



Report on the development of end-to-end competition and access regulation across the EU Member States in the light of recent jurisprudence concerning discount regimes in the postal sector



Table of Contents

| | |
|--|-----------|
| EXECUTIVE SUMMARY | 3 |
| 1 INTRODUCTION | 7 |
| 2 METHODOLOGY | 8 |
| 2.1 THEORETICAL DESK-TOP RESEARCH | 8 |
| 2.2 QUESTIONNAIRE | 9 |
| 2.3 COUNTRY CASES | 9 |
| 3 ECONOMIC AND LEGAL CONTEXT | 9 |
| 3.1 BUSINESS MODELS OF ALTERNATIVE OPERATORS | 10 |
| 3.2 PRICING STRATEGIES OF THE INCUMBENT OPERATORS | 11 |
| 3.3 SCOPE OF THE UNIVERSAL SERVICE OBLIGATION | 13 |
| 3.4 POSITION AND COMPETENCES OF THE NRA | 13 |
| 4 JUDGEMENTS | 15 |
| 4.1 BPOST-JUDGEMENT (ECJ C-340/13) | 15 |
| 4.1.1 <i>Developments after the ECJ judgement</i> | 15 |
| 4.1.2 <i>Open questions and issues after the bpost-judgement</i> | 15 |
| 4.2 POST DANMARK II | 19 |
| 4.2.1 <i>First series of questions: rebate criteria and price squeeze</i> | 20 |
| 4.2.2 <i>Second series of questions: relevance to be attached to the as-efficient-competitor test</i> | 22 |
| 4.2.3 <i>Third series of questions: probable, serious or appreciable character of the anti-competitive effect of a rebate scheme</i> | 23 |
| 5 THEORETICAL IMPACT OF THE JUDGEMENTS ON THE DIFFERENT PLAYERS | 24 |
| 6 REGULATORY ENVIRONMENT AND MARKET DEVELOPMENTS (FINDINGS OF THE QUESTIONNAIRE) | 25 |
| 6.1 SCOPE OF USO AND REGULATORY OVERSIGHT ON NATIONAL LEVEL | 25 |
| 6.2 MARKET LANDSCAPE | 30 |
| 6.3 PRICING STRATEGIES OF THE INCUMBENT OPERATORS AND DEVELOPMENTS IN THIS FIELD | 34 |
| 6.3.1 <i>Requirements for discounts</i> | 34 |
| 6.3.2 <i>Other pricing models</i> | 37 |
| 6.4 INVESTIGATIONS OF NRAs CONCERNING PRICE ISSUES | 39 |
| 6.5 IMPLICATIONS RESULTING FROM THE CURRENT JURISPRUDENCE | 40 |
| 7 COUNTRY CASES | 43 |
| 7.1 COUNTRY CASE: THE NETHERLANDS | 43 |
| 7.2 COUNTRY CASE: FRANCE | 47 |
| 8 CONCLUSIONS | 48 |



| | |
|---|-----------|
| LIST OF COUNTRIES AND NRAS | 52 |
| TERMS AND ABBREVIATIONS..... | 53 |

EXECUTIVE SUMMARY

(a) Introduction

Access regulation and the level of end-to-end competition are important elements for the development of the liberalized market for postal services. From a legal perspective, this report is meant to give an update on the current forms of application of Art. 12 of the Postal Services Directive (PSD). The report focusses on the recent judgements *bpost* (C-340/13) and *Post Danmark II* (ECJ C-23/14) of the European Court of Justice (ECJ). Another focus of the project is to deliver a picture of the developments in the fields of discount regimes and of the market situation for alternative operators.

(b) Methodology

The report is based on a desk-top theoretical research mainly used for the chapters 3, 4 and 5. Furthermore, a questionnaire to which 23 NRAs responded was basis for the analysis of the regulatory environment and market developments. Finally, two member states were chosen for case studies with relevance to the contents of the *bpost* judgement.

(c) Economic and legal context

The promotion of competition in postal markets creates benefits for users, e.g. by means of innovation in the sector. An incentive effect towards improving efficiency and reducing cost is possible on incumbent operators. Subject to investigation are letter market structure and business models of alternative operators.

Three business models for alternative operators are common:

- Intermediary/consolidator
- End-to-end competitor
- Hybrid operator, persecuting a model of end-to-end competition in a limited area while depending on the incumbents' services as intermediary/consolidator outside that area.

Pricing of access is an important feature assuring the development of competition in the postal sector. Different pricing strategies and discount schemes are applied by the incumbents, having various impacts on the ease of market access and performance of competing operators.

Quantity or volume discounts are granted for volume structures, providing for an optimised use of letter logistics, thereby leading to cost reductions. Applied retroactively, they effectuate a loyalty enhancing mechanism, the so-called suction effect, thus drawing the most attention in competition law. Operational discounts are granted to originating mailers and intermediaries for work-sharing



services. They take into account the costs being avoided by the incumbent through the work-sharing agreement and often come along with additional volume discounts.

Whether bulk mail has to be included within the Scope of the Universal Service Obligation or not the PSD does not specify. As the judgements concern bulk mail, it is however decisive, whether it is covered by the USO in the concrete national case. Approaches in the Member States are quite diverse.

In accordance with Art. 12 and Art. 22(2) of the PSD, the NRA's are obliged to control the tariffs applicable to USO services.

(d) Judgements

According to the ECJ in the bpost-judgement, whether the discount system forms a special tariff (Art. 12, fifth indent PSD) or a standard tariff (Art. 12, fourth indent PSD) is not decisive, for both contain the same principle of non-discrimination.

This opinion clashes somewhat with the aims of the European legislator, who meant to ensure the equity towards intermediaries in a more efficient manner by the later addition of the 5th indent.

Furthermore, the bpost judgement forms a specification of the Vedat Deniz judgement, which ruled that, under the scope of Art. 12 5th indent, intermediaries and customers should be treated strictly equal.

At last, the interpretation of Art. 12 in the bpost judgement is based on factual presuppositions, as it supposes an elasticity of demand among customers and consecutively states that only business customers, not intermediaries would be able to stimulate the demand for sending mail. On the other hand, the intermediaries could resell a sufficient part of the surplus of commercial discounts to their clients, thus creating demand; a perspective not envisioned by the ECJ.

Post Danmark II elaborates on the implementation of Art. 82 TEC (now Art. 102 TFEU) in the context of the discount system as granted by Post Danmark for direct mail. Art. 82 TEC prohibits the abuse of a dominant market position in so far as trade between Member States could be affected, referring to conduct which is such as to influence the structure of a market with competition already weakened.

The discounts granted by Post Danmark were to be characterised as standardised, conditional and retroactive. According to the ECJ, any judgement on Art. 82 TEC needs to intensively evaluate the situation upon its criteria, which it consecutively does. Furthermore it elaborates the relevance and necessity of the "as-efficient-competitor test" mentioned in Art. 82 TEC.

Summed up, the Court judged, that Art. 82 TEC must be interpreted as to say that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant market player must be probable, there being no need to show that it is of a serious or appreciable nature.

(e) Theoretical impact of the judgements



While the ECJ's bpost-judgement generally influences intermediaries in access models, the judgement in "Post Danmark II" rather affects end-to-end competition.

As a consequence of the bpost decision the 'per sender' model is declared to fall in line with Art. 12 PSD. It is considered not to cause discrimination between intermediaries and senders of bulk mail. However, a theoretical study showed that the introduction of said 'per sender' model has a negative impact on consolidators. It provides incentives for senders to switch from a mail handler to a direct contract with the incumbent and increases tariffs for intermediaries. For them it might become difficult to maintain a business model based solely on consolidation.

In the "Post Danmark II" case, the ECJ explicitly drew the boundary between competitive low-price tariffing and price dumping models jeopardising competition and consequently established criteria for such price measurements. Especially incumbent's pricing strategies are concerned.

(f) Regulatory environment and market developments (findings of the questionnaire)

In 70% of countries, the USO includes tariffs for bulk mail. Monitoring, approval or verification of bulk mail tariffs is handled by NRAs in 61% of countries, with very distinct approaches throughout the EU. 65% of NRAs stated that incumbents were obliged to submit the conditions of bulk tariffs and/or the terms of the contracts with very contrasting results.

Volume discounts can be applied incrementally or, as in many cases, retroactively (8/23). Recently, in 4 countries zonal pricing has been introduced meaning tariffs based on the costs of delivery in different areas – e.g. in cost intensive rural areas or cheaper urban regions.

With regards to competition in the markets for letter post items, all countries stated that some kind of competitor exists, end-to-end competition being a large majority. However, data for market shares in the majority (12 out of 23) of countries is not available and/or there is no data on specific types of competitors.

In more than half of the respondent countries, market shares of competitors remain very low, ranging only between 0 and 5%, whereas in some countries market shares between 10 and 20% for consolidators exist. With a few exceptions (UK, LT and RO) the postal market is still highly concentrated. National postal operators continue to dominate the letter post segments.

As regards investigations done by NRAs and/or NCAs, nearly half of the countries (11 out of 23) stated to have conducted investigations linked to abusive pricing in the market segment for bulk mail in the last five years. Most cases concern discrimination or anticompetitive pricing schemes.

Concerning the late bpost and Post Danmark II decisions, so far only 5 NRAs have analysed the implications resulting from the current jurisprudence. None of the countries have made amendments to the provisions of applicable primary/secondary legislation. The introduction of a 'per sender' model as a result of the late jurisprudence had no impact on end-to-end operators and/or access operators, according to most respondent countries (13 out of 17). In practice it is difficult at this stage to estimate whether a 'per sender' model will spread among Member States and whether alternative operators will be influenced positively or negatively.



(g) Country Cases

In the Netherlands, the ECJ judgement in the bpost-case has led to a number of developments in the postal market. PostNL refers to this decision in a case on uniform sender addresses per consignment. Also PostNL announced the introduction of a 'per sender' model on annual volume discounts. Both measures have been postponed awaiting judgement in court.

ACM's opinion is that the bpost-case is not relevant in the Netherlands due to a different legal framework and a different market situation. In the draft decision of the current market analyses on the postal market, ACM regards the introduction of the 'per sender' model as strategic product development which has negative effects on competition in the postal market.

In France, the 'per sender' model is not a consequence of the jurisprudence in the bpost-case, but has been introduced earlier and step-by-step. Before, the French NRA had to deliver an opinion on the impacts of such a model on competition on the letter market and the situation of different market players. It opined that discounts "related to counterparts in terms of cost savings [wouldn't] have anti-competitive effects" and therefore would be justified, and furthermore established that consolidators and business customers were not in the same position as regards the demand function. Therefore, an opinion in favour of the discount scheme had been issued, later supported by French jurisdiction as well as by continued practice.

(h) Conclusions

The analysis of the questionnaire revealed a low level of competition in the majority of the countries subject to the survey. Neither providers pursuing consolidation models nor end-to-end operators do exert substantial competitive pressure on incumbents.

Currently, only the bpost-judgement results in reactions of the incumbents or NRAs. In some cases, incumbents changed their existing rebate models and introduced a 'per sender' model or considered to introduce such a model. The decision in "Post Danmark II" does not yet have an impact on the incumbents' pricing policy, nor the regulation regime so far, but brings planning certainty for the authorities when investigating price dumping issues in the future.

An aggravating factor, however, constitutes the lack of transparency for the majority of the NRAs in the field of letter mail for business customers. Full transparency and knowledge of contractual conditions remain prerequisite for successful regulatory interventions in the case of price dumping with anti- competitive effects. Similarly problematic is the lack of empowerment of some NRAs.



1 Introduction

Access regulation and the level of end-to-end competition are important elements for the development of liberalized markets for postal services. Previous work of the ERGP sub-group has assessed developments, provided indicators and established findings in this field. While the earlier *Report on Access*¹ established a comprehensive evaluation of access regulation, including a stock-taking of the EU legal framework and the different regulatory approaches, as well as an in-depth analysis of regulatory intervention with regard to access, the 2014 *Report on end-to-end competition and access in European postal markets*² provided a comprehensive overview of competition developments (end-to-end and access) in all countries, based on an analysis of demographic and mail characteristic figures. Both reports provide a solid basis for further work of the ERGP sub-group.

Further groundwork for this year's task of the sub-group was established by the 2015 ERGP Task Force report³ dealing with the possible impacts of the European Court of Justice (ECJ) judgement in the bpost case (ECJ C-340/13) with regard to the application of Art. 12 fifth indent of the Postal Services Directive (PSD). The judgement dealt with the application of special tariffs under Art. 12 PSD and came to the conclusion that "the principle of non-discrimination in postal tariffs laid down in Art. 12 must be interpreted as not precluding a system of quantity discounts per sender, such as that at issue in the main proceedings."⁴ Based on a request by the European Commission, the ERGP Task Force was mandated to provide an analysis of the effects of the judgement in the different Member States of the interpretation of Art. 12 of the PSD. Amongst other findings, as one conclusion of this report, the majority of countries recommended to closely follow-up on the situation in the field of discount regimes and the developments subsequent to the ECJ judgement.

Consequently, the sub-group on end-to-end competition and access regulation was mandated to deliver a follow-up-report on the application of Art. 12 fifth indent PSD in the member states after the ECJ judgement. In addition to the bpost-judgment the sub-group was also tasked to include in its analysis the ECJ judgement Post Danmark II (ECJ C-23/14). Aim of the project is to deliver an updated picture of the developments in the field of discount regimes, and of the market situation for alternative operators.

In order to obtain a most recent picture of the market developments and the impact of the judgements on the market, the sub-group issued a questionnaire covering information on the status quo, the latest changes and the expected future developments in the field of discounts regimes. The report is based on a thorough analysis of the replies to the questionnaire, in order to deliver a comprehensive update on the implications for the competitive environment resulting from the current jurisprudence while also providing the necessary economic and legal background information. In doing so, the report aims at providing a continuation of the work of the Task Force as

¹ ERGP (12) 36 – ERGP Report on "access" to the postal network and elements of postal infrastructure.

² ERGP (13) 38 Rev. 1 - ERGP Report on end-to-end competition and access in European postal markets.

³ ERGP PL (15) 29 ERGP Report on the possible impact of Article 12 application after ECJ C-340/13.

