

## ERGP (18) 49 Report on the developments in the postal sector and implications for regulation

### Public Consultation

### Comments by ACS SA

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ACS SA is the main alternative postal provider of Greece (i.e. the main letter mail competitor of the State owned postal incumbent) as well as the largest courier company of Greece (operations in Greece, Cyprus, Albania and Bulgaria).

Comments:

#### **Harmonisation of postal markets across Member States and Uniform implementation of the regulatory framework versus flexibility on the national level**

In Section 3 “Regulatory implications” of the ERGP Report, the issue of harmonisation across Member States regarding some regulatory issues is pointed out. In Section 4 “Elements for a new regulatory framework” and in the “Conclusions and Observations” Section there is a lot of emphasis on the significance of flexibility on the national level in order for the NRAs to address national specificities.

Although national specificities are existent and certainly need to be addressed, caution is needed in the new regulatory framework in order to avoid the reoccurrence of incidents, such as under the present Postal Services Directive (PSD), whereby flexibility on the national level has been misused by some Member States, thus giving rise to a transposition of the PSD into national legislation/regulation that prioritises the well being of the state owned incumbent postal operators over the true opening of the postal market (which explains the persistent limited competition in Europe in the letter mail segment <10%).

It is therefore imperative that flexibility on the national level be allowed by the new regulatory framework only within the context of promoting competition in the postal market and only after the Member States have proven to the EC that their national specificities indeed warrant a non-harmonised transposition of the new regulatory framework (the new PSD).

#### **Harmonisation across all Member States regarding some issues of Universal Service (US) provision**

Some Member States decide unilaterally to designate the state owned postal incumbent operator as the sole Universal Service Provider (USP) for a quite a prolonged period of time (eg. 15 years), without asking the market stakeholders if other postal operators would be interested to assume in a more efficient way the USP responsibilities (entirely or partly). Such designations may imply that there may be a net benefit to the state owned USP in providing US over these prolonged periods of time, yet the Member States and/or the state owned USP maintain that the burden of the claimed “unfair” net cost of US provision should be born as well by the tax payer (through public funding) and/or the USP competitors (through contribution to the universal service fund).

- i) In order to eliminate any subjective approach by some Member States respecting the issues of a) efficient cost of US provision, b) assessment of the intangible benefits from US provision, c) the length of designation period, and d) the number of USPs, the new regulatory framework should:

- a) Identify specific efficiency indexes which measure the USPs' efficient operation in providing US and/or provide comparative data regarding the efficiency indexes of the USPs across all Member States and/or specify methodologies to be used (eg. bottom-up models or other) in order to determine the efficient cost of US provision,
  - b) identify specific indexes and/or methodologies for the assessment of the intangible benefits to the USP from the provision of US,
  - c) specify the maximum designation period for a USP,
  - d) specify that a Member State should consider the provision of US by more than one postal operator if the total cost of US provision by more than one USP is less than the cost of US provision by only one USP,
  - e) specify that a public tender request should be issued by the Member State in order to seek postal operators who would be interested in taking up the role of USP.
- ii) Furthermore, the new regulatory framework should provide specific obligatory guidelines for the determination of the maximum scope/content of the US. Some obligatory guidelines could be:
- a service for which there is competition in its provision, within a specific part of the country, cannot be included in the scope of US for that part of the country, given that the existence of competition means that there is indeed enough interest in providing this service in this part of the country, at affordable prices and desired quality (due to competition),
  - a postal service for which the phase of collection is not available across the entire US area, in the same way that the phase of distribution is, should not be included in the scope of US - eg bulk mail is not served (not collected) by all the service locations of the USP which provide the distribution of postal items,
  - if for a specific service there is no interest for its provision or no competition in its provision then the service in question will be provided by a designated USP and if an unfair net cost is realised by the USP from the provision of this service then the relative burden will be born as well by the taxpayers and/or the USP competitors according to a specific scheme.
- iii) As well, if the USP is designated through a unilateral decision of the Member State then any related unfair net cost to the USP will not be born as well by the taxpayers and/or the USP competitors. In the event that a Member State considers that the burden of US provision should be born as well by the USP competitors then the burden to the postal competitors cannot exceed 0,5% of their gross revenue from the provision of letter mail when the total market share of the postal competitors in the letter mail segment is at least 20% (0% contribution by the postal competitors if their market share is less than 20%).

