



La Poste answer to the ERGP's public consultation on the developments in the postal sector and their implications for regulation

Executive summary

On 29 November 2018, the ERGP published a report on "*Developments in the postal sector and implications for regulation*" and submitted it to public consultation.

La Poste welcomes this initiative and takes this opportunity to share its opinion on the various topics tackled in this report.

As a preliminary remark, La Poste would like to underline its full support to the PostEurop's contribution to the public consultation and share the concerns expressed by the whole postal industry.

La Poste agrees most of the observations made by the ERGP on the evolution of the postal sector, even if some of them call remarks and need to be amended (*see below for details*).

It is indisputable that the evolution of the society on many sides (technology (digitization), demographics (ageing), environment (fight against global warming), consumers' preferences and new way of living) raises both concerns and opportunities for postal operators. All postal operators already got the measure of all these fundamental changes and are continuing to invest and innovate to take up the challenges: to reply to the decline of letter mail volumes, the rise of parcels volume, the changes in consumer preferences; to reduce their ecological footprint; to improve processing and delivery of postal items and so on.

Nevertheless, La Poste does not think a modification of the regulatory framework is currently needed. Such changes would be counterproductive given the facts that (i) the postal ecosystem is still evolving and not stabilized, (ii) the current postal directive provides sufficient flexibility to NRAs to address national specificities and to postal operators to adapt their organizations to economic and environmental challenges and invent again their role in the digitized society for the benefits of consumers and citizens, (iii) and the fact that no market failures have recently emerged with the new trends observed, justifying the adoption of new regulatory constraints in the postal sector¹.

Changing the postal regulatory framework would deprive postal operators of leeway, destabilize an already delicate equilibrium and introduce even more uncertainty regarding the future. Moreover, according to La Poste, several proposals made by the ERGP in the report to modify the current regulatory framework are irrelevant.

In particular, the objective of imposing competition in the letter market pursued by the ERGP is irrelevant and utopian. As rightly noticed by the ERGP, "*it is unlikely that (...) in the contracting letter market a significant growth of competition will ensue*" (p. 13). Indeed, the lack of competition on the letter mail market is not linked to supposed barriers of entry or the exploitation of an alleged significant market power (SMP) by the incumbent but is the natural consequence of the lack of economic profitability on this market where actors suffer from the competition of e-mails. The universal service provider is not the "only" operator on this market, it is the "last" one!

¹ Note that the ERGP rightly emphasizes that any regulatory framework « *should be based on the principle that public intervention in markets takes place in situations of identifiable, actual or potential market failures* » (p. 18).



In this context, it is wrong to think that any regulatory intervention to promote end-to-end or access competition (such as the introduction of a SMP regulation) would modify this state-of-art. Such measures would only increase the economic difficulties faced by the last survivor and endanger the sustainability of the universal service whereas the NRAs' primary objective must be the safeguarding of the universal service. As clearly established in the economic literature, the potential adverse effects of mandatory access policies are substantial; in practice, regulated access to postal network has already proved to be hard to implement; last but not least, imposing access is unnecessary since national postal operators (NPOs) have strong incentives to conclude "worksharing" agreements with third-party operators (*see below for details*). This is why La Poste is in favor of the setting of free negotiated access tariffs and conditions between the holder of the infrastructure and other operators and strongly against any form of regulated access.

Regarding the parcel delivery market, the Regulation on cross-border parcel delivery services just comes into effect. So, it is necessary to assess its impacts before considering any additional regulatory measures. Re-opening now this field would go against the "Better regulation" strategy implemented by the Commission for few years.

Nevertheless, La Poste agrees the ERGP's view that it is "*important that sufficient regulatory or competition safeguards are in place to ensure where necessary that a level playing field exists for competitors*" (p. 14). La Poste fully supports the principle of a level playing field between the various actors operating, more widely, in the e-commerce sector; notably between integrated marketplaces which are developing their own parcel delivery network in urban areas and parcel delivery service providers, in particular, USPs who are obliged to cover the whole territory.

