



ERGP REPORT

Developments in the postal sector and implications for regulation

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1 Introduction

1.1 Background of the project

The Postal Services Directive¹ (PSD) was adopted in December 1997 as the culmination of a process that was initiated with the Green Paper² in 1992. Amendments to the PSD in 2002 and 2008 did not alter its basic concept, which reflects a situation of 25 years ago. Since then, however, several developments in social and economic circumstances can be discerned that have had, and will continue to have, a significant impact on the postal sector.

Predominant in these developments is the continuing and, in some cases, steep decline of letter mail volumes in the market. This volume decline is, to a large extent, caused by the possibilities provided by a progressive digitisation of society in terms of a more efficient, instant and direct communication. Of particular relevance is the impact of this development on the sustainable provision of a universal postal service.

At the same time, digitisation also provides possibilities for efficient processing and delivery of postal items,³ while the evolution of the digital economy has given an impressive boost to the emergence of e-commerce and a subsequent growth in the volume of parcels (in particular postal packages). Furthermore, changes in consumer preferences have led providers to develop and explore other models of postal delivery. The use of virtual mailboxes, parcel-lockers and Uber-like initiatives (platformisation)⁴ illustrates the possibilities for innovation in the field of postal delivery.

Recently the environmental impact of postal delivery has been drawing increasing attention, with a number of postal operators taking actions to reduce their ecological footprint⁵.

At the same time, developments in labour law and the use of employment models are also becoming

¹ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 (OJ 2008 L 52, p. 3).

² COM (91) 476 final of 11 June 1992.

³ For example, by using intelligent sorting machines and sophisticated track and trace options or by introducing forms of hybrid mail.

⁴ Referring to platforms that broker demand and supply between individuals of e.g. parcel delivery.

⁵ Copenhagen Economics, 'Main developments in the Postal Sector (2013-2016)' study carried out for the European Commission, July 2018, p. 169 and following.

relevant as long as the sector remains labour intensive.

Developments in the postal sector have blurred the lines along which letter mail versus parcels and regular versus express mail are traditionally viewed. Furthermore, the sometimes-unclear distinction between postal services and other services has prompted jurisprudence⁶ and an ERGP paper⁷ on the delineation between postal and transport services. These developments raise questions on whether existing legal distinctions between markets and services promote or rather hamper their growth prospects. In this light, a re-assessment of the need for and scope of future regulation is called for.

In the almost 8 years since the starting of ERGP activities, the ERGP has produced a number of documents describing and analysing the legal and economic aspects of the provision of postal services in the current regulatory context. During this activity, limitations and shortcomings of the existing regulatory framework faced by national regulatory authorities (NRAs), given *inter alia* the new market realities, have been discussed. In particular the substantial and profound changes taking place in the sector and in society, beg the question whether the content and concepts of the current regulatory framework are still fit for purpose.

Against this background and considering the timeline for the European Commission (EC) to compile its next Report on the Application of the PSD⁸ (announced for mid-2020), the ERGP has included in its work programme for 2018 -2019 a project on the regulatory needs of the postal sector. This project aims at identifying core developments in the postal sector and examining their implications for regulation in the near future and will be carried out in two stages. The present report identifies the main market developments and difficulties that the PSD poses to the regulatory practice and considers the implications for regulation. Based on this Report's findings, in 2019 the ERGP will present to the EC its opinion regarding a review or reform of the PSD.

This Report is structured as follows: Chapter 2 identifies the main discernible trends and

⁶ CJEU C-259/16 & 260/16 (Confetra, AICAI v. AGCOM) – Judgement of 31 May 2018.

⁷ ERGP (17) 37A; Report on the boundaries around postal services in order to ensure NRAs clarity in the performance of their tasks.

⁸ According to article 23 of the PSD every four years the Commission shall submit a report to the European Parliament and the Council on the application of the Directive, including appropriate information on developments in the sector, particularly concerning economic, social, employment patterns and technological aspects, as well as on quality of service. Where appropriate the report shall be accompanied by proposals to the European Parliament and the Council. The previous report was published in November 2015 (COM(2015) 568 final).

developments that affect or are likely to affect the postal sector and discusses their effects; Chapter 3 then deals with the regulatory implications of these developments and trends and difficulties that NRAs experience or may encounter in their practice, stemming from the current regulatory framework; Chapter 4 proceeds to consider the main elements that a fit-for-purpose and future proof regulatory framework could take on board; Chapter 5, lastly, contains the main findings derived from the previous chapters, as well as some related observations.