⁴ ECJ judgement *bpost* (C-340/13), ECLI:EU:C:2015:77, para. 50.



well as establishing a genuine link to the previous work of the sub-group on end-to-end competition and access regulation.

Following this introduction as chapter one of the report, chapter two describes the methodology which has been applied by the sub-group. In addition to a desk-top based theoretical analysis, a questionnaire and country cases have been used as further approach. The following chapter three delivers the economic and legal context providing background information concerning the project. It covers information on the business models of alternative operators, the pricing strategies of the incumbents, the scope of the universal service obligation (USO) and the role of the national regulatory authorities (NRAs).

Chapter 4 provides a detailed analysis of the relevant ECJ judgements. With regard to the bpost-judgement, which has already been described in detail by the Task Force report of the previous year, the actual report focusses rather on open questions and delivers a critical assessment of issues, which have not yet been resolved by the judgement. Chapter 5 outlines the theoretical impact of the judgements on the different market players.

The findings of the questionnaire with regard to the regulatory environment and the market developments subsequent to the judgements will be analysed in detail in chapter 6. Due to a lack of experiences with the Post Danmark II judgement on the national level (possible due to the long duration of these kind of competition law cases), emphasis needed to be placed on the developments driven by the bpost-judgement.

Chapter 7 delivers information on two country cases. While the Dutch case includes recent developments with references to the bpost-judgement, the French 'per sender' model already existed before this judgement.

Finally, in chapter 8 the sub-group draws conclusions based on the assessment in the previous chapters. In those conclusions, the essential developments in the letter mail market subsequent to the two landmark ECJ judgements are highlighted.

2 Methodology

In order to answer the research question, a theoretical analysis and both general information from all member states as in-depth information has been used. The general information was gathered with a questionnaire while an in-depth description of cases was made from a few member states.

2.1 Theoretical desk-top research

A theoretical framework from an economic and legal perspective has been made to analyze the context of the market situation in member states. With this framework, an analysis of the theoretical impact of the bpost and Post Danmark II judgements on the different players was made. This



theoretical analysis is combined with data from the actual situation gathered through the questionnaire and country cases.

2.2 Questionnaire

A questionnaire was developed by the working group. With this questionnaire, data was gathered on the scope of USO and regulatory oversight, requirements and types of discounts for bulk mail, introduction of the 'per sender' model or other access pricing schemes, and the analysis of the implications resulting from the bpost and Post Danmark II judgements. The questionnaire consisted of eight main questions with each several sub questions which were all open questions. The questionnaire was sent out to all NRAs in ERGP member states in April 2016 and answers to the questionnaire were received from 23 NRAs.⁵ The NRAs were asked to highlight confidential information. While analysing the replies and drafting the report, confidentiality aspects were respected.

2.3 Country cases

To complement the results from the questionnaire, an in-depth analysis of cases from a selection of member states was made. Member states were selected based on the current relevance of the bpost- or Post Danmark II-judgement in these countries. These country cases are from France and the Netherlands. While the case in the Netherlands has some relation to the bpost-judgement, the volume-based rebate models in France have a longer history with and have already been implemented before the relevant ECJ judgement. Given this longer history, there have been several versions of the discount scheme and several appraisals of the NCA and the NRA as well as court decisions.

3 Economic and legal context

This section of the report delivers economic and legal background information concerning the business models of alternative operators and pricing strategies of the incumbent as well as the scope of the USO and the role of the NRAs.

⁵ Answers were received from: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland, and the United Kingdom.



3.1 Business models of alternative operators

As generally accepted in economic regulatory theory, the promotion of competition in postal markets creates benefits for users. The development of competition in the market has acted to promote innovation in the sector with market entrants providing new services for the users. Additionally, a possible incentive for an incumbent operator is to improve its efficiency, reducing cost and improve its quality of service.

Taking into account the recent judgements (bpost and Post Danmark II) which are likely to have a possible impact on access competition, the sub-group investigated the market structure (in the letter post market) and the business models of alternative operators.

Intermediaries (Consolidators)

Intermediaries (Consolidators) – are defined as operators who collect, sort and transport mail before handing it over to the incumbent operator for delivery.

Access mail, also known as Downstream Access or Access Competition, is mail collected from mail senders by a postal operator other than the incumbent operator and handed over to the incumbent operator for the final processing (for final mile delivery).

End-to-end competitors

End-to-end competition occurs where letters are collected, processed and delivered directly to the recipient in direct competition with the incumbent operator without the necessity to use the incumbent's network. End-to-end competition is also sometimes referred to as direct delivery competition. Therefore, end-to-end competitors offer the full conveyance supply chain from sender to recipient. Their business offers include the operational processes and activities linked with collection, sorting and delivery of letter items.

End-to-end postal service providers each adopt their own business strategy. The operators may be local or national. Local providers convey letter items in a regional limited area, preferably in densely populated urban regions. Due to the limited geographical coverage they preferably target mailers generating a high percentage of local and/or regional letters.

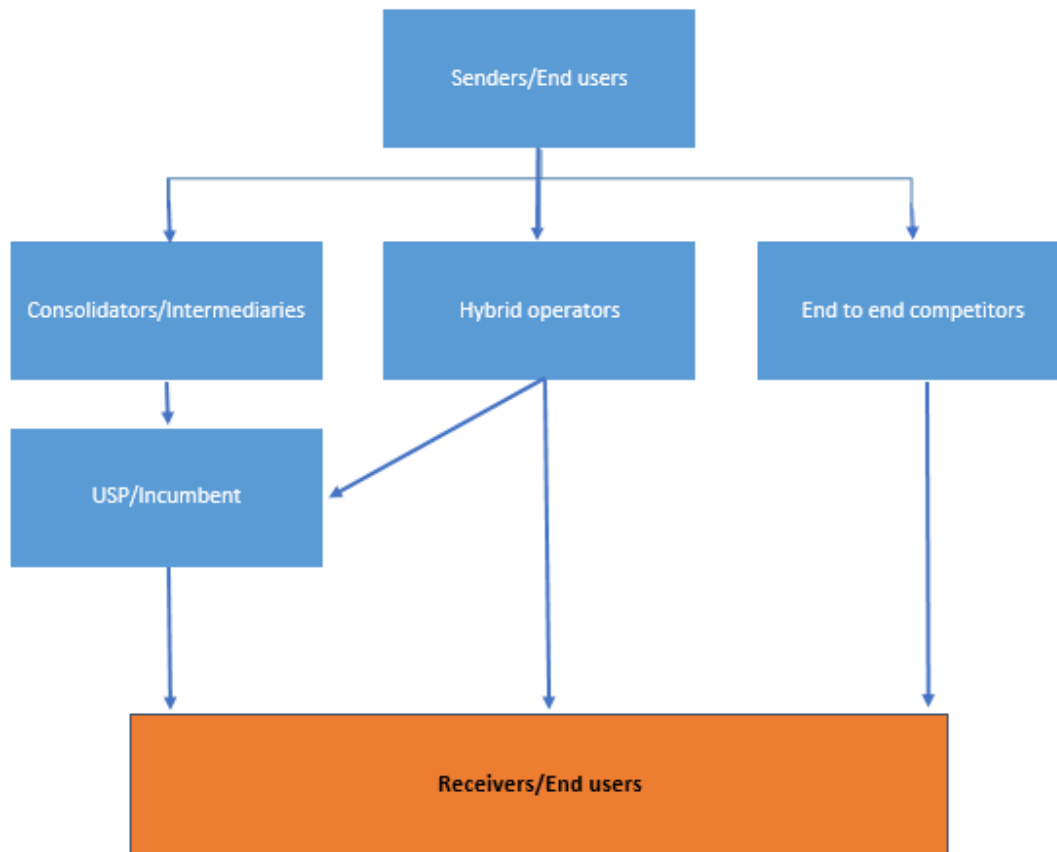
Hybrid operators

Operators pursuing hybrid models can be defined as providers who offer end-to-end services on a local or regional level, but act as intermediaries as well in that they require access to the incumbent operator's network for other deliveries.

General overview of the market landscape



The different business models are visualized in the following diagram setting out the different routes that letters which are once within the sphere of a competitor can take, from sender to receiver, by using either part or all or none of incumbent operator infrastructure.



3.2 Pricing strategies of the incumbent operators

Pricing of access is generally recognized as an important feature of assuring the development of competition in the postal sector. Art. 12 of the PSD states that, when USPs apply special tariffs within USO, they must respect the transparency and non-discrimination principles, both for tariffs and for the associated conditions. In so far, this provision requires equivalent conditions, tariffs and discounts for bulk mailers as well as postal operators. They must be available also to individual users and small and medium sized enterprises posting under similar conditions.

This chapter will describe the different pricing strategies and discounts schemes applied by the incumbent operators. Focus will lie on a general description of those pricing models, while the sub-group's concrete findings in this field will be presented in 6.3.



Quantity discounts (Volume discounts)

Quantity discounts are rebates which are built around a volume threshold and a volume structure. Larger volumes generally provide economies of scale in that they improve the utilization of the letter logistics and, consequently, lead to cost-reductions for the operator, which shall be passed on to the sender. Large mailers and intermediaries receive a lower average price than smaller mailers. So, quantity discounts for demand stimulation are intended to promote total volume growth and are therefore directed towards mail originating customers.

Our research and the previous ERGP Task Force report have shown that in most cases quantity discounts do not stand alone. They are often combined with operational activities concerning preparation of mail. Therefore it should be noted, that generally quantity discounts are offered as a part of the operational discounts.⁶

Volume influenced tariffs (stand-alone volume discounts as well as integrated discount schemes⁷) can be applied differently. The retroactive application of rebates has received the most attention in competition law. Rebates in this method are not only applied to the customer's incremental purchases above the target, but retroactively on all purchases. According to the European Commission, a retroactive rebate scheme applies when "the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted [...] on all purchases".⁸ On October 6, 2015, the ECJ issued the judgment *Post Danmark II* (Case-23/14) clarifying the application of Art. 102 to retroactive loyalty rebates. The ECJ stated that "the rebates were 'retroactive', in the sense that, where the threshold of mailings initially set was exceeded, the rebate rate applied at the end of the year applied to all mailings presented during the period concerned and not only to mailings exceeding the threshold initially estimated".⁹ In contrast, an incremental rate of discount is "only applied on [the quantities] made in excess of those required to achieve the thresholds".¹⁰

Retroactive and incremental rebates are often referred to as conditional rebates. Conditional rebates are not an uncommon practice. Undertakings may offer those rebates in order to stimulate more demand, resulting in benefits for the consumers. However, those rebates when granted by a dominant undertaking can also have actual or potential foreclosure effects similar to exclusive purchasing obligations. "Conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking."¹¹

⁶ ERGP PL (15) 29 – ERGP report on the possible impact of Article 12 application after ECJ C-340/13, p. 34.

⁷ I.e. the combination of various discounts applied in one discount scheme.

⁸ Guidance on the Commission's enforcement priorities in applying article 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02), para. 37.

⁹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 25

¹⁰ Guidance on the Commission's enforcement priorities in applying article 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02), para. 37.

¹¹ Guidance on the Commission's enforcement priorities in applying article 82 of the EC treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02), para. 37.



Operational discounts (Work-sharing discounts)

Operational discounts are directed to originating mailers and intermediaries for work-sharing services. Operational discounts are generally not linked to volumes. In network industries, the term ‘work-sharing’ is generally linked to access pricing. As with other network industries, access to postal network can occur at multiple stages, commonly taking place at the sorting facilities of the incumbent.¹² Work-sharing services are conditioned to preparatory work by the access-seeking party (bulk mailer and intermediary). This work includes the collection, consolidation, pre-sorting, bar-coding and transportation undertaken by customers or mail preparation companies preceding tendering the mail to the incumbent operator. In general and in line with the PSD, work-sharing discounts shall take into account the costs that the incumbent operator can avoid by the work-sharing arrangement.

3.3 Scope of the universal service obligation

In order to analyse the effects of the recent ruling of the ECJ in its judgements *Post Danmark II* and *bpost*, it is important to reiterate the legal and regulatory context laying down the universal service scope.

Art. 3.4 of the PSD states:

“Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,
- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,
- services for registered items and insured items”.

This definition does not specify whether bulk mail is included in the USO or not. As the judgements concern bulk mail it is however important to find out whether it is covered by the USO. The situation in the Member States is very different with regard to this issue (see Chapter 6).

3.4 Position and competences of the NRA

The NRAs are competent to control the tariffs applicable to USO services in accordance with Art. 11a, 12 and Art. 22.2 of the PSD.

Art. 11a:

¹² Michael A. Crew and Paul R. Kleindorfer ‘Pricing for Postal Access and Worksharing’ Handbook of Worldwide Postal Reform, p.32



Whenever necessary to protect the interest of users and/or to promote effective competition, and in the light of national conditions and national legislation, Member States shall ensure that transparent, non-discriminatory access conditions are available to elements of postal infrastructure or services provided within the scope of the universal service, such as postcode system, address database, post office boxes, delivery boxes, information on change of address, re-direction service and return to sender service. This provision shall be without prejudice to the right of Member States to adopt measures to ensure access to the postal network under transparent, proportional and non-discriminatory conditions.

Art. 12:

“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.”

Art. 22(2):

“The national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service. They may also be charged with ensuring compliance with competition rules in the postal sector.”



4 Judgements

In the following chapter the current jurisprudence of the ECJ will be presented. As regards the bpost-judgement in the first part of the subchapter, the presentation will focus on developments after the ECJ decision and provide an overview on open questions and issues, which might become relevant in the future. A detailed presentation of the bpost-judgement itself is not part of this section, since this has already been described in the 2015 ERGP Task Force report¹³.

4.1 bpost-judgement (ECJ C-340/13)¹⁴

4.1.1 Developments after the ECJ judgement

When submitting the preliminary question to the ECJ, the Brussels Court of Appeal interrupted its proceedings waiting for the ECJ to decide. After the judgement of the ECJ in the bpost-case ('per sender' judgement) the Brussels Court of Appeal resumed processing the case. This resulted in a judgement of the Court of Appeal on 10 March 2016 following the line of reasoning as laid down in the judgement of the ECJ.

