Decision of the NRA established that operational discounts should be on total volumes deposited provided USP standards are met. In NL the USP per sender model was suspended and is still in dispute. In BE the NRA decision of 20 July 2011 which obliged the USP to stop the per sender model, later prompted the preliminary question which the ECJ answered on 11 February 2015. The national Court is yet to decide on the matter after the ECJ Judgement.

In MT that question is 'not applicable' and IT did not provide an answer as to whether discounts were provided by the USP on the basis of per sender volumes deposited or of total volumes deposited.

Per sender models are currently in place in around half of the countries (in additional see answers to additional clarifying question in Annex II), for example in France only for 'real' volume discounts not for operational discounts

2. Intention to introduce a per sender model in the future:

13 NRAs report that the USPs in their countries have no intention to introduce a per sender model in the future IE (for US), RO (not possible under the Law), IT (for US), BG, CZ, SK, UK, LT, DE, FR (rather, no intention to modify the current system of discounts), HR, SI and CY. In SE the USP is to introduce such a model as of 1st January 2016. [REDACTED]

[REDACTED] In PT, the USP is planning to introduce in 2016 a clear differentiation between volume/value discounts and operational discounts, as a way to stimulate the demand more and independently of the type of sorting done. In three countries (MT, AT and LU) the question is 'not applicable'.

11° Do you think that the recent ECJ judgement could have a potential impact on commercial discounts practice in your national market? If yes, please can you briefly describe your impact assessment? If no, please explain why it has no impact on your national market.

The majority of countries (14 countries out of 24) consider that the recent ECJ judgement *would not have an impact* on commercial discounts practice in national market. The countries state that the USP has the legal obligation to respect the principles of transparency and non-discrimination in what concerns both the tariffs and the conditions related to them.

10 countries out of 24 consider that the recent ECJ judgement *could have a potential impact* on commercial discounts practice in the national markets because consolidators/mailhandlers/routers might be driven out of the market. Many senders would face higher end prices as their own volumes would not qualify them for volume discounts.



The recent ECJ judgement could encourage the USP to request the modification of the above mentioned national legal provisions in order to allow for different discount policies. Two countries stated that the recent ECJ judgement has led the USPs to present new discount models similar to the bpost model. This will affect the position of, in particular, other postal operators that combine postal items of different senders in one bulk mail batch.

12° Based on the recent ECJ decision, do you think that actions are needed by the EC, ERGP and/or NRAs? If yes, please briefly describe what actions are needed and the reasons for it. If no, please explain why no actions are needed.

Revision of Article 12 of the Directive	To analyse the situation	Actions not required
5 out of 24 countries	13 out of 24 countries	5 out of 24 countries

Remark: one country - no answer

The majority of countries (13 out of 24) propose to monitor closely the situation and the discounts scheme/policy of the USP, taking into account the tariff principles set in the Directive and taking into account the ECJ decision. Also it needs to be ensured that the national transposition of Article 12 of the Directive into national law in each individual Member State includes a non-discrimination clause and the wording needs to be checked if discrimination is possible because of different user types.

A few countries (5 out of 24) think that there is no need for action at all.

A few countries (5 out of 24) propose to make a revision or guidelines for Article 12 of the Directive in order to address the concerns regarding compliance with the ECJ decision. According to one of the respondents, the ECJ decision and its consequences are in conflict with the interests that should be safeguarded by the principles laid down in Article 12 of the Directive and it is hard to see a possibility to eliminate or even reduce the negative consequences through appropriate application of national law. Possibly the ECJ decision further underlines the urgency to initiate the work on the amendment of the Directive.



Analysis of the results of the additional question

The Task Force drafted an additional question and on 1 October 2015 circulated it among ERGP members in order to collect information in how many countries pure volume discounts are applied. The Task Force received answers from the following countries: IE, ES, FR, UK, CZ, EE, AT, HR, LU, MT, NO, DK, HU, NL, SI, RO, IS, BG, BE, LT, DE, PT, GR, CY, SK, PL, LV (overall from 27 countries).