1.2 Working method

The content of this report is largely based on an evaluation of answers that were received in April and May 2018 following two information requests that were sent to the members/observers of ERGP and to the co-chairs of the ERGP sub-groups. An internal ERGP workshop on the Regulatory needs of the Postal Sector, that took place in Oslo in June 2018, as well as the first ERGP Stakeholder Forum, that was held in Brussels on 20 September 2018, provided useful insights for completing this report. The study on the Main developments in the Postal Sector (2013-2016) (July 2018), carried out by Copenhagen Economics for the EC was presented in Brussels on 19 September 2018, providing useful information. The observations contained in this report mainly refer to the PSD as the current European regulatory framework governing the postal sector. The recently adopted EU Regulation on cross-border parcel delivery services⁹, though not the subject of specific consideration in this report, is discussed in relation to the market and consumer trends impacting the sector. A similar treatment is reserved for provisions on competition as outlined in the relevant Notice from the Commission¹⁰. The Universal Postal Union (UPU) Convention and other UPU legal acts, which are binding for the 28 EU Member States, though containing relevant provisions for the postal market, are international treaties and hence not part of the scope of this report.

The Report was submitted to public consultation in December 2018. The ERGP received 14 contributions from stakeholders, which were taken account of in preparing the final version of this report and which have been published on ERGP's website together with an accompanying report on

⁹ Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services (Text with EEA relevance), (OJ L 112, 2.5.2018, p. 19-28).

¹⁰ See "Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (98/C 39/02)" (Official Journal C 39, 06.02.1998, p.2 – 18).

the consultation¹¹.

2 Trends and developments in the postal sector

This chapter identifies trends and developments observed in the postal sector and those that can be discerned for the medium and long-term future, that have a significant impact on, or are likely to, significantly affect the functioning and evolution of the postal market. Furthermore, the chapter considers how these trends and developments may affect the market, both from the demand and the supply side.

2.1 Trends and developments

Technology

Digitisation and automation together with innovation in terminal equipment (e.g. smartphones and tablets) and the abundance of communication options are affecting consumer behaviour and business practice. This leads to the advent of platformisation, e-substitution, boosting of e-commerce and innovation in modes of delivery.

The EC's initiative for the Digital Single Market¹² induces Member States to invest in and adopt policies to promote broadband access, internet connectivity, e-commerce, and e-substitution, as a means to popularise e-government services, boost innovation, create new and innovative services with high quality at a reasonable price to European citizens, and achieve world economic competitive status for Europe.

Convergence

Changing users' needs and preferences together with technological development are changing the way postal markets and services are perceived. The distinction between postal and other services is blurring as well as the distinction between different postal services. Furthermore, trade-offs between electronical and physical services increasingly impact on the evolution of postal services

¹¹ See http://ec.europa.eu/growth/sectors/postal-services/ergp_en

¹² <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>

and postal markets.

Environment

An increasing need to protect the environment is expected to have a sizeable impact on consumers (e.g. opting for e-substitution) and postal operators who are concerned for their ecological footprint. Consequently, while the introduction of innovative solutions can already be observed in the market (such as parcel lockers and electric vehicles), alternative methods for the physical delivery of postal items are expected to be proposed in response to the challenges posed to 'last mile' delivery.

Demographics

Europe is the most rapidly ageing region in the world, aside from Japan. The median age of the EU's population rose by almost six years during the period 1996 to 2016¹³. With an ageing population in the EU, one could assume that the group of users depending on the postal services and affected by changes in postal delivery may become relatively larger¹⁴. It should however be noted that in 10 - 15 years' time this group will be formed by a generation that is in general more familiar with digital technology.

Europe's urban areas are home to over two-thirds of the EU's population¹⁵. Assuming that this trend will continue, profitability of postal delivery in rural areas may be called into question, affecting postal delivery practice.

Labour conditions

Although an overall average increase in postal sector employment is observed at EU level in the period 2013-2016¹⁶, the share of non-standard labour contracts (e.g. temporary employment, subcontracted workers) is increasing. Market players often make use of forms of temporary employment or outsourced workforce to meet the requests of more flexible services (e.g. e-commerce users require seven days delivery, delivery at night, extra-work during peak periods).

¹³[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=People in the EU - statistics on demographic changes](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=People_in_the_EU_-_statistics_on_demographic_changes)

¹⁴ «Effects of changing the USO in Norway» by Copenhagen Economics, December 2017.

¹⁵ http://ec.europa.eu/regional_policy/en/policy/themes/urban-development/

¹⁶ Copenhagen Economic Report "Main developments in the postal sector (2013-2016)".

In general, labour conditions vary significantly among postal operators at national level, but also among Member States, both in terms of average and minimum wage. The existence of different labour condition regimes among operators may adversely affect a level playing field.

2.2 Consequences of trends and developments

2.2.1 Demand

Fundamental changes in postal users' behaviour (both individual and institutional/business senders¹⁷ as well as recipients) have led to decreasing volumes of traditional letter mail, as a result of e-substitution and changes in interpersonal communication, as well as increasing volumes of parcels due to the rise of e-commerce.

