

ERGP Opinion on the review of the regulatory framework for postal services

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1. Introduction

Technological development, evolving consumer demand and adapting business practices are changing, with varying levels of maturity, the postal market landscape in the European Union (EU) Member States¹. Postal items/services² - now of diminishing importance as a means of communication due to e-substitution - have become more important for the delivery of goods due to e-commerce (national and cross-border)³.

In a forward-looking perspective (5 to 15 years) this trend is likely to continue. Therefore, in the new scenario, the aspects of delivery of physical goods will become predominant. Although the letter and parcel segments are characterized by a difference in development, given they are both postal services and in view of the need to ensure a forward-looking, future proof and fit for purpose regulation of the sector, they should be considered in their interrelated context.⁴

Following this approach, in view of a new regulatory framework, it will among others be necessary to establish clear definitions of the main concepts of the sector, such as "postal operator", "postal service" and "postal item", especially comprising parcels. The distinction between parcels and letters should also be evaluated and assessed, with a focus on delivery. To ensure that future regulation meets the requirements imposed by future market circumstances and changing user demand, ERGP calls for a fundamental approach ("*greenfield approach*") rather than a mere revision of the existing framework.

Such an approach will require assessing, at the outset, whether there is still a need to regulate and what the objectives of regulation will be, considering that regulatory intervention in markets should take place only in case of actual or potential market failures. Furthermore, it should acknowledge

¹ See ERGP (18) 49 'Developments in the Postal sector and implications for Regulation', March 2019.

² As defined in the current Postal Services Directive.

³ Despite their diminishing importance, in some Member States, volumes of postal items for communication may remain considerable in the foreseeable future, see ERGP Report (18) 49.

⁴ Traditional mail services (for letter mail) are, for example, also used to deliver physical goods (packets, when their dimension and weight allows it) that are purchased on-line.

the existing differences in postal markets among Member States hence allowing National Regulatory Authorities (NRAs) enough flexibility to adapt regulation to market circumstances. Notwithstanding, the new framework will need to determine the appropriate level of harmonization that is required to attain its objectives.

ERGP believes it to be useful, when considering future regulation of the postal sector, to do so from two distinctive perspectives. To begin with, there is the perspective of the market and competition. This leads to considering which regulatory provisions are needed to ensure a proper functioning or development of markets and the level and kind of competition that could be pursued.

Then there is the perspective of the user of postal services. This leads to considering which postal services need to be covered by regulation, whether there are grounds to distinguish between certain users (for example large businesses and private consumers), etc. It also for example concerns provisions on transparency of commercial offers and contracts and compensations for users in case of non-compliance. In this context, the concept and function of universal service will need special consideration. The shift in focus from a sender-oriented to a receiver-oriented service provision, in ERGP's opinion calls for a continued attention to safeguarding consumer interests.

2. Postal services from a market perspective

2.1 Scope of the postal sector

In the foreseeable and long-term future, it is likely that the relevance of delivery of postal items as a means of communication or exchange of information (letters, magazines, direct mail) will further diminish due to e-substitution. In contrast, the relevance of postal services as a means to deliver goods (parcels) is expected to intensify because of a further growth of e-commerce. These developments exemplify fundamental changes in society and in the postal market in terms of technological evolution and consumer behaviour, that warrant a thorough reconsideration and examination of the objectives of and concepts to be used in a future regulatory framework and the principles on which such a framework will be founded.

In view of these changes, a future regulatory framework will need to determine the postal nature of the market and of the services provided. A substantial part in this matter will depend on a proper use of definitions that, on the one hand, provide clarity but, on the other hand, should not unduly restrict a flexible and innovative development of the market and regulatory approach by NRAs. These definitions will, to a certain extent, define the market but are also needed to determine the scope of the regulatory framework. Basically, the framework needs to clarify when a service is a “postal” service and when it is not, making it clear to what postal services or products and which service providers⁵ it applies (considering also subcontractors). This will also be relevant for market entry regime of the new framework.

The future regulatory framework should moreover clarify which activities have to be considered in this market, making sure this includes at least the operators in the letter mail segment and the parcel delivery service providers (as well as subcontractors) defined in Regulation (EU) 2018/644.