In the course of the proceedings, the Belgian NRA (BIPT) asked the Court of Appeal to suspend its judgement again and to ask preliminary questions to the ECJ in order to obtain clarifications on a number of points. This step was based on a critical analysis of a number of points of the judgement C-340/13 carried out by BIPT subsequent to the ECJ judgement. The Brussels Court of Appeal however rejected BIPT's request and annulled BIPT's decision of 20 July 2011, sanctioning bpost for the violation of Art. 144ter, § 1, 5°, of the Belgian Postal Act.

4.1.2 Open questions and issues after the bpost-judgement

This part will provide a summary of open questions and issues after the ECJ judgement based on the analysis, as carried out by BIPT in its submissions to the Court of Appeal.

The personal scope of the fourth and fifth indents of Art. 12 of the PSD

The ECJ considers the question whether bpost's commercial discounts fall within the scope of Art. 12, fourth indent, or rather of the fifth indent, not to be decisive. According to the Court, it results from Art. 12 that the rates of each of the services forming part of the universal service have to abide by the principle of non-discrimination, regarding both the tariffs (fourth indent) and the special tariffs (fifth indent).¹⁵ Consequently, the assessment of the nature of bpost's commercial discounts is not impacted as to whether they fall under the scope of the fourth indent or under the scope of the fifth indent. In this assessment, it should therefore only be verified, whether the practice in question

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

¹⁴ ECJ judgement *bpost* (C-340/13), ECLI:EU:C:2015:77.

¹⁵ ECJ judgement *bpost* (C-340/13), ECLI:EU:C:2015:77, para 24, 25.



complied with the constant jurisprudence of the ECJ regarding the general principle of equal treatment.¹⁶ Therefore, the rules of non-discrimination as laid down in the fourth and fifth indents of Art. 12 enforce an identical scheme applying regardless of the nature of the special tariff in question, so that in any case it would be necessary to prove that the beneficiaries had indeed been in comparable situations.¹⁷

In this line of reasoning it was for the ECJ not necessary to reflect on the question, whether volume tariffs have to be regarded as standard (Art. 12, fourth indent) or special tariffs (Art. 12, fifth indent). The Advocate General made this assessment and came to the conclusion that only operational discounts are special tariffs under Art. 12, fifth indent.¹⁸ In the proceedings the European Commission and three Member States argued the contrary stating that “both operational discounts and quantity discounts depart from normal tariffs applicable to the traditional service for letter post [Art. 12, fifth indent]”.¹⁹ Moreover, the European Commission already established in 2001, that the general principle of non-discrimination, as laid down by Art. 12, fourth indent, and the tools provided by the competition law were insufficient to ensure a progressive opening up of the postal market in fair conditions.²⁰

The contrary opinions have not been clarified by the ECJ. The court did neither follow the reasoning of the Advocate General nor reflect on the motives that had driven the European Commission to propose and the legislator to adopt a specific scheme regarding the special tariffs. However, in future it might become relevant whether volume tariffs fall under the fourth indent of Art. 12 or rather under the fifth indent, because the latter not only includes the tariffs but also the associated conditions and therefore has a wider scope. Additionally the authorities, for the future handling of cases, have to take both into consideration: the general approach of the ECJ to exclude discrimination for the underlying reason that the beneficiaries are not in a comparable situation as well as the legislator’s intention to critically appraise special tariffs under the regime set by Art. 12, fifth indent. Therefore a clarification as regards the scope of special tariffs under Art. 12, fifth indent, might be useful.

A deviation from the Vedat Deniz judgement

The ECJ was given the opportunity to pronounce upon the scope of the scheme introduced by virtue of Art. 12, fifth indent, in the *Vedat Deniz* case. This case regarded the scope of Art. 12, fifth indent, and the possibility provided to the intermediaries to deposit, for commercial purposes, large volumes of mail collected from different clients in a postal sorting centre and to enjoy the same discounts as

¹⁶ ECJ judgement *bpost* (C-340/13), ECLI:EU:C:2015:77, para. 27.

¹⁷ See Fn. 14, 15.

¹⁸ Opinion of Advocate General Sharpston delivered on 16 October 2014, *bpost SA v Institut belge des services postaux et des télécommunications (IBPT)*, ECLI:EU:C:2014:2302, para. 43, 56.

¹⁹ Opinion of Advocate General Sharpston delivered on 16 October 2014, *bpost SA v Institut belge des services postaux et des télécommunications (IBPT)*, ECLI:EU:C:2014:2302, para. 38.

²⁰ Decision of the Commission of 5 december 2001, COMP/37.859, *De Post – La Poste*, OJEU 2 March 2002, n° L 61, p. 32.



applicable for the direct customers of Deutsche Post for the volumes of items bundled and pre-sorted in this manner.²¹

The ECJ stated that the non-discrimination schemes installed by the fourth and fifth indents were indeed different in the sense that the fifth indent, unlike the fourth indent, provided for a “strict obligation” of non-discrimination for the special rates which a provider would choose to grant the intermediaries. The strict nature of this obligation is related to the fact that under the scheme of Art. 12, fifth indent, all beneficiaries of special rates have to be treated equally. The ECJ confirmed: “when such a provider applies special rates for companies and/or senders of bulk mail, the intermediaries in charge of bundling the items from various customers have to enjoy the same rates and the same terms and conditions”.²²

In the ‘per sender’ judgement however the Court no longer considered Art. 12, fifth indent, in particular, but indicated that it should not be necessary to determine whether the commercial discounts fell within the scope of the fifth indent as the fourth indent provided for an identical rule of non-discrimination.²³ With this refinement the ECJ could evacuate from the *bpost*-judgement the debate previously started by the Brussels Court of Appeal on the respective material scope provided for in the fourth and fifth indents.

Elements for reflection on the comparability of the situation of intermediaries and business customers

The ECJ considered that only senders are capable of increasing the demand for sending mail, since they are at the origin of the postal items, as stated by the definition of the notion of sender, in Art. 2, point 16, of the PSD 97/67/EC. As for the intermediaries, they should not be capable of contributing to the increase of mail volume handed over to *bpost* as they content themselves with delivering to *bpost* the mail they had collected from the different senders in advance.

The ECJ therefore considered senders and intermediaries being in different situations, based on three elements relating to the objective of stimulating the demand: the legal criterion of the item’s origin, the different degrees of elasticity within the demand and the inability of the intermediaries to influence the demand.²⁴ These elements will be critically analysed below.

(a) The criterion of the item’s origin

As for the criterion of the item’s origin there is no doubt that the intermediaries are not the senders in the sense of Art. 2, point 16, of PSD 97/67/EC, except for their own postal items.

²¹ For a detailed description of this case: ERGP Task Force report “An ERGP report on the possible impact of Article 12 application after ECJ C-340/13.

²² *Deutsche Post and Others*, EU:C:2008:141, para. 28.

²³ *bpost*, ECLI:EU:C:2015:77, para. 24, 25.

²⁴ *bpost*, ECLI:EU:C:2015:77, para 37ff.



Therefore this element had no relevance in this case. Respecting the principle of equal treatment does not require the intrinsic quality of the involved parties to be identical, in other words, to constitute one and the same category of persons, although the parties in question do have to be considered being in a comparable situation as regards the nature of the service or the standard in question, in spite of their different qualities.

(b) The existence of different degrees of elasticity of demand is not established

The ECJ based its consideration of the comparability of the situation of business customers and consolidators on the core criterion, that the stimulation of demand is the general objective to introduce volume rebates. In this assumption it is also regarded as certain that the demand is price elastic.²⁵

However, the postulate of an elastic demand in the specific circumstances of this case, has not been documented anywhere. The ECJ does neither give a source nor does it refer to a written procedure or invoke a single file piece supporting its assertion. The ECJ interprets a law rule based on factual presuppositions of an economic nature that might be regarded as arbitrary:

- The elasticity, postulated by the ECJ, of the demand of addressed public mail exceeding a certain volume has not a direct basis of proof;
- The foreign studies, cited by bpost, do not confirm, not even indirectly, the postulate put forward by the ECJ;
- The postulate, posed by the ECJ, is incoherent with a view to the arbitrary nature of the rates of the discounts defined by bpost;
- The risk of substitution is not inherent to the senders enjoying commercial discounts.

(c) The inability of the intermediaries to influence the demand of mail is not established

After the judgement there remain doubts as regards objective elements allowing to presume, that business customers would be the sole commercial partner capable of stimulating the demand for sending mail.

If the intermediaries resell to their clients a sufficient part of the surplus of commercial discounts obtained on the aggregated volume of mail coming from their clients, they are in the position to create incentives for increasing demand on their customers' side. As the pre-postal activities can be subject to an active and dynamic competition, the intermediaries shall necessarily have to pass on a sufficient part of that surplus if they want to develop their commercial activities.

(d) Résumé

The legal criterion of the item's origin does not seem to be suitable for the analysis of purely economic circumstances. The consideration of the comparability of the situation of business

²⁵ *bpost*, ECLI:EU:C:2015:77, para 36ff, 48.



customers and consolidators would have to reflect whether volume rebates indeed qualify for the stimulation of demand as a general objective. Additionally it has not been considered in how far consolidation models would be able to provide incentives to stimulate demand. This might be due to the fact that the relation between consolidators and senders has not been scrutinised.

Finally an aspect which has not been in the focus of the proceedings, but which might become relevant for the authorities when dealing with per sender models, is the fact that, for the calculation of the tariffs in a per sender model, the consolidator/hybrid operator would have to disclose information on its business customers, which might be regarded a confidential business secret and a competitive advantage, to the incumbent.

4.2 Post Danmark II²⁶

In its judgement C-23/14 the ECJ had to give its verdict on a certain number of preliminary questions of principle asked by the Sø- og Handelsretten (Denmark) and pertaining to the implementation of Art. 82 TEC (today Art. 102 TFEU) in the context of the rebate granted by Post Danmark for direct mail.

The main characteristics of that discount system are described in para. 7 to 9 of the judgement:

- At least 3 000 copies at a time, and in aggregate of at least 30 000 letters per year or representing an annual gross postage value of at least 300 000 Danish crowns (DKK) ;
- A scale of rates from 6% to 16%, the latter being applicable to customers sending over 2 million items of mail per year, or items of mail of over DKK 20 million per year ;
- The rebate scale was 'standardised', that is to say, all customers were entitled to receive the same rebate on the basis of their aggregate purchases over the reference period, namely one year ;
- At the beginning of the year, Post Danmark and its customers concluded agreements setting out estimated quantities of mailings for that year. The rebates were granted and invoicing took place periodically on that basis. At the end of the year, Post Danmark made an adjustment where the quantities presented were not the same as those in the initial estimate ;
- The rebate scheme at issue in the main proceedings was applicable to all advertising mail bearing the address of the addressee, regardless of whether that mail was covered by Post Danmark's monopoly and of whether distribution took place in areas not covered by other operators.

²⁶ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651.



The questions asked by the referring court were rearranged by the Court into three groups:

1. by the first and second subparagraphs of Question 1 and the first subparagraph of Question 3, which it is appropriate to examine together, the referring court asked, in essence, the ECJ to clarify the criteria that are to be applied in order to determine whether a rebate scheme, such as that at issue in the main proceedings, is able to have an exclusionary effect on the market contrary to Art. 82 TEC. The referring court also asked what relevance is to be attached, in the context of that assessment, to the fact that the rebate scheme is applicable to the majority of customers on the market;²⁷
2. by the third and fourth subparagraphs of Question 1, the referring court asked, in essence, the ECJ to clarify the relevance to be attached to the as-efficient-competitor test in assessing a rebate scheme under Art. 82 TEC;²⁸
3. by Question 2 and the second subparagraph of Question 3, which should be answered together, the referring court asked, in essence, whether Art. 82 TEC must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme, such as that at issue in the main proceedings, must be, on the one hand, probable and, on the other hand, serious or appreciable.²⁹

4.2.1 First series of questions: rebate criteria and price squeeze

For the first series of questions the Court starts by contextualising its analysis by indicating that:

- The discounts granted by Post Danmark presented three characteristics: they were standardised, conditional and retroactive.³⁰
- As regards the application of Art. 82 TEC to a rebate scheme, it should be recalled that, in prohibiting the abuse of a dominant market position in so far as trade between Member States could be affected, that article refers to conduct which is such as to influence the structure of a market where the degree of competition is already weakened and which has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.³¹
- It is settled case-law that, in contrast to a quantity discount linked solely to the volume of purchases from the manufacturer concerned, which is not, in principle, liable to infringe Art. 82 TEC, a loyalty rebate, which by offering customers financial advantages tends to prevent them

²⁷ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 21.

²⁸ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 51.

²⁹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 63.

³⁰ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 23-25.

³¹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 26.



from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse within the meaning of that provision.³²

- In order to determine whether the undertaking in a dominant position has abused that position by applying a rebate scheme such as that at issue in the main proceedings it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.³³
- It is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market.³⁴

The Court then analyses in detail the rebate granted by Post Danmark.

As regards the criteria and rules governing the grant of the rebates, the Court states:

- The rebates were retroactive, and the contractual obligations of co-contractors of the undertaking in a dominant position and the pressure exerted upon them may be particularly strong where a discount does not relate solely to the growth in purchases of products of that undertaking made by those co-contractors during the period under consideration, but extends also to those purchases in aggregate.³⁵ Such a rebate scheme is capable of making it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and thus to secure the suction to itself of the part of demand subject to competition on the relevant market.³⁶
- As regards the standardisation of the rebate scale, whereby all customers were entitled to receive the same rebate on the basis of their aggregate purchases over the reference period, such a characteristic admittedly supports the conclusion that, in principle, the rebate scheme implemented by Post Danmark did not result in the application of dissimilar conditions to equivalent transactions with other trading parties.³⁷ However, the mere fact that a rebate scheme is not discriminatory does not preclude it from being regarded as capable of producing an exclusionary effect on the market, contrary to Art. 82 TEC.³⁸

³² ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 27.

³³ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 29.

³⁴ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 30.

³⁵ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 33.

³⁶ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 35.

³⁷ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 37.

³⁸ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 38.