More importantly, the postal market will become less sender-oriented and more receiver-oriented, as recipients of the postal items are influencing more and more the delivery process as compared to traditional postal services where the sender usually determines the delivery conditions. Consumers increasingly expect to be presented with various delivery options, track and trace options and a good and reliable delivery and return service. Although an increasing demand for same day or next day delivery of parcels seems apparent, consumers mainly value that the parcel is delivered timely and that they have the ability to track the delivery and to choose a specific location or time slot for the delivery¹⁸.

2.2.2 Supply

As e-retailers aim to accommodate this changing consumer behaviour, postal operators are compelled to develop more convenient customer-tailored and individualised delivery systems.

Postal operators are benefiting from advancements in technology to develop new business models

¹⁷ Such as utilities, insurance companies, banks and government institutions, that can have a significant on volume decline when deciding to switch to e-communication.

¹⁸ See e.g. WHY5Research: «A qualitative study into consumer perspectives in the Belgian postal market», 2017; Dutch Study by GfK: «Behoeften Postmarkt (Toekomstige) wensen en behoeften van consumenten en MKB ten aanzien van postdiensten», November 2016.

and innovative services¹⁹, which may also benefit consumers (e.g. live-tracking, same day deliveries). At the same time, advances in technology, changing demographics and changes in postal item volumes lead to a re-dimensioning of postal networks, with a possible reduction in the quality of service provision.

The need to efficiently use resources and achieve synergies and/or the need to compensate lost revenues trigger a noticeable increase in the diversification of activities of postal operators. These activities range from the delivery of food-products and groceries that are ordered online²⁰ to the provision of financial services²¹. Where postal services still involve a frequent and regular delivery, this diversification also reaches into domains such as community services and providing assistance to dependent people. Possibilities such as these provide an opportunity to address changes in society, such as an ageing population and a widening of the social gap²².

Furthermore, the growth in online shopping leads to e-commerce platforms extending their business models by vertical integration into the field of postal/logistics operations. The vertical integration can also be observed vice versa, i.e. postal operators extending their portfolio into e-commerce activities.

¹⁹ E.g. hybrid mail solutions and parcel lockers.

²⁰ E.g. <https://www.postnl.nl/campagnes/food/>
<https://post-medien.ch/unser-taeglich-brot-von-der-post/>

²¹ For instance in Belgium (bpost), France (Le Groupe La Poste), Greece (Hellenic Post S.A.), Italy (Poste Italiane), Norway (Posten Norge), Polonia (Poczta Polska), Portugal (CTT) and in Switzerland (Swiss Post).

²² For instance in France the USP La Poste launched the service “Veiller sur mes parents” (Watch Over My Parents) based on regular visits from the postman to older people, reassuring customers that their elderly parents or relatives are in good health. Included in the package is an alarm system with a wrist strap with a button to connect the person to a call centre in an emergency. There is also access to a platform where advisors will put the person in touch with a local technician if something like the heating goes wrong in the house (See: <https://www.laposte.fr/particulier/veiller-sur-mes-parents>).

3 Regulatory implications

3.1 Definitions and concepts

Considering the trends and developments and taking account of the experiences in applying the current postal regulatory framework, some definitions provided by the PSD appear to be outdated and in need of reform.

Difficulties arise from the lack of clear definitions regarding several aspects of the postal markets such as “postal operator”, “postal item”, “affordability”, the “transparency” and “non-discrimination” principles, as well as access to the postal network. The absence of clear definitions may have contributed to the low degree of harmonisation of postal markets across countries.

Different national regimes exist for the same postal services²³. This may lead to inconsistency, redundancy or questions of precedence. For example, some parcel delivery service providers may be subject to national postal provisions that other parcel delivery service providers are not. This issue is at least partially addressed by the Regulation (EU) 2018/644 on cross-border parcel delivery services. Recital 16 of this Regulation assumes that “*postal items which are over 20 millimetres thick contain goods other than items of correspondence*”. From its enacting terms (Article 2, paragraph 1) it follows that “*postal items containing goods with or without commercial value weighing up to 31,5 kg*” fall within the scope of the Regulation. They can be considered to fall within the sphere of postal services, “*since heavier items cannot be handled by a single average individual without mechanical aids and this activity is part of the freight transport and logistics sector*”²⁴. The PSD however does not use this weight limit. The definitions used and the distinctions made are useful for the purposes of certain legislation, but may not always provide clarity on what constitutes a postal service in general.

Furthermore, the principles of transparency and non-discrimination are general legal concepts and consequently open to different interpretations. The need to clarify or interpret these concepts is inherent to provisions of such a nature.

²³ The extent of these differences depends on the transposition decisions made by Member States to reflect national circumstances and dynamics. However, for the universal postal service, the key provision of the PSD, is largely the same.

²⁴ Recital 16 of EC Regulation 2018/644.