⁵ E.g. courier, express, innovative delivery services (such as pick-up and drop-off networks, or last mile riders guided by an app that matches supply and demand, etc.), platforms (e.g. fulfilment services providing deliveries end-to-end for purchases from third parties), warehouse logistics, final delivery systems (parcel lockers, autonomous guided vehicles, drones etc.).

Clear and unambiguous definitions are an important element in establishing the scope of the framework. Preferably such definitions should be formulated in a technology neutral manner in order not to hamper innovation in the market.

On this last point, it must be guaranteed that the market entry regime, e.g. by a general authorization, ensures the promotion of competition. As such, the regulations in this field should be defined in a way that the entry of new competitors is ensured through simple procedures which do not create an excessive burden which might constitute a market access barrier.

The expectation being that the postal sector will increasingly centre on the delivery of goods, there will also be cause to determine the demarcation between transport services in general and postal services in particular⁶. To this end, it will be necessary to identify the characteristics distinguishing the postal sector from the transport sector and assess, in particular whether:

- using a weight limit as a means of demarcation⁷ is still appropriate or whether some other functional or additional criteria regarding postal activities could be considered;
- the items delivered need to conform to certain outward specifications such as the dimension and packaging.

In ERGP's opinion any postal service provision needs to include processing⁸ physical items with the objective of their delivery at a specified address or location⁹. The scope of the postal market will therefore depend on physical items containing communications, information or goods, being processed for the purpose of their conveyance from one location to another. A future regulatory framework will however need to carefully consider to what extent the digital elements of forms of hybrid mail services or other digital solutions like digital mailboxes need to be included in its scope,

⁶ In this perspective, other pieces of legislation that also apply or are applicable to postal service providers may become more relevant (e.g. freight transport legislation) as well as the stakeholders involved, such as customs and border security agencies.

⁷ Currently set in the Postal Services Directive at 20 kilograms and at 31.5 kilograms in the Regulation on cross border parcel delivery services. The UPU Convention Manual sets the weight limit at 20 kilograms, but also states that the exchange of parcels whose individual weight exceeds 20 kilogrammes shall be optional, with a maximum individual weight of 50 kilogrammes.

⁸ Such as collection/clearance, sorting, transport, and distribution/delivery.

⁹ If the processing and delivery of communications, messages or information entirely takes place in the digital domain, this does not constitute a postal service.

as these may have an important impact on the market and on competition in the foreseeable future.

2.2 Competition

The changes in society as reflected in the postal market call for a reorientation from universal service provision to a proper functioning of the postal market and of competition as the main focus of a fit for purpose regulatory framework¹⁰ to the benefit of end-users. As such, the regulatory framework governing the postal market must be based on the principle that regulatory intervention in the postal market takes place in situations of identifiable, actual or potential market failures¹¹.

Promoting competition in letter mail markets, for example where volumes of letter mail are still or are likely to remain significant (e.g. bulk mail from large business senders and public administrations) in ERGP's view remains a valid and important objective to pursue. In such circumstances a lack of competition and level playing field, despite the introduction of full market liberalization, can still deprive users of potential benefits of competition in terms of choice between providers, prices, quality and product innovation.

The parcel segment of the market is, in that respect, generally considered to be more dynamic and less concentrated than the letter segment and needs in principle less regulatory intervention. In a forward-looking perspective, however, it is conceivable that this situation may change significantly. This can be, for example, on the supply-side, a result of consolidation of market players, through e-commerce platforms vertically integrating with delivery operators, or dominant operators on the letter mail market, leveraging their market power onto the parcel segment of the market. On the demand-side, large on-line platforms could, for example, gain such a strong bargaining power that they become indispensable customers for delivery operators. In this respect a correct and equitable functioning of markets in a broad sense will require constant monitoring by NRAs to prevent anomalies such as those derived from market abuse either on the demand or on the supply side. NRAs will therefore also need to be equipped with sufficient powers and tools to monitor the sector and to intervene to promote competition, in particular if the market would develop towards a

¹⁰ Proper functioning in this context refers to the presence of sufficient actual or potential competition, an absence of significant market failures and the existence of effective provisions to safeguard users' rights and interests.