Regarding the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the bulk mail market, the Court states:

- Post Danmark held 95% of that market, access to which was protected by high barriers and which was characterised by the existence of significant economies of scale. Post Danmark also enjoyed structural advantages, which placed Post Danmark in a position of strength making it an unavoidable trading partner and securing its freedom of action.³⁹
- In those circumstances, it must be held that a rebate scheme operated by an undertaking, such as the scheme at issue in the main proceedings, which, without tying customers to that undertaking by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing undertakings, produces an anti-competitive exclusionary effect.⁴⁰
- On the relevance to be attached, in the context of assessing the rebate scheme implemented by Post Danmark, to the fact that that scheme applies to the majority of customers on the market, the Court stated that the fact that the rebates applied by Post Danmark concern a large proportion of customers on the market does not, in itself, constitute evidence of abusive conduct by that undertaking, but this may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect.⁴¹
- Nonetheless, it should be recalled that a dominant undertaking may demonstrate that the exclusionary effect arising from its conduct may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.⁴²

4.2.2 Second series of questions: relevance to be attached to the as-efficient-competitor test

For the second series of questions the Court started by repeating certain elements of constant jurisprudence:

- The application of the as-efficient-competitor test consists of examining whether the pricing practices of a dominant undertaking could drive an equally efficient competitor from the market.⁴³

³⁹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 39, 40.

⁴⁰ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 42

⁴¹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 44, 46.

⁴² ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 47, 48.

⁴³ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 53.



- That test is based on a comparison of the prices charged by a dominant undertaking and certain costs incurred by that undertaking as well as its strategy.⁴⁴
- The invoicing of ‘negative prices’, that is to say, prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebate scheme operated by a dominant undertaking is abusive.⁴⁵

Based on these elements the Court decided that it is not possible to infer from Art. 82 TEC or the case-law of the Court that there is a legal obligation to apply an as-efficient-competitor test in order to establish whether a rebate scheme operated by a dominant undertaking is abusive or not.⁴⁶

For the concrete circumstances the Court added that implementing the as-efficient-competitor test is of no relevance as the structure of the market makes the emergence of an as-efficient competitor practically impossible.⁴⁷

More in general the Court concluded its reasoning by repeating that the as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.⁴⁸

4.2.3 Third series of questions: probable, serious or appreciable character of the anti-competitive effect of a rebate scheme

As regards this matter, the Court indicated the following:

- As for the likelihood of an anti-competitive effect, the Court recalls that the anti-competitive effect of a particular practice must not be purely hypothetical: the practice in question must have an anti-competitive effect on the market, without necessarily having a concrete effect, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors.⁴⁹
- A dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.⁵⁰
- Since the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the structure of competition may constitute an abuse of a dominant position.⁵¹

⁴⁴ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 54.

⁴⁵ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 56.

⁴⁶ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 57.

⁴⁷ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 59.

⁴⁸ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 61.

⁴⁹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 65, 66.

⁵⁰ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 71.



From these different elements the Court judges that Art. 82 TEC must be interpreted as to say that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking must be probable, there being no need to show that it is of a serious or appreciable nature.⁵²

5 Theoretical impact of the judgements on the different players

As an introductory remark to this subchapter it can be generally stated that, while the ECJ's bpost-judgement influences intermediaries in access models, the judgement in "Post Danmark II" rather affects end-to-end competition.

A consequence of the judgement of the ECJ in the case C-340/13 is that the 'per sender' model introduced by bpost in the 2010 conventional tariffs is declared in conformity with Art. 12 of the PSD. This means that, in the light of the European law, a model as introduced in the Belgian case is not considered to cause discrimination between the intermediaries and the senders of bulk mail.

At a theoretical level a study by WIK-Consult of 29 October 2010, "Economic Analysis of the Special Tariffs for the Services Intended for Non-residential Customers, Bulk Mailers and Consolidators" indicates that the introduction of the 'per sender' model has had a negative impact on intermediaries:

"The new price system in 2010 has led to lower tariffs for large senders, in particular if they contract directly with bpost. Therefore, the 2010 price system provides incentives for senders to switch from a mail handler contract to a direct contract with bpost. For mail handlers that have own contracts with bpost, the new price system generally meant increasing tariffs in 2010. The new system favours mail handlers with small customers as discounts for them increased compared to 2009, and has negative financial effects for those mail handlers that have larger customers."

"Until the end of 2009, it has been especially attractive for small volume senders to use a mail handler that has an own contract with bpost. An alternative was that customers team up to negotiate better discounts, e.g. through associations. Small volume senders who do not even reach the threshold for revenue class 1 would have had to pay (substantially higher) preferential or single-piece mail tariffs if they had a direct contract with bpost. In case they contracted with a mail handler (before 2010), the mail handler was able to consolidate the volumes of all the customers and offer them at least slightly better prices than preferential tariffs. With the 2010 price system, this option has been largely foreclosed, as only very small discounts are granted for consolidated volumes of unidentified senders."

The judgement of the ECJ in the bpost-case, previously presented and analysed in the Task Force Report, tackles the potential discrimination between so-called consolidators and large senders.

⁵¹ ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 72.

⁵² ECJ judgement *Post Danmark A/S* (C-23/14), ECLI:EU:C:2015:651, para. 74.



Consolidators are third party operators who act as intermediaries between the original customer who generated the mail and the postal services. In its judgement the ECJ held that the ‘per sender’ model did not discriminate against so-called consolidators. Therefore the bpost-judgement is expected to have considerable impacts on consolidation models. In terms of sustainability of those models it might become difficult for intermediaries to adapt to the new jurisprudence and keep up a business model based on volume consolidation.

In the “Post Danmark II”-case the ECJ explicitly drew the boundary between competitive low-price tariffing and price dumping models jeopardizing the workable competition and established criteria for such price measurements. As this ruling mainly deals with below cost prices the reasoning and the considerations in the judgement mainly concern the activities of alternative End-to-End-providers. The judgement lays down and repeats a certain number of theoretical marks regarding the interpretation of Art. 102 of the Treaty when a dominant postal operator grants the rebate of the type that was granted by Post Danmark in 2007 and 2008. This interpretation especially concerns pricing strategies of the incumbent which might affect competition on the postal markets. Other than the bpost-judgement, Post Danmark also impacts end-to-end competition.

6 Regulatory environment and market developments (findings of the questionnaire)

In order to assess the most recent market developments, the sub-group sent a questionnaire (to be answered until the 31 May 2016) to which 23 NRAs responded.

The questionnaire aimed to update the information collected last year by the ERGP Task Force and also to gather some additional information that was not covered by the referred collection.

6.1 Scope of USO and regulatory oversight on national level

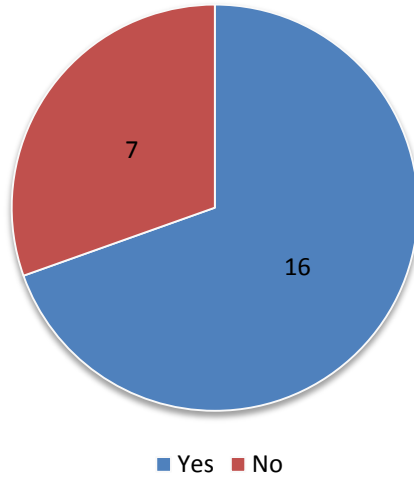
According to the answers collected, in 70% of countries⁵³ (16 out of 23) the USO includes tariffs for bulk mail. Some information as regards specific national contexts is worth to mention:

- In CZ and RO the postal law does not differentiate between single piece and bulk mail;
- In ES, although the postal law does neither include bulk mail in the US nor exclude it from the US, bulk mail has traditionally been treated as within the scope of the US.
- In CZ, IT, ES and PT Direct Mail is out of the scope of the USO;
- In NL, only international mail for which no individual agreements on tariffs or terms are being made is considered as bulk mail tariffs as part of the USO.

⁵³ BE, CH, CY, CZ, ES, DE, FR, GR, HU, IE, IT, NL, PT, RO, SK and SL.

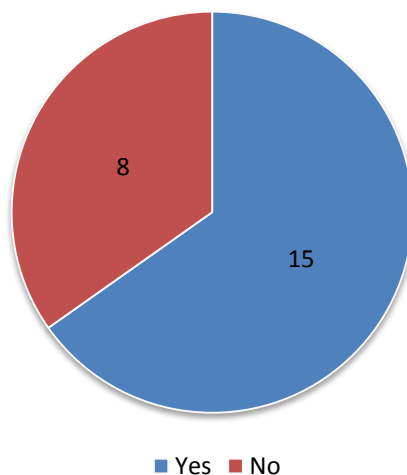


Figure 1 - Does the national USO include tariffs for bulk mail?



About 61% of countries⁵⁴ (15 out of 23) stated that the NRA monitors/verifies/approves bulk mail tariffs. There are a few cases where bulk mail tariffs, although not part of the USO, are monitored by the NRA (AT and PL). The exact opposite also occurs (CH and HU).

Figure 2 - Does the NRA monitor/verify/approve tariffs for bulk mail?



As can be seen, there are very distinct approaches throughout the EU countries with regard to the procedure:

⁵⁴ AT, BE, CY, DE, ES, FR, GR, IE, IT, PL (only bulk mail over 100.000 objects), PT, RO, SK, SL and UK.



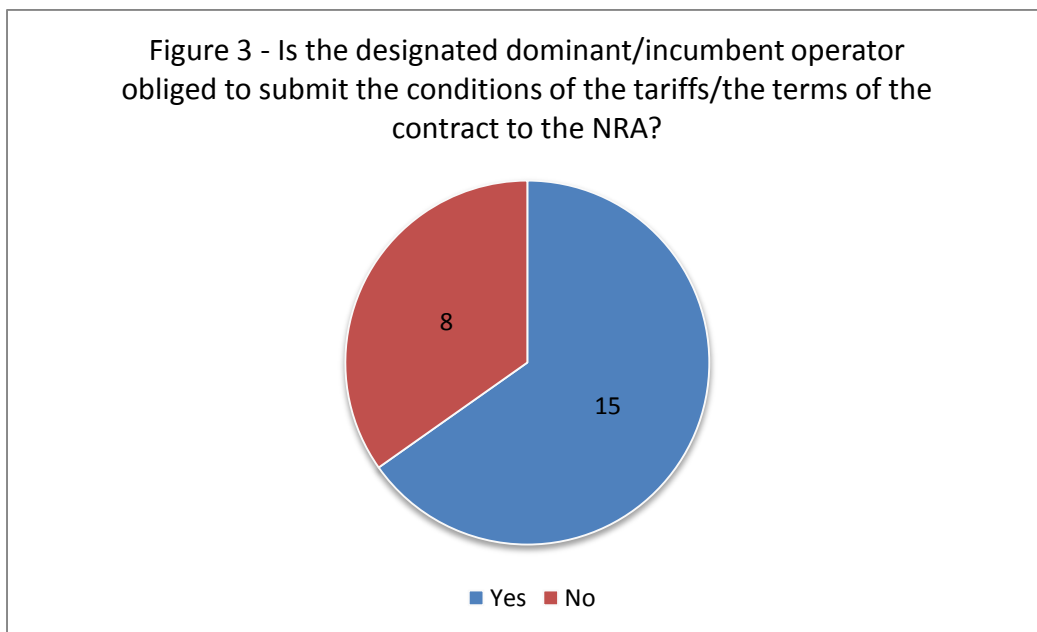
- In AT, ES, and RO bulk mail tariffs have to comply with general principles (affordability, cost orientation, transparency and non-discrimination; specifically: in ES bulk tariffs cannot cause bigger net cost of the US.
- In PT⁵⁵, special tariffs (applied to bulk letter mail) have to comply with the general principles of transparency and non-discrimination and they have to take into account the avoided costs, as compared to the standard service covering the four operations integrated in the postal service (acceptance, sorting, transportation and delivery).
- In BE, the tariffs for each service included in the USO (so also the bulk mail) must be in compliance with the principles of affordability, cost-orientation, territorial uniformity, transparency and non-discrimination. BIPT has the power to make an *ex post* control of these aspects.
- In CY, the costing systems of the USO are audited annually with the help of costing models and tools. The costing results of OCECPR models are used *ex ante* to define the cost-oriented tariffs for bulk mail.
- In CZ, the NRA does not verify nor approve tariffs for bulk mail as long as the postal items up to 2 kg (letters in the scope of the US) are cost-oriented from the aggregate assessment point of view.
- In FR and IE, bulk mail is included in the price cap applied to tariffs. Specifically in FR, each time the incumbent operator wishes to change the tariffs of bulk mail, ARCEP gives an opinion that is not mandatory.
- In GR, the NRA approves tariffs for bulk mail on an *ex ante* basis based on the results of the updated cost-accounting system, prices are undergone thorough checking prior to approval.
- In DE, the regulator monitors tariffs for bulk mail applied by the dominant postal operator in an *ex post* control if there are complaints.
- In IT, the incumbent operator can increase tariffs of US up to the limit of fair and reasonable prices and in respect of the non-discrimination obligation. Moreover, prices of priority bulk mail and registered bulk mail must be at least 10% below the tariffs of single piece priority mail and single piece registered mail, respectively.
- In UK, although Ofcom does not monitor bulk mail tariffs *per se*, Royal Mail must comply with an *ex ante* margin squeeze test that compares its bulk retail contract prices with its charges for access services. Royal Mail must recover at least 50% of the upstream costs in a given service from the revenue received after deduction of the relevant access contract costs, and overall it must recover total upstream costs from the revenue received from bulk retail services after deducting access charges that would be required to deliver the services. Ofcom also has *ex post* powers under competition law to deal with anti-competitive behaviour and closely monitors Royal Mail's price changes for access mail products.

⁵⁵ It should be clarified that PT's answers took only into account the prices considered as special prices, in the meaning of the 5th indent of article 12 of the Postal Services Directive. These prices are subject to the rules established by article 14º-A of the Portuguese Postal Law (Law nr. 17/2012 of 26 April, as amended by Decree-Law nr. 160/2013 of 19 November and Law nr. 16/2014 of 4 April).



- LT answered that it does not monitor/verify bulk mail tariffs. Monitoring, however, occurs when there is a complaint accusing the incumbent operator for not applying the principles of transparency and non-discrimination to the special tariffs.