	Yes	No
<i>Does the USP in your country apply pure volume discounts, i.e. volume discounts that are not correlated to an operational discount scheme in any matter</i>	FR, UK, CZ, AT, HR, NO, DK*, HU, NL, IS, BG, BE, CY, LT, PL (15)	IE, [REDACTED], EE, LU, MT, SI, RO, DE, PT, GR, SK, LV (12)
<i>-be it in the sense of being a threshold for receiving the operational discounts</i>	IE, [REDACTED], FR, CZ, HR, LU, DK, HU, NL, IS, CY, LT, PL, DE (14)	UK, EE, AT, MT, NO, SI, RO, BG, BE, PT, GR, SK, LV (13)
<i>-be it as any other component/element within the operational discount scheme</i>	[REDACTED], AT, LU, DK, HU, NL, IS, BE, DE (9)	IE, FR, UK, CZ, EE, HR, AT, MT, NO, SI, RO, BG, PT, GR, CY, SK, LT, PL, LV (18)

DK* - only for B and C letters

More than a half of countries (15 countries out of 27) stated that the USP applies pure volume discounts (the remaining 12 countries said that the USP does not apply pure volume discounts).

14 countries out of 27 indicated that there is a volume threshold to have the possibility to use operational discounts. 9 countries out of 27 stated that volume discounts feature as any other component/element within the operational discount scheme (The remaining 18 mentioned that pure volume discounts are just another component/element within the operational discount scheme).



III. CONCLUSIONS

- **In the majority of EU countries (24 out of 24 countries) USPs apply discounts models** (generally discounts for bulk mail).
- The majority of countries state that **the operational discounts** are combined with the volumes discounts although it appears that this means that the operational discount has a volume threshold requirement. The majority of countries (21 out of 24) affirm that **operational discounts (those based on avoided costs) for the different categories of clients are applied with the same discounts and conditions**. The majority of countries (19 out of 24) stated that if the mail handler/consolidator/router deposits mail from different senders (in the same expedition or reference period), it receives operational discounts based on total volumes deposited.
- Many countries indicated that there is a volume discount but, again, in many cases it is more a volume threshold to have the possibility to use operational discounts. Certain countries do have volume discounts (those used to stimulate demand and not based on avoided costs). The majority of countries (22 out of 24) affirmed that **the volume discounts/volume components for the different categories of clients are applied with the same discounts and conditions**. The majority of countries (19 out of 24) stated that if the mail handler/consolidator/router deposits mail from different senders (in the same expedition or reference period), it receives discounts based on total volumes deposited.
- **All 24 countries have transposed article 12 of the directive literally or similarly** in the relevant law of their country. Some countries extend the requirement to specific tariffs (the principles of transparency and non-discrimination).
- Almost all of the countries (20 out of 24) state that there are **no indications that the designated USP has the intention to introduce a per sender model**. Few NRAs indicate that the assessment of the introduction of a per sender model would likely be considered in the near future.
- The majority of NRAs (14 countries out of 24) consider that the recent ECJ judgement **would not have an impact** on the USPs' discounts practice in national markets. The countries state that the USP has the legal obligation to respect the principles of transparency and non-discrimination in what concerns both the tariffs and the conditions related to them.



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- 10 NRAs out of 24 consider that the recent ECJ judgement **could have a potential impact** on the USP's discounts practice in the national markets, of whom some raised the concern that consolidators/mailhandlers/routers might be driven out of the market and that senders would face higher end prices as their own volumes would not qualify them for volume discounts. The factual situation in the EU single postal market shows that in 15 countries the pure volume discounts are already applied, in these countries consolidators might face substantial pressure concerning their business model and might be driven out of pure volume discounts in the long run.
 - The majority of countries (13 out of 24) propose **to monitor closely the situation and the discounts scheme/policy of the USP**, taking into account the tariff principles set in the Directive and the ECJ decision. A few NRAs (5 out of 24 countries) think that **there is no need for action at all**. A few NRAs (5 out of 24 countries) **propose to make a revision or guidelines for Article 12 of the Directive** in order to address the concerns regarding the compliance with the ECJ decision.
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