Establishing a fair environment goes through a revision of the taxation rules, the deterrence of economic dependence and exploitative abuses linked to monopsony power, the promotion of fair trading practices in order to set a more balanced environment in which all actors along the value chain could bargain on equal footing. The recent initiatives of the Commission to address the issues of unfair contractual clauses and trading practices identified in platform-to-business relationships and to try to establish fairer taxation rules go in the right direction.

However, it is not by strengthening regulatory competencies of NRAs in the field of standardization and labelling of parcels and postal packages or by increasing the body of information requested from postal operators on parcel delivery activity (and consequently the red tape), as suggested by the ERGP, that a fair competition and the development of e-commerce will be promoted. According to La Poste, the application of general competition law is sufficient to ensure effective competition in an already dynamic parcel delivery sector.



La Poste welcomes the ERGP's public consultation and takes this opportunity to share its opinion on the various topics tackled in this report. La Poste would like to come back more specifically on some points highlighted in ERGP's report. These points are related to the reform of the Postal Services Directive (PSD), the role of regulators (national regulation authorities and the ERGP) and to different themes that are defined in the PSD.

1. Reforming the PSD

*"If the conclusion of the analysis described above is that specific regulation of a postal sector is needed, this new postal regulatory framework will have to be fit for purpose and future proof, while also looking to address the issues identified in chapter three, where this would still be relevant. The provisions of such a framework should be based on the **principle that public intervention in markets takes place in situations of identifiable, actual or potential market failures that require regulation in the absence of sufficient competitive dynamics**" (p. 18).*

*"**A greenfield approach in establishing a new regulatory framework or directive may not therefore be excluded**, as change or even structural change of the current postal directive may not be sufficient" (p. 23).*

*"The trends and developments identified earlier could be considered of such a fundamental and far-reaching character **that they warrant a structural and thorough reform of the PSD and not just a mere incremental change**" (p. 23).*

The ERGP based its call for reforming the PSD on the fact that potential market failures exist. La Poste supports the market-failure based approach as an appropriate regulation principle. However, the ERGP does not back this assertion up with impact assessments. As long as La Poste knows, no regulatory authority has recently identified any new market failures on the postal market justifying a complete revision of the PSD. In particular, on the growing parcel delivery sector, competition is developing, new actors are entering in this market.

From this point of view, La Poste considers that the arguments developed by the ERGP are not solid enough to justify an in-depth reform of the Postal Directive. Modifying in depth the regulatory framework now would be counterproductive. It would deprive postal operators of leeway, destabilize an already delicate equilibrium and introduce even more uncertainty regarding the future in a rapidly evolving and not stabilized ecosystem.

Moreover, La Poste is against a larger piece of legislation that would embrace both the letter and the parcel markets. These are two different markets, with different competition characteristics and different users' needs. As a consequence, La Poste is convinced that any legislation on postal services should be based around the regulation of the universal service.

Regarding the parcel market, La Poste would also like to recall that a parcel regulation has just been adopted (Regulation (EU) 2018/644 on cross-border parcel delivery services) and that it is important to let it produce its effects and to thoroughly evaluate its impacts before considering any new regulatory measures.

This "greenfield approach" to establish a new regulatory framework is therefore not adapted and would not address current challenges that operators are facing on both markets. The regulatory framework should be reviewed on the basis of the 20 years of legislative and regulatory experience at the European level.



2. Regulator's role

a. Monitoring and data collection by national regulatory authorities

"Therefore, a new regulatory framework will need to give due consideration to improving the competences of **NRAs to collect detailed data on the market** in particular on the parcel delivery segment but also adjacent markets (e.g. in the context of hybrid mail products)" (p. 12).