¹¹ Market failures in this context refers to situations where the market does not function properly or – exceptionally - does not meet certain objectives as set by public policy or legislation.

situation of restriction or potential restriction of competition.

Furthermore, a greater emphasis on the competitive aspects of the postal market calls current VAT provisions regarding services within the universal postal service into question, as a VAT exemption for these services introduces distortions in the market¹². Although this concerns specific and separate legislation, in the interest of ensuring a level playing field a removal or revision of such provisions nevertheless warrants particular consideration in the context of developing a new regulatory framework for the postal sector.

The system of intra-community terminal dues will need careful consideration in the new regulatory framework. Considering that volumes of e-commerce parcels from non-EU countries to EU countries are likely to continue to increase in the coming years, the evolution of the UPU reform of terminal dues merits careful monitoring, as these represent a potential financial burden for several universal service providers and also affects the competition dynamics of the market.¹³

2.3 Regulatory aspects

Where the Postal Services Directive is mainly focused or centred on the Universal Service, a future regulatory framework needs to approach the market from a holistic perspective, taking into account the fundamental changes that are and will be taking place in the future. This means for example that, where there are reasons to distinguish between segments of the market in terms of regulatory approach, such as between a letter and a parcel segment, any provisions need to be considered and developed in conjunction with each other, in order to ensure a consistent application of the framework as a whole.

ERGP believes that, for the foreseeable future, it is necessary to maintain sector specific regulation for the postal sector and a new framework should first and foremost focus on a proper functioning of markets and competition as the primary means to meet user demand. NRAs should have sufficient powers to intervene *ex-ante* in case of actual or potential competition problems. This

¹² In relation to VAT regulation, ERGP also draws attention to the proposed removal of the VAT de minimis exemption, which may have a significant impact on e-commerce and the delivery market. See for example «Effects of removing the vat de minimis on e-commerce imports, 11 October 2017», a study by Copenhagen Economics, commissioned by PostEurop.

¹³ Note that the European Commission has launched this year the tender for a study regarding international postal services (Remuneration and Regulation of terminal dues), for which a first draft will be delivered during the fall of 2019, and in March 2020 the report will be finalized.

entails sufficient powers to define, monitor and analyse markets (including adjacent markets¹⁴) and, in particular, the competence to impose regulatory obligations such as access to the network and its components at cost orientated prices as well as been able to impose a reference offer, non-discrimination obligation and conducting margin squeeze test. Consequently, based on the identification of one or more operators with Significant Market Power (SMP) following an analysis of the relevant market(s), NRAs should have specific powers in determining how the access to the network has to be provided (e. g. defining access prices, processes, interfaces, formats). The competences of NRAs in this respect should be directly grounded in the regulatory framework, and not made dependant on discretionary implementation by Member States. The implementation of this competence should be left to the consideration of NRAs. This will ensure the possibility of a more coherent application of the framework in the European markets.

Security of the network and standard aspects should continue to be acknowledged within a new regulatory framework.

¹⁴ For example, logistics and transport.

3. Users rights and interests

3.1 Protecting users of postal services

Provisions in a new regulatory framework will have to reflect the reorientation in postal markets from a “sender-oriented” to a “receiver-oriented” service provision¹⁵ and hence consider users’ rights and interests also in relation to the digital services associated with the provision of postal services. To this end, it should identify the minimum requirements needed to protect postal users in terms of, for example, transparency of commercial offers and contracts (to make informed choices), proof of delivery, compensation in cases of non-compliance (loss/damage/delay), track and trace options¹⁶, corrective properties of complaint and redress procedures to be offered by postal operators.

As the Consumer Rights Directive 2011/83/EU (CRD) already encompasses provisions regarding the delivery of goods in “distance sales” or “off-premises contracts”¹⁷, the future framework for the postal market will need to decide whether the existing general provisions on these subjects are sufficient or whether specific or additional provisions are needed for the postal sector or for different categories of postal users.¹⁸ Similarly, the new framework should analyse the Directive 2013/11/EU on alternative dispute resolution to assess if additional special provisions need to be implemented for the postal sector.

Users’ rights such as personal data protection, the confidentiality of information transmitted or stored, protection of privacy should continue to be acknowledged within a new regulatory framework.