Three quarters of the NRAs⁵⁶ (15 out of 23) stated that incumbent operator was obliged to submit the conditions of bulk tariffs and/or the terms of the contracts. This included, of course, all countries that monitor/verify bulk mail tariffs. BG, CZ and LT, although not monitoring per se, are within the countries whose incumbent operator is obliged to report on tariff conditions of bulk mail.



As was the case for the previous question, the results disclosed in the answers to the questionnaire testify to very contrasting situations:

- In FR, there is such an obligation for the tariffs, but not for the terms and conditions.
- In BE, due to the BIPT 'per sender' decision bpost has committed itself to provide, prior to the communication to its customers, the tariffs and conditions to BIPT. bpost is obliged to provide information on the conditions and tariffs of the contract at BIPT's request.
- In DE, the dominant incumbent operator is legally obliged to submit all contracts on incidental services.
- In CY new tariffs of the incumbent have to be within the cost oriented price range set by OCECPR. After the publication of the tariffs the USO has to submit those to OCECPR including any conditions regarding volume discounts in order for the NRA to check for compliance.
- In CZ any prospective increase in prices of the US must be notified 90 days prior to their increase.

⁵⁶ AT, BE, BG, CY, CZ, DE, ES, FR, IE, IT, PL, PT, RO, SK and SL.



- In RO the incumbent operator has the obligation to submit for ANCOM approval the criteria and conditions under which special tariffs (for bulk mail) are applied, as well as any amendments or supplements thereto. Within 60 days from the entry into force of the designation decision, the incumbent operator shall send ANCOM, for approval, the criteria and conditions based on which special tariffs are granted, so that the principles of transparency and non-discrimination should be observed. The incumbent operator shall publish on its website and shall post at its manned access points information regarding the special tariffs, the postal service for which they are granted, the number and category of postal items for which they are granted, the deposit of the items and the area where the delivery is taking place, as well as any other issues relevant for the granting of special tariffs.
- In BG the general terms and conditions (non-price conditions) are submitted for approval by the CRC. Before submission the UPS provider has to receive the opinion of the Consumer Protection Commission. Prices of services from the scope of the USO are submitted for approval by the CRC 30 days prior to the date when they become applicable. The incumbent operator is obliged to submit to the CRC copies of the contracts setting the applicable discounts for the services from the scope of the USO and all subsequent amendments and supplements to them within 14 days of their conclusion. The incumbent operator has to submit to the CRC a report on revenue, expenses and number of items delivered under the contracts for granting discounts.
- In the UK Royal Mail is required to provide ten weeks' prior publication and notification of changes to standard price terms for D+2 access products under existing regulation. It must notify its customers in writing of such changes and publish the information to ensure reasonable publicity. It does not need to inform Ofcom as the NRA but it may choose to do so. There is no regulatory requirement for Royal Mail to provide prior notification of its retail bulk mail prices.
- In LT the NRA monitors only when a complaint is received accusing the incumbent operator of not applying the principles of transparency and non-discrimination to the special tariffs (ex-post regulation). According to Postal law of the Republic of Lithuania the postal service provider must publish the terms and conditions of an agreement on the provision of the postal service, a procedure for providing the postal service approved by the postal service provider and other information affecting the user's decision to use the postal service.
- In PL the incumbent operator specifies in the regulations for the provision of universal services the conditions for the provision thereof and the general conditions for access to those services. The incumbent operator submits to the President of UKE draft regulations for the provision of universal services or draft modifications to the rules and regulations in force, together with his reasoning, at least 30 days before planned introduction thereof. The President of UKE may, by decision, within 30 days of submission of the draft regulations for the provision of universal services or draft modifications to the regulations in force, raise an objection to their provisions, if these are contrary to the legislation or in breach of the rights of entities using universal services. The rules and regulations for the provision of universal services or modifications thereof within the scope covered by the objection of the President of UKE do not enter into force. The incumbent operator is obliged to make its regulations for the provision of universal services available at each postal point of contact and on its Internet website.

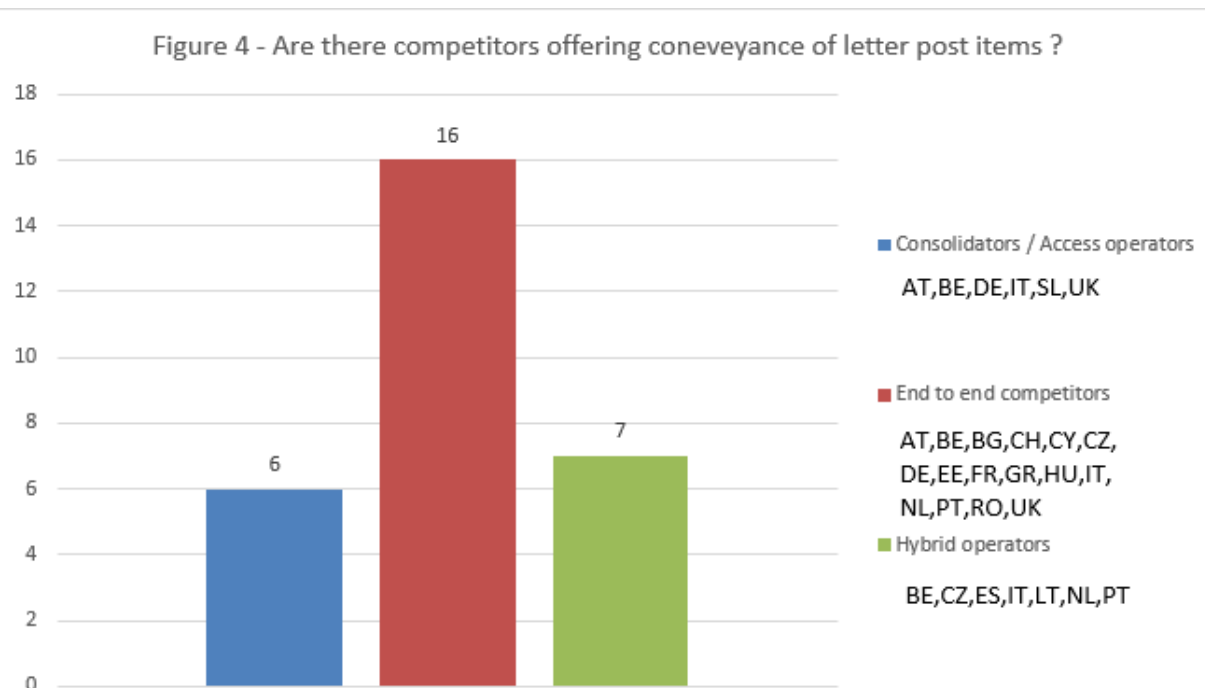


- In PT the USP shall notify ANACOM of the special tariffs to be applied to postal services integrating the universal service provision, before the date on which such prices take effect.
- In IT, according to AGCOM's decision n. 728/13/CONS, price changes notified to AGCOM are not subject to ex-ante approval. However, AGCOM can inhibit at any time price changes in case of infringement of national regulatory and legal framework.

6.2 Market landscape

In the questionnaire, the NRAs were asked if there are any competitors offering conveyance of letter post items in their respective country. All countries said that some kind of competitor exists, end-to-end competition being a large majority (16 out of 23 countries), followed by consolidators and hybrid operators (e.g. end-to-end operators that also use the incumbent operator's network for delivery). From the responses the following information can be extracted:

- The existence of competitor models in national postal markets
- Market shares of single competitor models
- Aggregated market shares of competitors

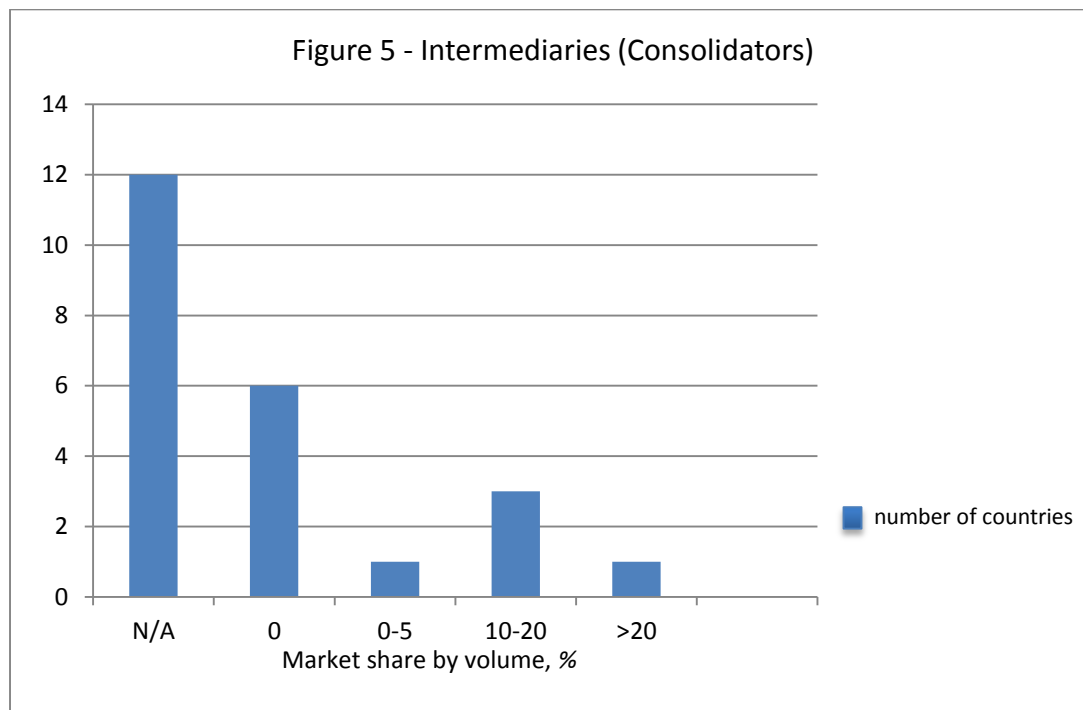




Intermediaries (Consolidators)

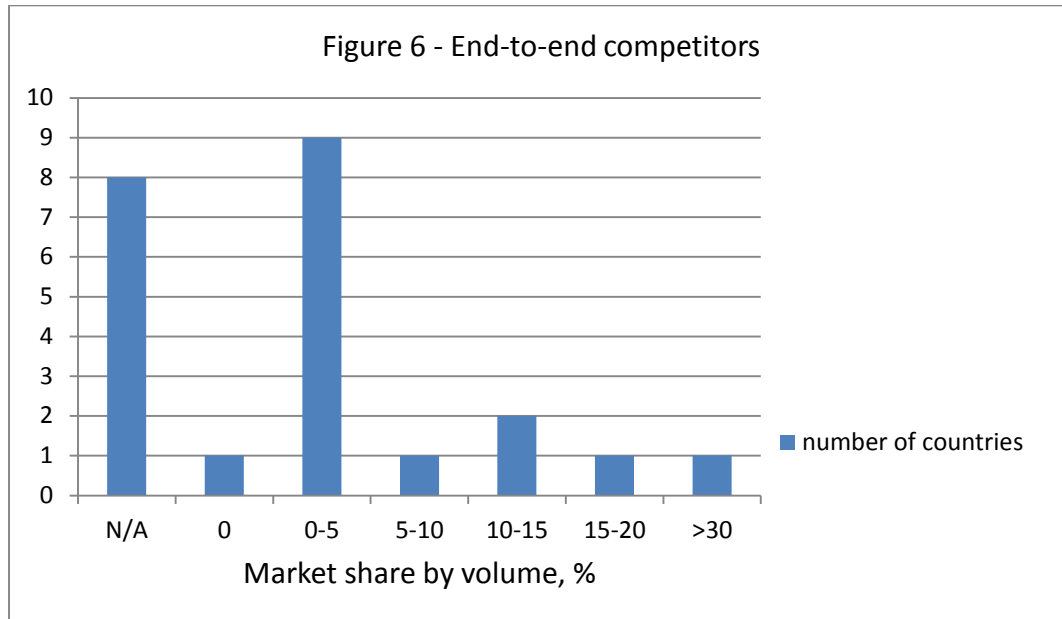
The majority of the countries (12 out of 23) have reported that the data on market shares is not available and/or there is no data on specific types of competitors. Some NRAs are empowered to collect data only from postal operators; this, according to their definition, excludes consolidators. A few countries have indicated that they do not use the term *consolidator/ access operator*. Furthermore, two countries have stated that 'there is no access regime'. Three countries have indicated that the market share held by intermediaries is between 10 to 20%. The market share held by intermediaries exceeds 20% only in one country.

The summarized data in Figure 5 illustrates the market share of intermediaries (consolidators). Whenever countries have indicated that the market share of competitors is confidential, the specific countries are listed in the first column.