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. Moreover, the EU Regulation on cross border parcel delivery 2018/644/EU introduces the concept of “unreasonably high tariffs”: according to article 6, paragraph 2, NRAs shall assess, in accordance with the principles in Article 12 of Directive 97/67/EC, the cross-border tariffs in order to identify those that it considers to be “unreasonably high”. This implies that three different requirements (not unreasonably high, affordability, cost orientation), that do not necessarily coincide, apply to the same tariff.

The jurisprudence of the CJEU (e.g. in the *bpost* case and in the *Post Denmark II* case)²⁵, and the regulatory practice by national authorities show that most of the core regulatory notions suffer from being general principles or from a lack of clear definition (such as for example “affordability” or “efficiency”) and may consequently be subject to different interpretations. Hence, in a new European regulatory framework there seems to be room for improvement in this respect.

With some remaining uncertainties on the concrete boundaries between postal and transport sector(s)²⁶ and the definition of “express services”²⁷, it can be noted that the scope of NRAs’ enforcement competences and policies still varies from one Member State to another. Having a clear and uniform understanding throughout all EU Member States of what are considered postal activities is especially relevant in demarcating their relation to transport services and to avoid creation of legal or regulatory grey areas.

In this regard, it must be noted that the judgments of the CJEU provide clarification and legal certainty on concepts used in the current PSD. At the same time, it might be questioned whether current definitions and concepts as such will still be useful and appropriate in five to fifteen years’ time. When considering a future-proof framework, existing case law needs to be assessed on its usefulness before possible codification.

²⁵ CJEU C-340/13 (*bpost*); C-23/14 (*Post DK II*).

²⁶ Note that this issue has in large part been clarified by the CJEU recently, particularly in case C-259/16 (*Confetra et al.*) as well as by Regulation (EU) 2018/644.

²⁷ For example, according to the case law of the CJEU, providers of express and courier services are considered to be postal service providers as defined in the PSD. Neither express nor courier services however are defined in the Directive.

3.2 Monitoring and data collection

The PSD establishes that the NRAs should have accurate and relevant information about the postal market so that they can ensure conformity with the provisions of, or decisions made in accordance with the Directive.

However, the analyses undertaken so far by the ERGP have identified some difficulties for regulatory practice with regards to information collection to which the PSD does not provide sufficiently concrete and specific obligations. The main difficulty is related to the fact that NRAs are not always empowered to collect certain data from all postal operators. In addition, the existence of different definitions (“postal services”, “universal service”, “express”, “courier”, etc.) amongst NRAs makes the data collection process and the comparison of indicators significantly more complex. All these elements related to data gathering may represent an obstacle to the regulatory activities of NRAs.

A better understanding of cross-border parcel deliveries (functioning and possible competition problems) is regarded as necessary and requires a solid basis of information. Regulation (EU) 2018/644 has clearly set out the elements on which information should be provided (Articles 4, 5). This is strengthened by the fact that there have to be effective, proportionate and dissuasive penalties in place (Article 8).

The convergence of markets is also likely to cause problems in determining market boundaries. Regulatory action in this field needs to be based on transparency and a sufficient knowledge of the markets by NRAs, which is why more regulatory oversight may be an important element of any future regulatory framework.

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 on adjacent markets (e.g. in the context of hybrid mail products).

3.3 Promoting competition

The ability for NRAs to promote competition 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.

In the postal market there is a significant difference in the level of competition between the letter mail segment and the parcel segment. While in the former segment most incumbents still have a

market share above 90%, the latter one is on average less concentrated and market shares are more evenly distributed among different players.

In the letter market regulatory intervention may still promote competition and at least should safeguard consumers' interests. It should be noted that in the foreseeable future letter volumes in some national markets may remain considerable, while in others volume decline may level out at some point in the next five to ten years²⁸.

Different considerations apply to the growing parcel delivery market. This market is characterized by competitive pressure enhanced by the entry of new operators²⁹ such as logistics/delivery companies and vertically integrated on-line platforms. The former companies increasingly enter the parcel delivery services markets, especially in the more profitable urban areas, while parcel delivery in rural areas and more expensive suburbs is still carried out by the Universal Service Provider (USP). As far as on-line platforms are concerned, when they started operating they limited their activities to collecting orders from on-line buyers that were then delivered to recipients by postal operators or by express couriers; however, as the demand for parcels increases, they may become vertically integrated and supply (on their own or through subsidiaries) delivery services to end users as well³⁰. In this context it is important that the developments in the competitive structure of the parcel delivery market are taken into account and that sufficient regulatory or competition safeguards are in place to ensure, where necessary, that a level playing field exists for competitors.