¹⁵ Postal products are, for example, increasingly focusing on the needs of the receiver as, for e-commerce purchases, the receiver is de facto the person that orders the product to be delivered.

¹⁶ Other examples are in-transit delivery alterations and the use of electronic advanced data to accommodate more efficient delivery of domestic and cross border postal items (e.g. regarding information to be declared at customs). These services are already common to both postal services and larger logistics businesses today.

¹⁷ According to the CRD, consumers have the right to know the total costs of their purchase; in case the good delivered is damaged, they have the right to get it repaired, replaced or else to get a refund; furthermore, goods should also be delivered within 30 days.

¹⁸ Directive 2011/83/EU is currently under revision; the new version is likely to be published by the end of 2019.

3.2 Universal Service

In view of a reform of the regulatory framework, the future postal environment along with changing consumer demand and the adoption of innovative delivery solutions by providers should serve as the basis to evaluate whether a proper functioning of markets and competition will sufficiently provide the postal services that are needed by users, or whether it is still necessary to ensure a postal universal service.

Currently, universal postal service in the EU regulatory framework is aimed at ensuring to all users an adequate baseline level of services, otherwise not provided by the market¹⁹, thus contributing to social and territorial cohesion. Its provision conforms to a set of principles including transparency, non-discrimination, proportionality, affordability and should avoid market and competitive distortions.

Assuming the overarching principles of economic and social inclusion, regional cohesion and consumer protection - as stated in European Commission policy initiatives - such as the Digital Single Market (DSM), the Regulation of Cross Border Parcel Delivery²⁰ and the European Electronic Communications Code²¹ - are still valid for the postal sector, a postal regulatory framework reform should align with such principles by ensuring a minimum set of postal services is available to users at a certain level of quality and price and provide for the designation of one or more universal service providers, only in case the market forces do not ensure such a provision²². When the portion of population dependent on postal services is very small, a universal service may not be a proportional instrument hence its imposition may not be necessary.

¹⁹ Postal universal services are, therefore, nowadays accessible to every citizen - in most cases at the same price nationwide - providing benefits to all postal users, both senders and recipients.

²⁰ See Regulation (EU) 2018/644 on Cross Border Parcel Delivery Services, recitals 9, 11, 25, 26 and Art. 6, 11

²¹ See Directive (EU) 2018/1972 on the European Electronic Communications Code, recital 214 and art. 86(3)

²² As far as parcel delivery services are concerned, if e-commerce is considered an element of social inclusion, people should have a kind of "right to receive" parcels bought on-line.

3.3 Minimum set of postal services and scope of universal service

In determining a minimum set of services that will contribute to ensuring social and territorial cohesion, the new regulatory framework should consider the following factors:

1. an upper limit on weight: considering that currently more than 80% of postal items, as defined in the current postal directive, weigh less than 2 kg, weight limits should be set reasonably below the current 20 kg, both for letters and parcels²³;
2. the possibility for users to send and receive cross-border postal items;
3. quality of service (the frequency and modalities of delivery): these should take account of and be adapted to the shift from a communication (sender-centred) to an e-commerce (receiver-centred) oriented service provision;
4. the users or groups of users for which this minimum set of services is relevant. The framework should for example determine whether the minimum set of services needs to be equally available for large senders as for private citizens and small companies. For example, the position of large mailers and their efforts in digitalization in order to save costs and reduce their ecological footprint may, where justified, no longer support an inclusion of bulk mail within the universal service scope.

Once a minimum set of services is determined, Member States should have the possibility to assess whether in their country, or parts of it, the market is able to provide this minimum set, or whether a universal service obligation should ensure its availability for users.

As an alternative to the provision of a uniform universal service provision for all citizens, Member States should be allowed to adopt targeted measures for specific categories of users²⁴ on the ground that if in such circumstances postal users are equally served as with the universal service as defined, but at a lower cost, it would be preferable to implement such measures²⁵. As this implementation will greatly depend on the specific circumstances in each Member State, a future regulatory

²³ In setting a weight limit, the interests of population in remote areas with no sufficient alternatives in parcel delivery may be taken into account.

²⁴ For example, by issuing vouchers to compensate for higher costs of delivery in certain areas or specific users for whom the price of postal services is less affordable, or measures supporting municipalities in providing sufficient access and delivery points.