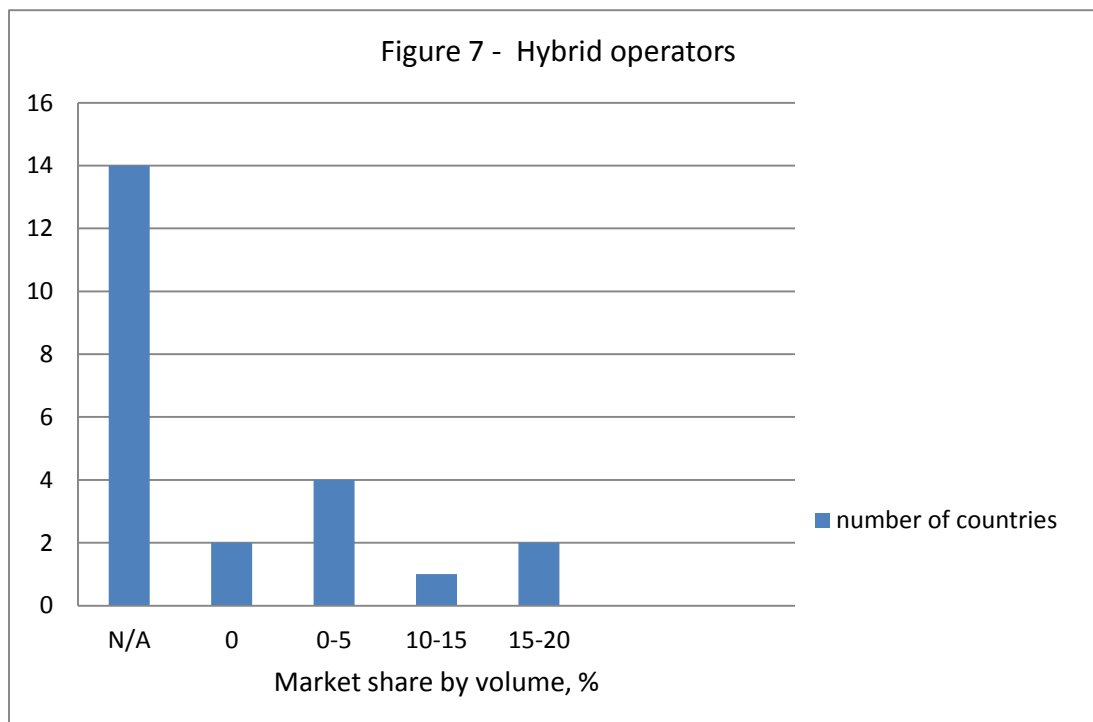
End-to-end competitors

End-to-end competition is a relatively new form of postal competition in the liberalized postal markets. Our investigation has shown that end-to-end competition is currently small in scale. The majority of the countries have stated that the market share of end to end competitors is very small, i.e. from 0 to 5%. Only one country has indicated that the market share of end-to-end competitors exceeds 30% of the market. In two countries the market share of end-to-end competitors ranges from 10 to 15%, in one country from 15 to 20% and in 1 country from 5 to 10%.



Hybrid operators

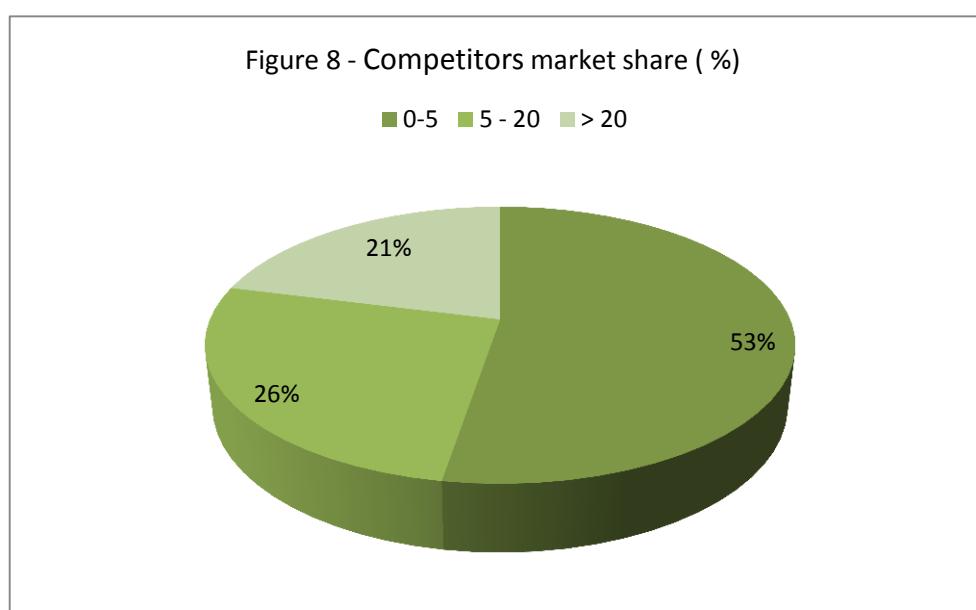
The majority of countries (14 from 23) have reported that the data on market shares is not available and/or there is no data on specific types of competitors. Two countries have stated that they do not have hybrid operators. Four countries have indicated that the market share of operators pursuing hybrid models is not significant (0 -5%), in one country the market share lies between 10 and 15% and in two countries between 15 and 20%.





Overview market shares

Even though not all of the 23 countries could provide answers concerning market shares, our first observation is that the level of competition (measured as the market share held by all alternative postal operators – consolidators/ access operators, end-to-end competitors and operators using hybrid models) is comparatively low in those countries who submitted data. However, two countries should be mentioned as an exception. In comparison to other countries they show high percentage of competition, i.e. more than 30 and 50%, respectively. Based on statistical data the following picture of the market situation can be made.



The results of the questionnaire indicate that in more than half of the respondent countries (53%) the market share of competitors is still very low and only ranges between 0 and 5%.

It can be noted is that the majority of the responding countries do not collect data on market competitors. Some countries have also indicated that the market share of competitors is confidential, that there is no access regime (FR), or that the NRA is empowered to collect data only from the postal operators and the NRA, therefore, has no data regarding consolidators (CZ). Due to the fact *that information is* only limited (low overall rate of reply at 34%), the following observations of the sub-group concerning the level of competition have to be regarded with caution:

The NRA's feedback on the business models of alternative operators showed that the level of competition measured as the market share held by alternative postal services providers (end to end competitors, consolidators, hybrid operators) with exception of few countries (UK, LT and RO) is comparatively low. Competition is mostly active in the B2X segment. Mail market opening has been achieved; however, from its findings, the sub-group can conclude that the postal market is still highly concentrated. National postal operators continue to play an important role in the letter post segments. In such a situation it is important to take into account the extent of the incumbent



operator's specific position and the particular conditions of competition prevailing in the relevant market.

6.3 Pricing strategies of the incumbent operators and developments in this field

According to the answers given to the questionnaire, in all countries the dominant/incumbent operator offer discounts for bulk mail (either within the USO or outside the USO).

The replies indicate that the incumbent operators offer different types of discounts: quantity, work-sharing (operational), zonal, etc. In some countries the discounts may depend on delivery D+N requirement, franking method, volume and category of postal items, regularity of shipments and others.

In most cases discounts are publicly available on the websites of the incumbent operators.

6.3.1 Requirements for discounts

All countries that answered the question related do requirements for discounts (all except for NO which has no data on the matter) said that discount schemes of the dominant/incumbent operator depend on volume requirements. In 82% of the countries⁵⁷ (18 out of 22), in order to be eligible to the volume discounts bulk mail clients have to comply with some kind of preparatory and logistical activities.

In 65% of countries (15 out of 23) there are additional discounts attributed exclusively by the fulfilment of operational activities. Note that in IT this only applies for Direct Mail.

Table 1 – Requirements for discounts

| | Do the discount schemes of the dominant/incumbent operator depend on a volume requirement? | Is the discount scheme conditioned to operational (preparatory and logistical) activities? | Are there any exclusive rebates for operational activities which are not linked to volumes? |
|----|--|--|---|
| AT | Yes | Yes | Yes |
| BE | Yes | Yes | Yes |
| BG | Yes | No | No |
| CY | Yes | No | No |
| CZ | Yes | No | No |
| EE | Yes | Yes | Yes |
| FR | Yes | Yes | No |
| DE | Yes | Yes | No |

⁵⁷ All except for BG, CH, CY and CZ.



ERGP (16) 41 – Report end-to-end competition and access regulation

| | | | |
|----|-----|-----|---------------------------------------|
| GR | Yes | Yes | Yes |
| HU | Yes | Yes | Yes |
| IE | Yes | Yes | Yes |
| IT | Yes | Yes | No for bulk mail, yes for direct mail |
| LT | Yes | Yes | yes |
| NO | N/A | N/A | Yes |
| PL | Yes | Yes | No |
| PT | Yes | No | Yes ⁵⁸ |
| RO | Yes | Yes | No |
| SK | Yes | Yes | Yes |
| SL | Yes | Yes | No |
| ES | Yes | Yes | Yes |
| CH | Yes | No | Yes |
| NL | Yes | Yes | Yes |
| UK | Yes | Yes | Yes |

Volume discounts

As can be seen in the table, 22 out of 23 countries indicated that incumbent operators apply volume discounts. For the remaining country, no information is available. Mainly the discount regime is applied for transactional and direct mail. Applied discount rates are very diverse - the range is between 0.5% and 60%.

Volume discounts can be applied in two ways – either incrementally or retroactively. Most countries (10 out of 23)⁵⁹ said that a retroactive rate of discount is applied. In 5 countries⁶⁰ only incremental rates of discount are applied, while in 3⁶¹ countries both types of rates apply. For five countries the answers to the questionnaire did not provide a clear indication.

Table 2 – Application of volume discounts

| | Services for which the discount regime applies | Type of rates of discount applied (retroactive or incremental) |
|----|--|--|
| AT | Letters (min 2500 pieces) | Incremental |

⁵⁸ However, the operational discount is applied above a specified minimum volume.

⁵⁹ BG, CH, CY, CZ, ES, LT, NL, PL, RO and SL.

⁶⁰ AT, EE, DE, PT and UK.

⁶¹ BE, GR and IT.



ERGP (16) 41 – Report end-to-end competition and access regulation

| | | |
|----|---|----------------------------------|
| BE | Transactional and direct mail | Both |
| BG | Business (non-private) letters | Retroactive |
| CY | Outward Bulk Mail | Retroactive |
| CZ | Transactional and direct mail | Retroactive |
| EE | Business letter (ordinary, registered mail for non-private customers) | Incremental |
| FR | Transactional and direct mail | Not clear |
| DE | Incidental services and direct mail | Incremental |
| GR | Transactional and direct mail | Both |
| HU | Letter type mail, EMS express mail | Not clear |
| IE | Not clear | Not clear |
| IT | Bulk mail, Smart Guaranteed mail (only for insured value up to 50€), Registered mail for judicial procedure and direct mail | Both |
| LT | Transactional and direct mail | Retroactive |
| NO | Transactional and direct mail | Not clear from the link provided |
| PL | Transactional | Retroactive |
| PT | Non-priority bulk mail and direct mail | Incremental |
| RO | Second class domestic letter mail services weighing up to including 2 kg, second class domestic registered letter mail services weighing up to including 2 kg, second class domestic parcels up to including 10 kg, second class domestic insured parcels up to including 10 kg | Retroactive |
| SK | Transactional and direct mail | Not clear |
| SL | Letters | Retroactive |
| ES | Mainly US letters (transactional, bulk). Direct mail is outside the US scope | Retroactive |
| CH | Transactional and direct mail | Retroactive |

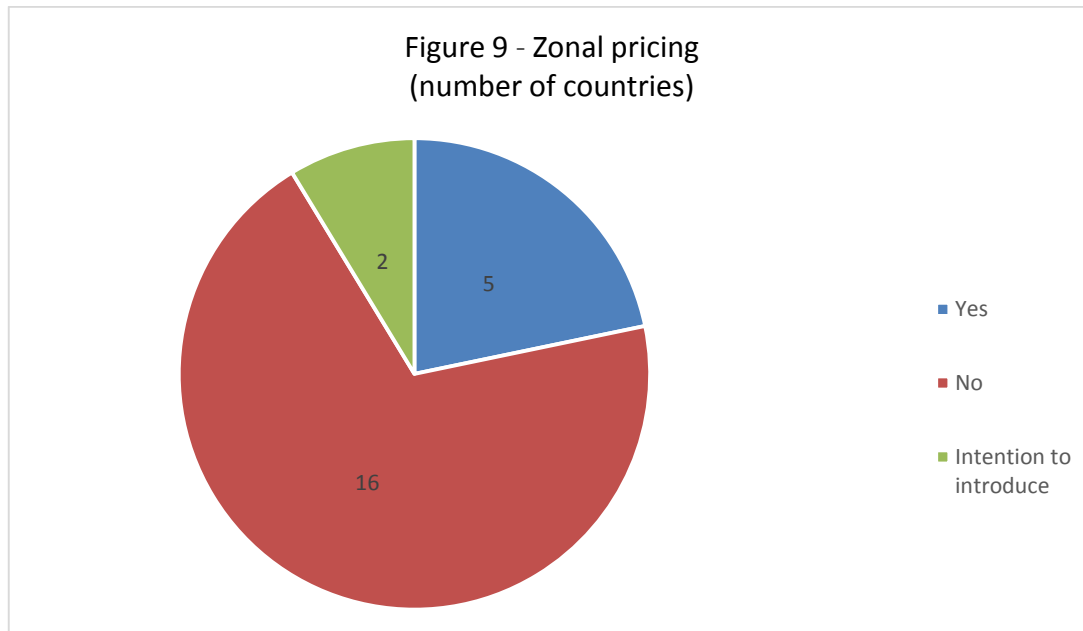


| | | |
|----|--------------------------------------|-------------|
| NL | Transactional, direct mail and other | Retroactive |
| UK | Transactional and direct mail | Incremental |

6.3.2 Other pricing models

In addition to volume discounts and operational discounts, other pricing categories exist, e.g. zonal pricing. Zonal pricing can be characterized as a form of access pricing with elements dependent on regional disparities in relation to cost-structures. The zonal pricing approach takes into account cost-differences resulting from urbanity and/or population density. Based on these criteria clusters with regional profiles are established as a reference for zonal tariffs. The delivery area pricing approach is one of several that go under the general title of 'bottom-up' approaches, to reflect the fact that these approaches charge for access based on the cost of work to be performed by the postal operator in delivering the mail in the respective region. The 'delivery area pricing' approach can be important in countries with a large proportion of rural, high cost routes as well as in other countries with significant numbers of rural delivery areas whose costs are higher than those of urban delivery areas.

The summarized data shows that zonal pricing is introduced in five countries⁶², 16 countries⁶³ have stated that there is no zonal pricing, or 'no access regime'. Furthermore, two countries have stated that their incumbent operators have an intention to introduce zonal pricing (Figure 9).



⁶² CZ, IT, LT, PT, UK.

⁶³ AT, BE, BG, CH, CY, DE, EE, ES, FR, HU, IE, NL, PL, RO, SK, SL.



One of the countries using zonal pricing is the UK. The following box is an illustration of the British case.

Royal Mail has both national, sub-national and zonal pricing plans. The national pricing plan can be based on meeting equivalent national posting profiles or equivalent zonal posting profile. There are four zones – London, urban, suburban and rural. See Section 3 of Ofcom’s 2014 Access Pricing Consultation (http://stakeholders.ofcom.org.uk/binaries/consultations/rm-access-pricing/summary/Royal_Mail_Access_Pricing_Review.pdf) or Royal Mail Wholesale website (<https://www.royalmailwholesale.com/>).