The current regulation already allows national regulatory authorities to request information from postal operators. The current Postal Directive states "*Member States shall ensure that postal service providers provide all the information, in particular to the national regulatory authorities, including financial information and information concerning the provision of the universal service*" (article 22a). The new Regulation on cross-border parcel delivery services extends the collection of information from regulatory authorities to data on parcels to better monitor this market. Thus, **La Poste considers that the NRAs' already benefit for well-defined and proportionate competences on data collection.**

Indeed, La Poste would like to point out that the use of the data collected must be proportionate to the objectives pursued. In the case of the Regulation on cross-border parcel delivery services, the rationale behind data collection is still not clear. La Poste therefore calls for any new provisions on data collection to be duly justified.

b. ERGP's role

Based on the new regulatory regime, the ERGP wishes to reflect on its role, position and strategic objectives.

"Depending on the form and content of a new regulatory framework, **ERGP will also have to consider the implications for its role, position and strategic goals for the next years**" (p. 27).

La Poste believes that the current distribution of roles between the legislator, the national regulatory authority and the competition authorities as defined in the current Directive is satisfactory and well balanced.

3. Themes in the PSD

a. Clarifying definitions and concepts

"Considering the trends and developments described in the previous chapters of this report, **a rethinking of the basic definitions and concepts is needed**" (p. 20).

"**Definitions of specific products have to be reassessed** in function of users' needs and other relevant trends and developments in order to ensure a relevant and coherent regulation. The concept of "item of correspondence", for instance, is related to the communication aspect of the postal service" (p. 21).

"**Also the concepts of affordability, transparency and non-discrimination may cause problems in interpretations**" (p. 21).

La Poste shares the view that some definitions are becoming blurred in a commercial perspective as different products may satisfy similar customers' needs. For instance, the concepts of affordability, transparency, non-discrimination and accessibility are shared



with most Services of General Economic Interest and La Poste thinks that specific definitions for the Postal sector would be irrelevant and risk to create non-useful rigidity. Globally, any modifications should be made cautiously. In particular, La Poste believes that these new definitions will have to be consistent with the ones used in the other relevant legislations such as the privacy rules for items of correspondence and with definitions and terminology applied by the Universal Postal Union or at the European level in the postal Directives. Note that La Poste is willing to contribute to this rethinking work alongside with legislators and regulatory authorities.

b. Affordability

*"The same goes for the general concepts employed in the regulatory mechanics of the Directive such as **"affordability"** and **"cost orientation"**. Furthermore, general principles such as these, may in certain cases result in conflicting interpretations"* (p. 10).

"When the possibility to adapt or raise prices is exhausted, due the requirement to provide services at affordable prices, other measures to compensate the effect of decline in letter volumes can be considered" (p. 16).

The current Directive provides the national regulatory authorities with the possibility to regulate the prices of the universal services (article 12, Directive 2008/6/CE). The regulatory authorities are responsible for finding the right balance between affordability and cost-orientation. Here again, the situation varies from one country to another and a suitable approach is needed. La Poste therefore believes that this issue is better addressed at national level by the NRA.

c. Competition and level playing field

The ERGP supports the competition in the letter market (particularly the "documents" segment) and parcel market. The ERGP wishes to reassess how competition is promoted in these two segments.

"The ability for NRAs to promote competition, depending on the specific national circumstances, is of crucial importance. Instruments and regulatory powers to promote competition should be anchored in the regulatory framework itself and not just as an option that may or may not be exercised by Member States" (p. 12).

"It is unlikely that, without regulatory intervention, in the contracting letter market a significant growth of competition will ensue" (p. 13).

"Obstacles to fair competition may also be observed as far as VAT exemption for USP is concerned. [...] Other obstacles to fair competition may be caused by the application of customs privileges, creating differences in conditions under which postal service providers can operate" (p. 14).

"The competition level on this segment is low in most European countries and there is no indication that, without regulatory intervention, competition will increase in the near future. These characteristics lead to consider the possibility to review the way competition is promoted on this segment. For instance, by reviewing access conditions of the SMP operator in order to take into consideration the fact that this is a declining market or, by opting for promoting competition on services instead of infrastructural competition" (p. 21/22).