**In all the above issues (i, ii and iii), there should be no reason for the new regulatory framework to warrant flexibility on a national level.**

#### **Non-compliance of Member States with Judgment C357/2007 of the CJEU**

Compliance with CJEU Judgment C357/2007 is obligatory by all Member States, since the said Judgment provides clarifications about specific clauses of Directive 2008/6/EC. Despite the fact that compliance should have been materialised within a very short period of time as of the issuance of the Judgment, several Member States remain non-compliant to this date. The EC as well as the NRAs ought to take immediate action to rectify this problem given the profound implications that non-compliance has on competition in the letter mail segment.

This example proves that there is a lack of enforcement conditions and procedures in the PSD to ensure a quick compliance with the PSD and that the regulatory framework is not implemented uniformly across all

Member states. It is therefore necessary that the new regulatory framework include specific deadlines for Member State compliance as well as specific procedures by which postal operators can address State non-compliance cases to the EC for its immediate action - that is, the new regulatory framework ought to specify a maximum of a one month time period for action to be taken by the EC in order to enforce compliance where appropriate, given that prolonged delays in issue resolution always works on behalf of the non-compliant party.

**Flexibility on the national level cannot be allowed by the new regulatory framework in such matters of non-compliance.**

**The VAT exemption for the USP**

The VAT exemption gives a significant competitive advantage to the USP over its competitors when the latter provide same or similar services to the VAT exempted services of the USP (this relates to both the letter mail segment and the parcel segment).

The new regulatory framework should secure equal treatment of all postal operators when providing same/similar services, either by lifting the VAT exemption on all universal services or by providing a VAT exemption to the all postal operators that provide services universally. Also, the VAT Directive should be modified so that the new regulatory framework (the new PSD) can eliminate the market distortion arising from the VAT exemption.

**Fraud regarding the Cash On Delivery service (COD)**

In some Member States, COD is still the predominant payment method by consumers (as high as 70%-80% of delivered e-commerce postal items). Despite the extensive use of the COD service in the delivery of postal items, the COD service is not regulated by the NRAs as it is not considered a postal service under the definition of postal services of Directive 2008/6/EC. Due to lack of regulation, some rogue courier operators either withhold for extensive periods of time the collected money or do not remit it at all to the sender. These rogue courier operators also take advantage of the fact that the adjudication process in some Member States is extremely lengthy (ranging from 2 to 10 years) and, thus, can use the withheld money for financing their operations. In some cases the withheld money can reach hundreds of thousands of euro.

The consequences on e-commerce are significant. Financial problems arise to the senders of the postal items until the owed COD money is recovered. As a consequence, the senders lose trust in COD deliveries which in turn limits payment choices to the consumer and discourages consumers from acquiring even more e-commerce goods. Also, the rogue operators acquire a competitive advantage over the law abiding operators, since the withheld money is used to finance the operating capital of the rogue operators (a market distortion) while the law abiding operators have to seek loans in order to finance their business operation.

This stated problem can be rectified if the new regulatory framework modifies the definition of postal services in a way as to include the COD payment service as a supplementary postal service which supports the delivery of postal items (i.e. only when COD involves an item delivered by a postal operator). Alternatively, the COD service can be defined as a supplementary courier service. Once the COD service is identified as a supplementary postal service, it will automatically come under the regulatory responsibilities of the NRAs, who will then be able to take appropriate measures to protect both the postal users and the law abiding courier companies from COD fraud.

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