In summary, there are currently four access contracts:

- National Price Plan 1 (“NPP1”) offers uniform national access charges for each mailing item, independent of the mailing address. This is subject to a number of eligibility and performance requirements measured across individual contiguous postcode areas (known as “standard selection codes” or “SSCs” – they broadly correspond to the letters and numbers of a postcode). There are 86 SSCs in the UK.*
- Averaged Price Plan 2 (“APP2”) offers a uniform national access charge for each mailing item throughout the UK, independent of the mailing address. As with NPP1, this is subject to a number of eligibility and performance requirements, but under APP2 these were measured across the four Zones.*
- Zonal Price Plan 3 (“ZPP3”) does not have any relevant eligibility criteria. The ZPP3 tariff contains, for each access service, a separate access charge for each of the four Zones based on a specified variance against the APP2 charge.*
- Regional Price Plan offers a uniform charge that reflects the weighted average for a typical Royal Mail geographic mix of mailing items for each specific region. It is offered on the premise that the actual posting profile under this price plan reflects a typical Royal Mail geographic mix of mailing items for the chosen region measured to the urban, suburban and rural zones.*

Royal Mail is required to comply with an ex-ante margin squeeze test and prior notification requirements. There is no regulation on the overall level of Royal Mail’s access prices.



6.4 Investigations of NRAs concerning price issues

Regarding investigations done by NRAs and/or NCAs, nearly half of the countries⁶⁴ (11 out of 23) informed that investigations linked to abusive pricing in the market segment for bulk mail in the last five years had been undertaken. Most cases concern discrimination or anticompetitive pricing schemes:

- In GR, the NRA (EETT) conducted an investigation linked to abusing pricing behaviour in the market segment for bulk mail after a complaint of a competitor regarding a special offer made by the incumbent operator to a specific customer.
- Ofcom is currently undertaking an investigation in relation to certain prices, terms, and conditions offered by Royal Mail for access services, following a complaint from Whistl (previously called TNT)⁶⁵. Ofcom's provisional view is that Royal Mail breached competition law by engaging in conduct that amounted to unlawful discrimination against postal operators competing with Royal Mail in delivery. In July 2015, Ofcom issued a Statement of Objections that alleged that the changes to Royal Mail's wholesale prices for bulk mail delivery services contained a differential in pricing which meant that, in practice, higher access prices would be charged to access customers that competed with Royal Mail in delivery than to those access customers that did not.
- In DE, BNetzA recently initiated inquiries concerning discrimination of consolidators via comparable consolidation services by the incumbent and concerning alleged tariff charges below-cost.
- In CH, an investigation into the business customer pricing system for letter post services was opened in July 2013. The main issue is whether the incumbent operator is obstructing competitors by structuring and applying its pricing system in such a way, for example, that business customers find it difficult or even impossible to obtain services from its competitors. It is also examined whether the incumbent operator has discriminated against certain customers or placed them at a disadvantage in other ways.
- In RO, the Competition Council's investigation concerned the Romanian Post's policy of granting tariff rebates in respect of certain postal services. The investigation showed that between 2005 and 2009, the Romanian Post (incumbent operator) has granted to one of its clients, Infopress Group SA, preferential treatment on the market of the standard postal service of direct mail (also called Infadres service) by applying an additional discount (2,5 %) compared to others consolidators. This abusive behaviour extended also to the market of the postal service for commercial correspondence. The Competition Council found also that Romanian Post has granted discriminatory tariff rebates to intermediaries for the standard postal commercial correspondence and Infadres services by applying the 'per sender' model for discounts and not on the total volumes. The Competition Council confirmed an abuse of dominance on the relevant markets analysed and the breach of non-discrimination principle by disfavoursing the consolidators, and in 2010, a decision to fine the incumbent operator for this practice was

⁶⁴ BE, CH, DE, GR, IE, IT, RO, SL, ES, NL and UK.

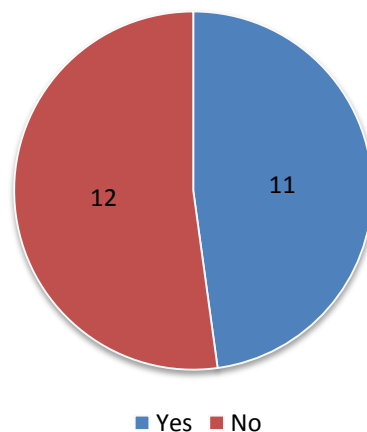
⁶⁵ http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01122/.



issued. In 2015, under a new investigation, the Competition Council fined the Romanian Post for failure to comply with the obligations reaffirmed through the decision issued in 2010 on the hybrid mail market.

- In 2013, the Italian Antitrust Authority stated that Poste Italiane abused its dominant position by applying discounts – due to the non-application of VAT - for universal services that have been individually negotiated⁶⁶.
- In January 2014 a CNMC Decision (Spain) was issued sanctioning the incumbent operator for margin-squeezing Unipost (hybrid operator). The Decision was overturned by the revision Court in the summer of 2015 on the grounds that the NCA would have failed to prove that the conduct could expel the rival from the market (since Unipost is a hybrid operator and so did not depend 100% on access to the public network, the CNMC should have showed that the margin squeeze was critical to Unipost competitiveness and survival in the market).

Figure 10 - Has there been any investigations linked to abusive pricing in the market segment for bulk mail in the last five years?



6.5 Implications resulting from the current jurisprudence

In the sequence of the most recent jurisprudence (bpost, Post Danmark II), the WG asked a few questions in order to assess if there were any changes (or if any changes are planned) from a legal and/or economic perspective.

Reactions of the legislator and/or the NRA

⁶⁶ <http://www.agcom.it/concorrenza--delibere/concorrenza-istruttorie/open/41256297003874BD/2ADCA0181FA43746C1257B5C0051DA5E.html>.



From what was gathered, none of the countries claimed to amendments being made to the provisions of applicable primary/secondary legislations. However, RO informed that is currently undertaking an analysis of the market situation based on the data at its disposal in order to propose to the body entitled with amending the primary national legislation (Ministry of Information Society and Communications) the removal of bulk mail from the universal service area.

Only IT, NL, PL, PT and UK claimed to have undertaken an analysis of the implications resulting from the current jurisprudence. Here are a few examples:

- In PL, recently a debate was initiated by the President of UKE on access to the incumbent operator's network. Although the incumbent operator is obliged to conclude, within the scope that is necessary to maintain interoperability in the provision of universal services, cooperation agreements, including on mutual access to the postal network, under transparent and non-discriminatory conditions, such agreements are rare. UKE has undertaken some measures on creating proper conditions for network access by the postal operators. However, these actions were dictated rather by lack of specific provisions on network access in national postal law than by any current jurisprudence;
- AGCOM (IT), in its observations submitted to Italian Government about Case C-340/13 (bpost), maintains that, by excluding quantitative discounts from the special tariff category provided for by Art. 12, fifth indent, of the PSD, the 'per sender' model would violate anyhow the general non-discrimination principle set forth by said provision;
- NL is discussing the bpost-case in different cases;
- ANACOM (PT) claimed to have taken into account the most current jurisprudence while analyzing the US tariffs proposed by the incumbent operator;
- UK considers that the bpost-judgement does not affect the UK market. The UK market is not solely reliant on mail consolidators as the basis of competition in mail services. They exist in the UK market but it has been ensured competition, namely through imposing on Royal Mail "USP access conditions" under section 38 of the Postal Services Act 2011. These conditions create obligations on Royal Mail to offer services to access operators. Such operators may provide retail bulk mail services to multiple companies and consolidators without Royal Mail being able to identify that this is the case. Royal Mail cannot therefore price discriminate on the basis of the volumes sent by or the nature of the individual businesses being served by the access operator. Royal Mail is also subject to non-discrimination requirements for access mail, in order to ensure equivalent treatment between its retail and access customers.

Reactions of the market (including the introduction of a 'per sender' model)



The sub-group also asked about the impact of the current jurisprudence on end-to-end operators and/or access operators, to which 17 countries answered⁶⁷. Most countries (13 out of 17) said that the current jurisprudence had no impact on end-to-end operators and/or access operators.

BE claimed that the introduction of the 'per sender' model and the uncertainty caused by the proceedings before the courts and also by the decisions of the courts have probably had a negative impact on the development of the consolidation market (for example, some consolidators went bankrupt).

In PT, the incumbent operator changed in the 1st of February of 2016 the discount regime in order to clearly distinguish operational and volume discounts. Until then, to benefit from discounts one had to cumulatively comply with volume and operational conditions.

The Dutch regulator answered that access operators are being influenced negatively if PostNL introduces a 'per sender' model.

In CY, this issue will be taken under consideration for the regulation of the access to the USO network.

In practice it is difficult at this stage to estimate whether a model of the 'per sender' type (or equivalent) will have the tendency to generalise within the Member States and whether the alternative operators have been influenced negatively by the two judgements.

A certain number of countries however do have a 'per sender' model in different forms:

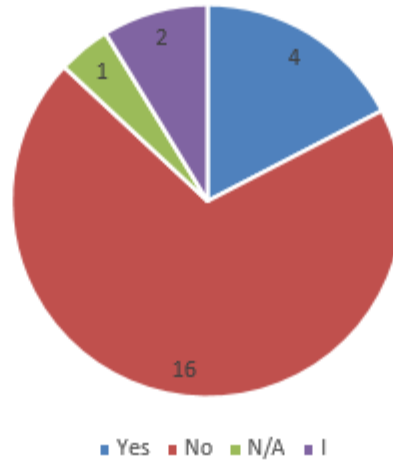
- NL: see country case in subchapter 7;
- IT : Poste Italiane introduced a 'per sender' model only for direct mail ;
- PT : The incumbent operator applies a 'per sender' model since 01.02.2016. Quantity rebates are applied only to the quantities sent by each sender (the customer who sends the mail) ;
- FR: see country case in subchapter 7;
- ES: The USP has filed a new access model contract including per sender discounts ;
- SL anticipates the arrival of such a model in the near future.

The summarized data shows that the majority of countries do not apply a 'per sender' model (70%). 17 % reported that they apply this model.

⁶⁷ AT, BE, BG, CH, CY, CZ, DE, EE, ES, HU, IT, NL, NO, PL, PT, SK and UK.



Figure 11 - 'Per sender' model (breakdown by countries)



*I- intention to introduce

7 Country cases

In addition to the experiences in the bpost-case, which have been elaborated in the ERGP Task Force report and in previous subchapters of this report, the sub-group chose two other country cases to describe developments in the field of discount regimes. While the Dutch country case features a development with reference to the bpost-case, the French country case deals with volume discounts which have been set into operation before the court proceedings and which are likely to have had an impact on the reasoning of the ECJ.

7.1 Country case: The Netherlands

Since the bpost-judgement, some relevant developments have been seen in the Dutch postal market. For a clear understanding of the developments in the Netherlands, first a description of the market situation will be provided. After this, developments after the bpost-judgement and the implications of this will be described.

Market situation in the Netherlands

In the Netherlands, domestic bulk mail is excluded from the USO. PostNL is the designated provider of the USO and is the largest player in bulk mail. PostNL is the only operator with a postal network which is able to deliver 24h postal services covering the whole country.



There are two types of competitors in the market for bulk mail. One operator, Sandd, has a postal network covering the whole country with two delivery days offering non-24h bulk mail services. Sandd has a market share of 10-15% in terms of revenue in bulk mail.

Besides the end-to-end competition from Sandd, there are a number of postal operators with hybrid models. These operators provide 24h bulk mail services to business clients and have their own regional networks for delivery. For the mail which has to be delivered outside the region of their regional networks, these operators use access services from the networks of PostNL or other regional operators. However, for parts of the country where PostNL is the only operator with a 24h delivery network, these hybrid operators are dependent on the network of PostNL. These operators together have a market share of 0-5% in terms of revenue in bulk mail.

Since bulk mail is excluded from the USO, the tariffs are unregulated. PostNL has the freedom to determine its own tariffs and conditions. The postal act provides a non-discrimination obligation towards other postal operators compared to business senders and an obligation on the transparency of tariffs (Art. 9). Since this is non-USO, it is not a direct implementation of Art. 12 of the PSD.

In 2014, the legislator has introduced the competence in the postal act to impose obligations on a postal operator with significant market power on a relevant market. Therefore, this competence is comparable to the market analyses as known in European telecommunication markets. The first market analysis based on this competence is currently being performed and a draft decision has been published for consultation. The legislator will withdraw the non-discrimination and transparency obligation towards other postal operators (Art. 9 of the postal act) after the final decision is definitive.

Developments after EUCJ judgement in bpost-case

PostNL has a tariff structure with different operational and volume related discounts on standard tariffs. Also, large senders negotiate with PostNL an individual offer for tariffs and conditions. Examples of discounts offered by PostNL are discounts for annual volume, guarantee of volume, multiannual contracts and the size of a consignment. All these tariffs and conditions should be offered non-discriminatory to other postal operators.

In 2015, there have been four court cases on the non-discrimination and transparency obligation towards postal operators. ACM succeeded in three preliminary injunctions and one case on the merits. Due to the development of more competition in the Dutch postal market, issues around discrimination and transparency are increasing, as appears from these cases. Therefore, discrimination issues in the postal market are high on the agenda in the Netherlands.

The uniform sender case

In one of the cases, the 'per sender' model as in the bpost-case, has been part of the defense of PostNL. In 2013, PostNL introduced the condition 'uniform sender' in a consignment. This means all envelopes in a consignment must have the same originating address. For other postal operators this makes it impossible to consolidate mail in a consignment since the letters are coming from different



end users. Therefore postal operators cannot qualify for the higher discounts for larger sizes of individual consignments.

For consignments with more than one originating address, PostNL introduced a new service, diverse senders (DivA), with a 15% higher tariff. The introduction of this service is subject of another case where ACM has intervened. In the opinion of ACM this service is also discriminatory towards other postal operators. Because of the current cases, PostNL has suspended both the condition uniform sender as well as the service DivA until the results of the court cases are known.