In his report, the ERGP emphasizes the need to promote competition on letter and parcel markets, because, according to ERGP, obstacles to fair competition still exist on both market but once again there is no impact study supporting the ERGP's assertions.

This leads La Poste to pledge for more researches and studies on the subject and to welcome the ongoing studies lead by the Commission. Indeed, as an active actor on these markets, the opinion of La Poste differs significantly from ERGP's one.

On the parcel market, La Poste considers there is no lack of competition. It is also still too early to assess the impacts of the cross-border parcel delivery Regulation on competition on this market.

On the letter market which has been declining for almost ten years, the limited number of players is primarily explained by this shrinking market. The incumbents in charge of universal service should not be considered as the only players but as the last ones.

Regarding the VAT exemption, La Poste recalls that it is justified by specific constraints on universal service products. In addition, La Poste would like to contest the existence of any so-called "customs privileges". The customs rules are defined and are fit-for-purpose to the business models to which they apply. The supposed customs privileges are in fact specific rules adapted to a specific mode of transport, as recognised by the World Customs Organisation. The customs rules are not the same for maritime, air or express modes of transport. It is thus logic that there are specific for postal items too. Moreover, it is important to call the attention of ERGP on the recent efforts made by the European Union to bring the customs rules closer for postal and express items. As an example, the customs data required for the clearance of items below 150€ will be the same whatever their postal or express nature.

On the particular issue of network access, La Poste does not support any form of regulation and promotes free negotiated commercial access. Implementing an access regulation policy would be counterproductive for several reasons.

As clearly established in the economic literature, the potential adverse effects of mandatory access policies are substantial: regulating access could discourage the development of alternative delivery networks and investments in innovative delivery modes and in fine, limit the development of end-to-end competition; lead to inefficient cream-skimming behaviours; encourage unfair remailing for items of correspondence; and threaten the sustainability of universal service obligations. In practice, regulated access to postal network has already proved to be hard to implement and such a policy is unnecessary for at least two reasons: (i) the distribution network of national postal operators (NPOs) cannot be considered as an essential facility (there are no barriers to entry and the postal network could be duplicated); (ii) NPOs have strong incentives to conclude "worksharing" agreements with third-party operators. Indeed, concluding "worksharing" agreements permits to increase the volume handled by NPOs, thus allowing them to benefit from higher economies of scale and economies of scope (in a context of global volume decline, this is a strong incentive). Taking into account all these facts, the drawbacks of a regulated access policy exceeds its potential benefits. So, a regulated access would be detrimental for the collective welfare.

Regarding competition in general, La Poste would like to underline that general competition rules fully apply to the postal sector. The European and national competition authorities are already responsible for ensuring compliance with competition law in all the markets including the letter and parcel markets and could cooperate with sectoral regulatory authorities. For instance, in France, the ARCEP must refer the matter to the French competition authority if it becomes aware of a potential breach of the competition rules and the French competition authority may request ARCEP's opinion if it suspects a potential



breach of competition law rules in the postal sector. Therefore there already are actors and instruments to monitor competition on the postal sector.

Finally, La Poste would like to make a few final comments on the overall theme of the “level playing field”. The ERGP states that it is “**important that sufficient regulatory or competition safeguards are in place to ensure where necessary that a level playing field exists for competitors**” (p. 14). La Poste fully supports the principle of a level playing field between the various actors operating, more widely, in the e-commerce sector; notably between integrated marketplaces which are developing their own parcel delivery network in urban areas and parcel delivery service providers, in particular, USPs who are obliged to cover the whole territory. Rather than reforming the Postal Directive La Poste calls for a more comprehensive and integrated approach including the digital and the disruptive players of the market.

d. Standardisation

*“Increasing volumes in parcel delivery, due to e-commerce development, **have also drawn attention to interoperability of networks and the need for standardisation and specifications such as labelling of parcels and postal packages and the use of weight standards. Strengthening regulatory competencies of NRAs in this field, in order to foster interoperability and prevent market failures or the occurrence of dominant market behaviour, may be an important aspect for consideration in a new regulatory framework**” (p. 14).*