In either market, such measures may involve the imposition of access obligation as a means to promote competition in the cases where end-to-end implies investments that new entrants may not be ready to sustain. Access competition depends partly on clear provisions about the power of NRAs to ensure access to the postal network and to shape the market environment by defining access conditions and/or access specific obligations. In this regard, it should be noted that access obligations, as foreseen in Article 11a of the PSD, are an option that has not been exercised by all Member States when transposing the Directive in the national legislation³¹.

²⁸ Copenhagen Economics study for the European Commission, "*Main developments in the postal sector 2013-2016*" seems to allow for this possibility.

²⁹ Often (subsidiaries of) incumbents from other European countries.

³⁰ This is already the case for Amazon in Italy, France, Spain, Germany and UK (Pan-European Fulfilment by Amazon (FBA): <https://services.amazon.co.uk/services/fulfilment-by-amazon/pan-european-fba.html>).

³¹ Some Member States, in transposing the PSD, have attributed NRAs the ability to set ex ante terms of access (for example Portugal, Italy, Germany and the Netherlands) while others have not.

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.

Obstacles to fair competition may also be observed where a VAT exemption for USP is applied. However, the CJEU in case C-357/07 clarified the scope of the VAT exemption (i.e. the postal service has to be provided by a “universal service provider”, irrespective of whether the provider is a public or private operator and has to be limited to the “universal service”). Supplies of services for which the terms have been individually negotiated are not allowed to benefit from the VAT exemption. Other obstacles to fair competition may be caused by the application of customs rules, creating differences in conditions under which postal service providers can operate.

3.4 Sustainability

USO scope and sustainability

In recent years, most NRAs have struggled to align the consequences of letter mail volume declines with the principles and obligations laid down in the PSD. The decline in letter volumes - sometimes in combination with demographic changes as well as policy measures promoting the use of electronic means of communication as an alternative to written documents or removing legal constraints³² that limit that possibility - impacts on the scope and the profitability of the universal service provision as it may lead to an increase of its relative cost. This affects the sustainability of the universal service³³.

In order to reduce the costs of universal service provision, Member States or NRAs in some cases

³² In Denmark, the population is obliged to use electronic means of communication when communicating with agencies and other public institutions unless they cannot refer to any special reasons that reduce the ability to use electronic tools; a similar trend is also visible in The Netherlands. Furthermore, in Spain a key element in a law from 2015 (Law 39/2015) is the obligation to communicate electronically with the administration in the case of legal persons (electronic notifications).

³³ See for example ERGP PL (17) 44 “Draft ERGP report Assessment of the possible changes of the USO scope in the light of market development and their impact on US sustainability”.

allow for modifications in the quality and scope or content of the universal service, e.g. by eliminating priority mail or reducing the prescribed number of delivery days or number of postal outlets. In this way, the universal service has also been brought more in alignment with changing consumers' needs and commercially optimal service provision. Several countries have already taken such cost reduction measures³⁴, the potential for which in certain cases can be considerable³⁵.

Apart from reducing actual costs for universal service provision, the strategies to reduce the impact of the decline in letter mail volumes may also take on a more general form. 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, which calls for sufficient knowledge of NRAs on the actual costs of universal service provision.

Affordability

If it is not possible for an efficient postal operator to reduce costs in line with the decreasing revenues in the letter market, a possible cost increase may also impact the affordability of the universal service as required by the PSD. Where a rise in prices is not possible (due to legal constraints) or is unwanted (for economic reasons)³⁶, this may result in a net cost or a net cost increase for the USP. Therefore, the relationship between cost-orientation, affordability, the use of a net cost compensation fund and competition, becomes complex and sometimes conflicting.

Linked to this is the question whether the PSD regulates universal service tariffs too strictly. As these tariffs must be cost-oriented, this means that, if there is limited scope for further cost reduction to an efficient level, the tariffs may go up when volumes decline. However, according to the PSD the universal service should be provided at affordable prices; hence, such a provision limits the possibility to increase prices to match cost. When the possibility to adapt or raise prices is exhausted, due to the requirement to provide services at affordable prices, other measures to

³⁴ Concerning single-piece priority mail, Poland has reduced its D+1 target to 82%, while in 2014 Malta increased it by 1% and kept it stable in the 2016 review, Italy has introduced a new priority service with different price and quality, for non-priority mail, France has slightly reduced its target delivery, as well as Poland (D+3), for registered mail France has increased its target on D+2, while Italy has relaxed its targets and Romania has changed in 2018 the D+1 target in D+2, and D+2 target in D+4 for domestic single-piece priority mail.

³⁵ Copenhagen Economics: «Effects of changing the USO in Norway», December 2017.

³⁶ Raising prices to a certain level may make provision of the same services for other operators or new entrants a more attractive proposition. Price elasticity may also deter an incumbent to raise its price levels.

compensate the effect of decline in letter volumes can be considered.

