

Public consultation on ERGP Report  
“Developments in the postal sector and implications for regulation” (ERGP (18)49)  
29 November 2018

Submission by An Post (Universal Service Provider in Ireland)

An Post welcomes the opportunity as the universal service provider (USP) in Ireland to present its views to this consultation which it understands will form the basis of an ERGP Opinion to the European Commission in 2019 on what form any revision to the Postal Services Directive (PSD) should take.

An Post shares much of the analysis of the postal industry as outlined in ERGP (18)49 and in particular the growing necessity to respond to a number of trends, either existing or forecast, including the following:

- Postal market gradually becoming less ‘sender oriented’ and more ‘receiver oriented’
- USO scope and sustainability, including risk that profitability of postal delivery in rural areas, *“may be called into question”*
- Increased blurring of distinction between postal, ‘express’ and transport services
- That *“public intervention in markets takes place [only] in situations of identifiable, actual or potential market failures.....”*
- Any new PSD must be ‘fit for purpose’ and ‘future proof’
- Notable increase in the proportion of non-standard labour contracts (and the implications for a race to the bottom).

### 1. USO sustainability

This is a key issue in relation to the sustainable provision of the USO into the future, considering the ongoing volume decline experienced by the industry. The paper advances two solutions to financing the net USO cost at Section 3.4 (*“The USP could for example seek to pass on as many of its costs as possible to public funding or to funding by its competitors through a universal service fund”*) but there are inherent flaws in the Compensation Fund mechanism as the paper concedes (*“... financing through a compensation fund may not always be feasible (it may, for example, cause disproportionate administrative burdens) and State financing of the universal service provision may be a solution to deter legal actions by competitors.....”*).

Postal industry Compensation Funds as a mechanism have demonstrably failed to generate any significant contribution to the net USO costs in any Member States where these have been introduced. If Compensation Funds have any role to play these should be viewed as secondary to finance through public funds which should cover the shortfall. Consideration should therefore be given to a mechanism that would entitle USO providers to compensation for losses incurred in discharge of the USO through the public finances, where that obligation is imposed by government. At present Article 7 of Directive 97/67/EC, as amended by Directive 2008/6/EC, provides only the option, but not the requirement, that EU governments make such a remedy available to USO providers. This conclusion is

unescapable particularly where that portion of USO costs attributable to inbound international mail cannot be covered due to international treaty commitments entered into by Member States on behalf of their designated operators”.

It is also our belief that the complexity of the USO net cost methodology in Annex 1 to the PSD be refined particularly in relation to encouraging a conservative valuation of intangible costs.

In addition, An Post incurs significant losses on the delivery of UPU traffic which undermine the ongoing provision of the USO. For example, a recent Copenhagen Economics report commissioned by An Post shows a revenue reduction of almost €20m in 2017 due to the application of UPU rates for delivery of UPU traffic. Any revision of the PSD must address this issue and ensure such losses do not compromise the sustainability of the provision of the USO into the future.

## 2. Legal certainty and imprecise definitions

An Post shares the observation by the ERGP that many key terms in the PSD lack clarity (e.g. ‘affordability’, ‘efficiency’ and ‘cost orientation’) and that *“the core regulatory notions suffer from being general principles”* as evident from recent case law from the CJEU. It would therefore support the codification of existing CJEU case law as part of preparation for a new PSD.

## 3. Promotion of competition

The paper makes a very pertinent observation that promotion of end-to-end competition in a declining market may prove to be problematic. But the ERGP analysis fails to point out that the prospect of more competition for the USP calls into serious doubt the commitment of expenditure to enhance its network. As a consequence the statement that end-to-end competition *“implies investments that sometimes new entrants are not ready to sustain in a contracting market”* has a resonance that is just as crucial for USPs and their investment decisions.

Again, the ERGP suggestion that access to the existing network rather than end-to-end competition would avoid the *“need for initial large investments”* by competitors ignores the negative repercussions for investment decisions by USPs thus placing a risk on the long term viability of their networks. An Post would therefore urge the ERGP to place a specific duty on NRAs in granting access not to undermine the economic rationale of long term investment decisions to be made by USPs by limiting the number of licensed competitors.

## 4. Special position of USPs in relation to VAT and customs clearance

The special consideration afforded to USPs in regard to VAT and certain customs clearance issues must not be undermined or diluted as it recognises the unique burden placed on USPs.

## 5. Approach to amending the PSD

The ERGP put forward the contention that establishing a new PSD based on a fresh start reflecting today's conditions in the postal market is preferable to one of maintaining a rule-based strategy. It observes that *".....Amending the existing Directive would imply a rule-based approach that may not do sufficient justice to the import of the developments and changes. A more fundamental, market oriented greenfield approach could therefore also be considered, in which the goals and underlying concepts of the Directive can be re-examined and, where appropriate, reaffirmed....."* (page 25))

In the light of the impact of profound technological change including those from 'disruptive' technologies and the consequences for demand An Post would advocate that a principles based approach underpin any new PSD.

In summary the new PSD should be presented in terms of the obligations to vulnerable, private and commercial users in society so as to meet their social and economic needs.

The increasing market distortions resulting from the significant difference between UPU and the EU in relation to the inter-administration remuneration must be addressed in the PSD. The current practice of the EU-28 lodging a declaration at each Congress that EU Treaty provisions will prevail where there is a conflict with UPU provisions cannot be enforced. Consequently, the EU Treaty provisions should be regarded as regulating postal services within the Community (*".....It should be noted also that the UPU Convention, which is binding for the 28 EU Member States, also contains relevant provisions for the postal market, but this is an international treaty hence not part of the scope of this report....."* (page 5)).

## Conclusions

In summary, An Post would urge the ERGP in its Opinion to the European Commission on the overhaul of the PSD to:

- 1) Ensure that UPU rates are clearly no longer acceptable where these rates are below the costs incurred by the USP. A number of EU USP's incur unsustainable losses on the delivery of non-EU origin traffic, placing the sustainable provision of the Universal Service in jeopardy.
- 2) Ensure an appropriate funding mechanism is put in place to address USO losses, where these exist, and promote ongoing investment in the Universal Service network. The existing mechanism(s) and structure clearly does not meet the requirements of the USP's.