PostNL argues the condition of a uniform sender per consignment was introduced and justified because of operational reasons. Later, PostNL added that it is a form of the 'per sender' model and, since it is meant to attract more volumes, this condition should be allowed considering the bpost-judgement.

The opinion of ACM is that the uniform sender condition is not comparable with the 'per sender' model in the bpost-case for different reasons. The first difference is that the 'per sender' model of bpost contained a reference period for volume discounts. This reference period encouraged end users to send more letters. The model of PostNL does not contain a reference period so senders are mainly encouraged to send more letters per consignment and reduce the number of consignments. The second difference is that according to ACM the bpost-case is not applicable in the Dutch postal market because of the different market situation. This will be pointed out in the next subsection.

The court case in first instance has been won by ACM.⁶⁸ The case at the Supreme Court was lost by ACM because the court judged that ACM had not provided enough evidence.⁶⁹ According to the court, more evidence was required on the question if mail from postal operators is equally labour consuming and the question if the discount system indeed leads to a discriminatory situation. In the decision, the Supreme Court did not provide a decisive answer on the applicability of the bpost judgement in the Netherlands. Since bulk mail is excluded from the USO in the Netherlands, the case is not based on EU regulations concerning the USO (PSD). Therefore, no appeal at the EUCJ is possible and the decision of the Supreme Court is the final decision in this case.

Introduction of the 'per sender' model

Besides the cases on the condition of a uniform sender and the service DivA, PostNL has introduced the 'per sender' model on annual volumes per 2016. In this model, the retroactive discounts provided for annual volume of bulk mail are provided on a 'per sender' basis. ACM has indicated that the 'per sender' model has a discriminatory effect towards postal operators and therefore is contrary to the non-discrimination obligation in the postal act. Awaiting the outcome in different cases, this condition is suspended for 24h bulk mail towards other postal operators because of the objections of ACM.

⁶⁸ Judgement of the district court of Rotterdam of the 4th of February 2016, ECLI:NL:RBROT:2016:823.

⁶⁹ Judgement of the Administrative High Court for Trade and Industry of the 8th of November 2016, ECLI:NL:CBB:2016:311



According to ACM, the market situation in the Netherlands is different than in the bpost-case, making it not applicable in this situation. First of all, in the bpost-case, bulk mail services are part of the USO while in the Netherlands the legislator has excluded domestic bulk mail from the USO. This means that a shift of bulk mail volumes from the incumbent operator to other postal operators is a development in an unregulated service where no measures need to be in place to protect the delivery of the service. When postal operators qualify for higher volume discounts because of consolidation of the mail they cannot deliver themselves, the protection of the financial stability of the USO cannot be an argument in this situation.

Second, the alternative postal operators in the Netherlands have their own delivery activities and require access to the network of PostNL for only a part of their delivery. The business model of these postal operators is built on end-to-end postal services with regional postal networks. In the bpost-case, the postal operators were pure consolidators without own delivery activities. Their business model was built on the arbitrage in the system of volume discounts of bpost. This difference is important, because for part of their volumes postal operators can make the choice between delivering themselves or using access to the network of PostNL which makes them sensitive to the incentives of the discount system of PostNL to attract mail volumes.

Because of these differences in circumstances, the ECJ decision in the bpost-case is not applicable on the situation as it currently is in the Netherlands. The opinion of ACM is that the 'per sender' model should not be allowed for the situation in the Netherlands.

Implications and way forward

Since both the condition of uniform sender addresses per consignment and the 'per sender' model on annual volumes are suspended for 24h bulk mail awaiting the decisions in court cases, no material effect of the introduction of the 'per sender' model by PostNL is visible for this service yet. However, it does cause uncertainty in the market since the outcome of the cases will probably be applied retroactively. The expectation is that the introduction of the condition of a uniform sender address per consignment, the introduction of the service DivA, and the introduction of the 'per sender' model all have a strong cost increasing effect for competing postal operators. Since these postal operators gain their margin with the mail they deliver with their own regional networks, this cost increase also has a margin squeezing effect for postal operators. The negative influence is that the postal operators who are to a certain extent dependent on the access to the network of the incumbent will not be able to offer competing services towards business clients for bulk mail. This will have a strongly negative effect on competition. Therefore, the decisions in the current court cases are very important for the development of competition in the Dutch postal market.

In the draft decision of the market analysis that is currently being performed, the 'per sender' model is being discussed as well. In this draft decision, ACM regards the introduction of the 'per sender' model as strategic product development. Almost only other postal operators experience negative effects because of a strong increase of costs. This results *de facto* in the refusal of granting access to the network of PostNL which prohibits postal operators from offering competitive bulk mail services to business clients.



Summary

In summary, the ECJ judgement in the bpost-case has led to a number of developments in the Dutch postal market. PostNL refers to this decision in a case on uniform sender addresses per consignment. Also, PostNL announced the introduction of the 'per sender' model on annual volume discounts. Both measures have been postponed awaiting the judgements in different court cases.

ACM's opinion is that the bpost-case is not relevant in the Netherlands due to a different legal framework and a different market situation. In the draft decision of the current market analyses on the postal market, ACM regards the introduction of the 'per sender' model as strategic product development which has negative effects on competition in the postal market.

7.2 Country case: France

The 'per sender' model in France is not a consequence of the jurisprudence in the bpost-case. In fact, La Poste came up with a volume-based discount scheme for industrial mail already in 2007. Earlier volume discount models of La Poste even date back to the early 1990s. The rebate scheme proposed by La Poste in 2007 aimed at modulating marginal rates of universal service products by allowing the largest customers discounts with respect to the annual turnover.

Administrative channel

Before La Poste introduced the volume-based rebate scheme, the French NRA had to deliver an opinion on the impacts of such a model on competition on the letter markets and the situation of different market players (intermediaries and business customers). As it was to be feared that the proposed rebate scheme might have implications on the full opening of the postal markets, the French NCA was asked to deliver an opinion on the compatibility of the discount scheme with the emergence of competition in the letter mail market and on the exclusion of intermediaries from the benefits of the rebate scheme.

In its opinion the French NCA stated that discounts which are "related to counterparts in terms of cost savings are presumed not to have anti-competitive effects" and that the level of rebates to business senders is justified by the volume of activity they bring and the economies of scale they allow La Poste. Furthermore, the NCA established that consolidators and business customers are not in the same position regarding the demand function. As they are not in the same situation, different treatment in terms of access to the discounts was regarded admissible.

On the basis of the NCA's evaluation the French NRA issued an opinion in favour of the discount scheme in 2008.



Relevant judgements on the national level

Already in 2005 and therefore directed against a preceding version of the volume-based discount scheme, consolidators lodged a complaint to the tribunal de commerce de Paris (first level court) contesting a violation of the equal treatment of users principle as contained in Art. 1382 of the national civil code. In its defense, La Poste argued that the intermediaries were not its clients but simply representatives thereof. The tribunal de commerce found that the intermediaries themselves were clients of La Poste and that they had been disadvantaged by an anticompetitive practice.

Against this judgement, La Poste filed an appeal and the Paris court of appeal overturned the ruling of the first instance. The court of appeal held that intermediaries did not have their own “demand curve” as they are not responsible for deciding what mail will or will not be sent. The volume-based discounts might therefore be applicable differently for bulk senders and intermediaries. Consequently, La Poste’s rebate scheme in question was not regarded discriminatory against consolidators as the rebate scheme was based on the demand of the bulk sender.

The subsequent appeal to the Supreme Court (final court of appeal) was dismissed in 2009. The Supreme Court confirmed the ruling of the Paris court of appeal.

Regulatory consideration of La Poste’s 2010 rebate scheme

In 2010, La Poste proposed a new volume-based discount scheme with different rebates for direct mail and transactional mail. When evaluating this proposal, the French NRA followed the previous jurisprudence in France in that the discount scheme does not lead to discrimination between senders and intermediaries.

8 Conclusions

The analysis of the questionnaire revealed that the level of competition (measured in terms of the market share held of the alternative operators) is low in the majority of the countries subject to the survey. Despite the full liberalization of the letter markets in all European countries the incumbents play a very important role on the letter mail market. The observations confirm the market trends described and characterized in the previous 2014 report of the sub-group. Neither providers pursuing consolidation models nor end-to-end operators seem to exert substantial competitive pressure on incumbents. A thorough assessment of the questionnaire reveals that alternative operators predominantly still pursue end-to-end models. Access models appear to be less attractive for alternative operators which might be due to possible barriers related to negotiating access conditions with the incumbent. The trend which was observed in the previous report seems to have stabilised.

From its analysis the sub-group can also conclude, that the incumbent operator possesses an overwhelming market position even regarding the bulk mail segment (within the scope of the USO)



which is assumed to be attractive for alternative operators. Only in two countries alternative operators achieved a significant market share exceeding 30 %. However, due to the fact that the countries provided limited information, it is advised to be cautious when drawing conclusions on the market situation in the letter segment.

As fragmented competition emerged in the business segments the link between the successfulness of alternative operators and the incumbent's pricing behaviour in the respective segment has been investigated. The following table gives a compiled overview of the existence of rebate models in the different member states:

Table 3 – Overview discounts models

| Countries | Volume discounts | Operational discounts | Retroactive rebates | Zonal pricing | 'Per sender' model |
|-----------|------------------|-----------------------|---------------------|---------------|--------------------|
| AT | Y | Y | N | N | N |
| BE | Y | Y | N | N | N |
| BG | Y | N | N | N | N |
| CH | Y | N | Y | N | N |
| CY | Y | N | Y | N | N/A |
| CZ | Y | N | Y | Y | N |
| DE | Y | Y | N | N | N |
| EE | Y | Y | N | N | N |
| ES | Y | Y | Y | N | I* |
| FR | Y | Y | N/A | N | Y |
| GR | Y | Y | Y | I* | N |
| HU | Y | Y | N/A | N | N |
| IE | Y | Y | N/A | N | N |
| IT | Y | Y | N | Y | Y** |
| LT | Y | Y | Y | Y | N |
| NL | Y | Y | Y | N | Y |
| NO | Y | N/A | N/A | I* | N |



ERGP (16) 41 – Report end-to-end competition and access regulation

| | | | | | |
|----|---|---|-----|---|----|
| PL | Y | Y | Y | N | N |
| PT | Y | Y | N | Y | Y |
| RO | Y | Y | Y | N | N |
| SK | Y | Y | N/A | N | N |
| SL | Y | Y | Y | N | I* |
| UK | Y | Y | N | Y | N |

* Intention to introduce

**Only for direct mail

This overview reveals that volume-based discounts are existent in all countries replying to the questionnaire. Operational rebates are granted in many countries, mostly in combination with volume elements. Only in five countries the incumbent applies a 'per sender' model or has the intention to introduce such a model. Other pricing models such as zonal pricing are not widespread. The volume discounts are mostly applied retroactively and only in few cases incrementally.

The judgements Post Danmark II and bpost entail fundamental considerations in relation to the conformity of the incumbent operator's applied tariff structure with the competition law and the PSD. Although both judgements may potentially have an influence on the market, investigations in this report show that they currently have not led to changes of business models of the incumbents in many countries (bpost) nor to changes concerning the market position of alternative operators in the business letter segment (Post Danmark II).

Currently, only the bpost-judgement results in reactions of the incumbent and/or the NRAs. Some NRAs analysed the impact of the bpost-judgement on their national market; however the legislators have not undertaken specific steps to amend the legal framework. According to the NRA's feedback the judgements did not lead to changes in the pricing strategy of the incumbent in most of the countries. However, the bpost-judgement influenced the situation in some countries in that national incumbents changed their existing rebate models and introduced a 'per sender' model or considered to introduce such a model.

The judgement in "Post Danmark II" impacted neither the incumbent's pricing policy nor the regulation regime so far. Nevertheless, this fundamental judgement brings planning certainty for the authorities when investigating price dumping issues in future. In times of declining volumes as consequence of e-substitution, it can be assumed with high probability that incumbents will pursue low-price-models. The ruling provides detailed guidelines for the authorities when examining the anti-competitive effects of discounts.



ERGP (16) 41 – Report end-to-end competition and access regulation

An aggravating factor, however, constitutes the lack of information for the majority of the NRAs in the field of letter mail for business customers. Full knowledge of the contractual conditions in the business letter sector is prerequisite for successful regulatory interventions in the case of price dumping with anti-competitive effects. In absence of such transparency for the NRAs the competition protective effect of Post Danmark II will be counteracted. Similarly problematic is the lack of empowerment of some NRAs. According to the survey in some countries the NRA's competences are limited to the single mail users, whereas prices in the business sector are not subject to the sector specific regulation. These tariffs are at most subject to control of the competition authority.



List of countries and NRAs

| Country | Country Code | NRA Acronyms |
|-----------------|--------------|--------------|
| Austria | AT | RTR |
| Belgium | BE | BIPT |
| Bulgaria | BG | CRC |
| Cyprus | CY | OCECPR |
| Czech Republic | CZ | CTU |
| Estonia | EE | ECA |
| France | FR | ARCEP |
| Germany | DE | BNetzA |
| Greece | GR | EETT |
| Hungary | HU | NMHH |
| Ireland | IE | COMREG |
| Italy | IT | AGCOM |
| Lithuania | LT | RRT |
| Norway | NO | NKOM |
| Poland | PL | UKE |
| Portugal | PT | ANACOM |
| Romania | RO | ANCOM |
| Slovakia | SK | TELEOFF |
| Slovenia | SL | AKOS |
| Spain | ES | CNMC |
| Switzerland | CH | POSTCOM |
| The Netherlands | NL | ACM |
| United Kingdom | UK | OFCOM |



ERGP (16) 41 – Report end-to-end competition and access regulation

Terms and abbreviations

| | | |
|------|---|---|
| Art. | - | Article |
| ECJ | - | European Court of Justice |
| N/A | - | Not available |
| NRA | - | National Regulatory Authority |
| PSD | - | Postal Services Directive 97/67/EC, as amended by Directives 2002/39/EC and 2008/6/EC |
| TEC | - | Treaty Establishing the European Community |
| TFEU | - | Treaty on the Functioning of the Union |