Calculation and compensation of US net cost

According to the PSD, the net cost is to be calculated as the difference between the net costs for a designated USP operating with the Universal Service Obligation (USO) and the cost incurred by the same service provider operating without the USO (the reference scenario). The assessment of the net cost of the whole USO, or of the net cost of some specific components, is to be calculated by taking into account all relevant elements including the benefits of being a USP.

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. Many of them experienced difficulties in the calculation, concerning the complexity of the model set by the Annex³⁷. From ERGP's reports on net cost calculation, the need to simplify and clarify the principles contained in Annex I to the PSD emerged.

Once the net cost calculation is carried out, another difficulty concerns the assessment on whether the net cost calculation entails an unfair financial burden to the USP because of the lack of definition of 'unfairness'.

Moreover, the financing of net cost can also impact competition as, for example, other postal service providers may be called upon to contribute to a compensation fund. A compensation of USPs by Member States needs also to respect the European state aid rules³⁸.

The financing mechanism may also pose problems as financing through a compensation fund may not always be easily implemented (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.

³⁷ Challenges related to, among others, the following assessments were identified: delivery frequency, geographical coverage, quality standards, prices, the network design, demand reactions and efficiency. There are also challenges regarding intangible/special benefits and availability to data resources.

³⁸ See e.g. also State-aid case of Spain (case SA.37977), Germany (case C61/1999; case SA.17653), Poland (case C21/2005).

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 of overcompensation in any form, including “cross-subsidization”, on the market³⁹.

³⁹ Using the same tools (personnel, network, widespread distribution on the territory), which are typical endowments of former monopolists, the various USPs perform, alongside typically postal activities, activities characterized by the same objectives and content in many aspects similar, but de facto subject to different regimes.

4 Elements for a new regulatory framework

4.1 Introduction

One of the questions the European legislator will have to consider before designing a new regulatory framework is whether there is still a specific postal market and, if so, how this market may be determined.

In order to assess the existence of a specific postal market, it will be necessary to prospectively analyse the nature and the economic implications of different topics, such as the possible convergence between postal services and transport/logistics operations on the one hand and between postal services and electronic communications on the other hand, the diversification of services provided by postal operators⁴⁰, the most recent technological innovations⁴¹, the new business models and strategies deployed by postal operators and other market players (e.g. vertical integration etc.) and changing consumer behaviour and demand.

4.2 A new fit-for-purpose and future-proof regulatory framework

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.

4.2.1 A fit-for-purpose Directive

A fit-for-purpose postal directive must provide a relevant framework in line with the market circumstances, with a high degree of internal coherence and the necessary flexibility for NRAs to address national specificities and should use clear notions and principles.

⁴⁰ For example, financial services, transport of food, proximity services, etc.

⁴¹ For example, the use of apps to communicate about a postal operation and uber-like platforms as a tool for postal services.

4.2.1.1 *Relevant objectives and internal coherence*

The main objectives of a new postal regulatory framework will need to reflect the trends and market developments presented in the previous parts of this report. The general objectives could be:

Effective competition

Fostering effective competition needs to be assessed in the light of *ex ante* versus *ex post* regulation, and the respective roles of sector specific Regulators and Competition authorities.

Depending on the definition of the postal market, options such as the promotion of competition *for* the market (one designated operator to provide the service) instead of competition *in* the market could be entertained in order to accommodate for specific national circumstances.

To ensure the needed internal coherence of the postal regulatory framework, the competent authority must be furnished with the necessary instruments to promote competition in an effective and efficient way. The relevance of Significant Market Power (SMP) principles and mechanisms in this regard will need to be assessed.

Innovation and investments

A new regulatory framework should facilitate, or at least leave room for, the introduction of innovative solutions and the provision of services with low upfront costs. This has consequences for several aspects of the regulatory framework such as the way delivery obligations are described in the directive and the possibility to use part of the network of the incumbent operator. The latter could allow new entrants to enter the market by way of access to the existing postal network, avoiding the need for initial large investments.

Choices for end-users

This objective aims at giving users sufficient choice from a variety of services and delivery solutions at different tariffs. This is more likely if multiple operators are active on the market.

Users' interests

Having in mind the rules already existing for instance in the general consumer protection regulation, an important assessment to make in this context is whether there is a need to have a sector specific set of provisions including quality of service levels or whether targeted measures to safeguard users'

interests may be needed. As the market becomes more receiver oriented, an approach that centres on the consumer as the sender of single piece items, may no longer be suitable. Particularly in the case of e-commerce the consumer will have an essential interest in the delivery of a parcel as an integral part of the purchase that he/she has made. Consequently, provisions that safeguard his/her interests may need reorientation as well.

Inclusivity

When determining the postal market that will be governed by the new regulatory framework, scope, content and sustainability of a universal postal service will need particular consideration. In addressing this issue, a number of relevant aspects, such as the level of development of the market and of competition, geographic and demographic circumstances, the level of digital penetration and relevant governmental policies, need to be taken into account. These aspects can vary considerably between Member States.