La Poste would like to comment the issue of standardisation. Standardisation must define common standards to smooth operational process and it should not be used for other purposes. When inappropriately used in order to develop anti-competitive behaviours, competition authorities must tackle the issue. However, La Poste doubts that any market failure exists as the trend is to develop open standards as shown by the recent standard in labelling. The standardisation process as described in the Directive works well. It ensures coordination and consistency between the different stakeholders: national standardisation bodies / European Commission / TC331 of the CEN / Standard Board of the UPU. Moreover it ensures a high technical level focused on operations. In this context, the added-value of NRAs to promote standardisation and the existence of market failures have to be proven.

e. Financing of the USO

*“According to ERGP’s records, **so far only 10 NRAs have calculated the net cost of the USO** following the methodology indicated in Annex I to the PSD in the last five years: this is because some Member States have no provisions in their national legislation on net cost calculation while others have explicit provisions that have not been applied so far” (p. 16).*

*“Finally, it is worth noting that some USPs, while carrying out the same basic postal activities, receive compensation not only for the universal postal service but also for activities under the SGEI (Services of General Economic Interest) regime. The main justification proffered for the compensation granted for said SGEI activities are often social cohesion requirements, which are also offered to justify the universal postal service compensation scheme. **This creates an overlap in regulatory systems that may call for a clear demarcation of the application range of each to avoid possible compounding distortive effects on the market**” (p. 17).*

La Poste would like to come back to the points raised by the ERGP in its report regarding the financing of the USO.



First, the ERGP refers to the calculation of the net cost of universal service. La Poste is not in favour of systematically calculating this cost, notably in the cases where this net cost is not compensated. Indeed, La Poste wishes to point out that this calculation would lead to additional costs burden for universal service providers or NRAs, which would have to mobilise a team to calculate this cost, and consequently for the whole society.

With regard to the issue of compensation of SGEI provided by postal operators, La Poste would like to underline that there are control mechanisms in place to ensure the relevance of these missions defined by each Member States (according to the subsidiary principle) and the legality of the compensation received (State aids control by the European Commission) and to avoid any overlap between funding mechanisms. In this respect, this issue does not need to be covered by the postal regulatory framework.

f. USO

*"In light of these developments **the universal service could for example be redesigned starting from the concept of vulnerable users** (e.g. people living in remote areas or disabled people) which would allow for more targeted and efficient ways of safeguarding their interests and needs" (p. 22).*

*"**This may for example include that specific measures are taken to provide for the interests of specific users' target groups**, instead of imposing a general universal service obligation on one or more postal operators" (p. 20).*

La Poste notes the ERGP's willingness to focus the postal universal service on a group of specific users, the so-called vulnerable users. If La Poste understands ERGP's approach, we want to emphasize the practical difficulty of limiting the scope of the universal service to certain groups of users. For example, La Poste wonders how to define which user groups would have access to the universal postal service and which criteria should be used to identify these users.

In addition, such a system would need to be constantly reassessed in order to always target the right kind of users. This would lead to constant uncertainty and instability in the scope of the universal service which would be ultimately detrimental to all users. It also represents a significant workload for the ones in charge of determining this perimeter.

g. Flexibility and innovation

*"**A new regulatory framework should facilitate, or at least leave room for, the introduction of innovative solutions** and for the provision of services with low upfront costs" (p. 19).*

*"It is therefore important that **a regulatory framework affords Member States sufficient flexibility to find solutions suitable to their respective national circumstances**" (p. 20).*

La Poste acknowledges that, in its report and approach, the ERGP repeatedly emphasizes the need for flexibility, as in the above quotations. La Poste fully agrees with these statements. It is important to allow for flexibility and innovation on markets which are still evolving and where important disparities between European countries exist. Hence, the European postal regulatory framework must also leave sufficient room for subsidiarity so that Member States can adapt it to their national circumstances.

In this respect, La Poste maintains that the current Postal Directive should not be reformed but should rather be interpreted flexibly.