From the perspective of a properly functioning market, a universal service should ideally focus on essential elements of the provision of postal services that would not be offered under normal competitive conditions and to which there are no technically and economically viable alternatives. Where the universal postal service, ensuring provision of a basic service to all citizens, is seen as an instrument for inclusion, ensuring social and territorial cohesion, this objective may need reassessment in view of the fundamental changes that are taking place in national markets and in society in general. The fact that in certain areas the provision of postal services is not economically viable may provide a rationale for maintaining a universal service. But e-connectivity may also be an important instrument to ensure genuine inclusion of citizens in a future society. In this respect also, Member States show significant differences.

It is therefore important that a regulatory framework affords Member States sufficient flexibility to find solutions suitable to their respective national circumstances. This may for example include that specific measures are taken to provide for the interests of specific users' groups, instead of imposing a general universal service obligation on one or more postal operators.

4.2.1.2. Clarity of concepts and definitions used

Considering the trends and developments described in the previous chapters of this report, a rethinking of the basic definitions and concepts is needed.

Definitions of specific services 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. “Items of correspondence” are protected by the privacy provisions of the European Convention on Human Rights and by national constitutions and legislations. But the question may be raised whether the privacy of parcels should be protected in the same way. The definition of “registered item” also may be problematic in relation to the facilities that are usually also provided with parcel delivery.

Also the concepts of affordability, transparency and non-discrimination may cause problems of interpretation. In this respect, a basic reconsideration of these concepts is needed.

4.2.2 A future-proof regulatory framework

To be future-proof, a new regulatory framework has to address the new challenges created by the trends and developments on the market; it must also be flexible enough to adapt to new and unforeseen developments. The different trends and developments and their consequences were described in chapter 2. The purpose of this section is to consider the way these consequences could be addressed in a new regulatory framework.

4.2.2.1 *Letter mail volumes / Parcels volumes: two different market segments?*

An important task for the European legislator will be to address the trends and developments observed on the market, and in particular to decide to what extent specific market segments need to be regulated separately or in different ways.

It is recognized that the letter mail segment (delivery of documents) and the parcels segment (delivery of goods) have different characteristics that could justify different regulatory approaches.

The “documents” segment is mainly dedicated to communication, where the volumes are in decline (even for registered mail, in a near future and at least in some countries). The competition level on this segment is low in most European countries. 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.

The “goods” segment (at least in the field of e-commerce) has evolved in an opposite direction. It focuses on transport and delivery. Users’ needs and preferences in this field have turned towards

better information, track and trace facilities, quality of delivery and choice of point of delivery. The competition level on this segment is relatively high.

In this perspective, regulatory approaches including SMP mechanisms, market monitoring and consumer protection issues, could be considered. It may also be argued that the application of general competition law could be sufficient to ensure effective competition in the more competitive segment.

For both segments it is also crucial to clarify, whether and to what extent the concept of the postal sector regulation includes business segments (both business to consumer (“b2c”) and business to business “b2b”) in order to establish a consistent European-wide regulation regime. Such a broader approach would facilitate an efficient monitoring of pricing behaviours in the business letter and parcels segments (especially e-commerce).

4.2.2.2 *USO*

The different factors analysed above (technological, economic and social) have consequences for the relevance and the design of the universal service. 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. Such a design could also take into account new delivery solutions and create flexibility to encourage innovations and more environment-friendly solutions when addressing the difficulties faced by users.

4.2.2.3 *Environmental issues*

A new European regulatory framework could be useful in contributing to a better environment by allowing Member States to impose requirements in this respect and by giving regulators legal instruments or possibilities to stimulate innovative solutions.

4.2.2.4 *Flexibility*

An essential requirement that the new regulatory framework needs to fulfil is flexibility. Flexibility is

seen as an important precondition to achieving the goals of effective competition and safeguarding users' interests. Flexibility is needed to ensure that NRAs adequately address these goals in the ongoing changes in markets and society and given the many substantial differences between Member States.⁴² Governmental policy, for instance aimed at broadband dispersion, can also have a considerable impact on the development of the postal sector. This underlines that the approach of 'one size fits all' is not tenable, and that the need for flexibility for NRAs to tackle the challenges in a changing market is essential. All together, these different conditions show that such flexibility is needed on a national level to promote a competitive market and to effectively safeguard users' interests.

4.3 Greenfield approach in reforming the PSD

The current postal regulatory framework does not and cannot be expected to address issues that have arisen in recent years related to trends and developments that did not exist when the PSD was enacted in 1997, such as digitization, platformisation and e-commerce, as well as the consequential and fundamental changes in communication and consumer behaviour and demands. For the medium and long-term future, the PSD will certainly not be in alignment with developments in the market.

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.

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. Given the fact that most, if not all, interpersonal communication will in the future take place electronically, the purpose and function of a universal postal service needs to be re-examined. The increasing substitution of postal services by electronic communication services as well as the growing importance of parcel services meeting new expectations of users raise the question to what extent a distinction between the delivery of communications and the delivery of goods will still serve a purpose in the medium to long term future.

⁴² Circumstances and developments in the European countries differ for instance in terms of topography, demography, population density and other aspects linked to infrastructure, level of digitization, cost levels and users' needs.



If the current PSD should be considered to provide for a sufficient solid base of rules to further build upon, changes will be needed in order to adapt the regulatory framework to the challenges NRAs are facing today and will face in the years to come. These changes would e.g. concern strengthening market monitoring, re-thinking definitions and allowing for more flexibility in the regulatory tool-set and in the concept of universal service.

5 Conclusions and Observations

Rapid volume declines in letter mail and a substantial growth of parcels delivery are currently and in the near future the defining trends in the postal sector. It is important to keep in mind, however, that these developments are not in and of themselves the relevant trend or development, but that they are an expression of underlying, deep-seated developments in technological advancement, digitisation of society and changes in consumer behaviour and preferences of end-users of postal services. These changes and developments manifest themselves in a fundamental shift of interpersonal communication to digital modes of communication, new businesses and business strategies (e-commerce, innovative delivery services, e-substitution). The regulatory environment for the postal sector needs to reflect that.

The origins of the European regulatory framework for postal services however, at least as far as the PSD is concerned, date back a quarter of a century ago. And although it has been amended a few times, it was not conceptualized with the fundamental developments and changes mentioned earlier in mind. This, in itself, would be a reason that the existing PSD can no longer be called “fit-for-purpose”. But previous reports of ERGP as well as experiences of NRAs in practice show that the PSD raises several issues and difficulties, independently of the powers attributed to each NRA in the respective Member State and how the PSD was transposed. These difficulties range from general definitions and concepts, such as “postal operator”, “non-discrimination” and “access”, to the difficult application of the principles of net cost calculation.

Marginal changes to the Directive may to some extent solve these difficulties, but this would disregard that market characteristics and dynamics and the social context of the regulatory framework have changed drastically. This is reinforced by the fact that many differences exist among Member States that have an impact on the provision of postal services, such as geographical and demographical circumstances, development of competition, e-penetration, national policies and national jurisprudence. 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.

Promotion of competition is one of the main goals of the existing European regulatory framework. Apart from provisions on authorisations and access, however, few provisions in the PSD actually deal with promoting competition. Notwithstanding the stated goals in the PSD, competition in the letter mail market is still very limited. Where volumes in the letter mail market, in spite of declines, are

expected to still remain substantial in the foreseeable future, promoting competition therefore remains a valid goal. The future regulatory framework should provide NRAs with sufficient instrumentation to pursue that goal, tailored to the national situation and needs.

The possibility of regulatory intervention on behalf of a proper and equitable functioning of the market and competition is also highly relevant for the parcels market. An often heard argument is that the parcels market is already sufficiently competitive. Nevertheless, there is a need to have instruments in place in order to maintain, or even further foster, these levels of competition, or to address specific cases that may require regulatory intervention.

Safeguarding of users' interests will still be of relevance, even in the more competitive segments of the postal sector, and this should be addressed in a future regulatory framework.

The focus on the issue of sustainability of the universal service provision is understandable in view of the rapidly declining letter mail volumes and the effects on affordability of tariffs as well as the fact that the PSD mainly contains provisions that concern the universal service. However, the fundamental changes in consumer behaviour and needs and the decline in volume indicate that the relevance of universal service is also subject to change, at least in some Member States. Given the challenges NRAs or Member States face in e.g. attempting to promote competition, safeguarding consumers' interests in the letter mail market and maintaining sustainability of universal service provision or applying provisions on net cost compensation, content and function of a universal service and a universal service obligation need to be reassessed in the context of a reform of the regulatory framework. The possibility and proportionality of targeted solutions for groups of consumers to address specified problems should expressly be considered when designing the new framework⁴³. Although the function of postal services as a means of communication is undisputed, e-inclusivity for all citizens will be the real challenge for the next decade.

Developments in the past decade show a clear need for flexibility in regulatory response. Together with the fact that circumstances in Member States often still differ significantly, this will need to be reflected in the level of harmonisation that is decided on in the new framework. Practical experiences in the past furthermore show that it is indispensable that the future regulatory framework should provide for a clear and consistent vocabulary.

⁴³ See Copenhagen Economics, «Main Developments in the Postal Sector (2013-2016)», July 2018, page 255.



It is clear that the trends and developments in the postal market as well as in society in general, must have consequences for the design and content of the European regulatory framework governing postal services. 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.