²⁵ Copenhagen Economics Report: “Main Developments in the postal sector 2013-2016”, July 2018

framework will need to carefully consider to what extent a harmonized application of such measures is needed.

In Member States in which market forces and competition in the postal market segments do not or insufficiently ensure the availability of the minimum set of services, this should be established through a universal service obligation²⁶. In that case, the framework should provide harmonized rules covering the issues of prices, quality of service and postal network coverage, including density of post offices and/or alternative service points. Considering that both the costs of universal postal service provision and the size of users' groups requiring specific attention, may vary significantly across the EU²⁷, the minimum set of services as determined by a new regulatory framework should be flexible enough to allow Member States to adapt the scope of the universal service to national circumstances.

Furthermore, care should be taken so that the quality of service obligations imposed on the universal service provider are adequate to the nature of the service and adhere to an approach conducive to innovative methods of delivery.

3.4 Net cost calculation and methods of financing

The new framework should simplify the existing methodology for universal service net cost calculation and ensure that such a methodology and its outcomes as well as any methods of financing a net cost do not introduce competitive distortions²⁸. It might also foresee to increase the granularity of accounting separation (e.g. for non-universal postal products and any other type of product provided by the USP).

In case the new framework would allow for the introduction of a compensation fund, it should continue to adopt a competition-wise non-intrusive approach regarding the specific prerequisites for contributing to such a fund. Nonetheless, other compensation methods could be examined (e.g.

²⁶ The level of e-substitution is also an important element to take into account in this context. See 'The Digital Economy and Society Index' (DESI), <https://ec.europa.eu/digital-single-market/en/desi>

²⁷ The former is affected, *inter alia*, by traditional letter post volume decline, geographical characteristics and level of digitization; the latter, could depend, *inter alia*, on the level of broadband penetration, orography, population age, digitalization and income per-capita.

²⁸ The methodology should, however, be consistent with other methodologies used in other situations for which the calculation of a compensation is needed.

vouchers).

4. General aspects of regulation

4.1 Flexibility and harmonization

Given the differences between Member States in terms of market development and in accordance with the principle of subsidiarity, a future regulatory framework for postal services will have to provide Member States and NRAs with the necessary flexibility to address national specificities within a general framework of common rules and principles. NRAs' competences to *ex-ante* promote competition in the postal sector should be clearly and unconditionally set at the EU level and not just optionally. Ex-ante regulation is more flexible and is able to respond better to market dynamics.

Although the Postal Services Directive affords Member States and NRAs with some level of flexibility, e.g. in interpreting the provisions on universal service (in terms of prices, quality of service and coverage), in determining the scope of the universal service, and in regulating access conditions, flexibility will be of crucial importance in designing a new regulatory framework. It will need to find a balance between a sufficient level of harmonization to ensure a consistent implementation in the Member States not going beyond what is necessary to achieve its objectives, but nevertheless leave enough room for Member States and NRAs to provide for any national market specificities. This will for example be of particular relevance in developing the definitions used in the regulatory framework, the design of provisions and competences of NRAs on promoting competition and on safeguarding users' interests. These definitions, provisions and competences should be clear enough to be implemented in all Member States, but not so rigid as to prevent an optimal and innovative development of the market as well as an efficient and effective application in national circumstances.

4.2 Governance

An important aspect of governance that will need to be addressed in the future regulatory framework concerns the independent role of NRAs. Currently, role, function and competences of NRAs sometimes differ significantly between Member States. This is not conducive to a consistent and coherent application of the regulatory framework in all Member States. In ERGP's opinion and notwithstanding the concurrent need for flexibility, in a new regulatory framework this situation could be improved upon and should be a minimum of harmonization of the competences of the NRAs.

The cooperation between NRAs is also a topic that the new regulatory framework should consider.

In the same context and depending on the ultimate content of a new regulatory framework, role, position, competences and the institution of ERGP will need to be strengthened ²⁹.

²⁹ ERGP being an independent group, a Body with competences clearly defined in the future regulatory framework, continuing the EC to be the secretariat (RSPG model) is an option that could be considered. ERGP can also assume the role of collecting data in the postal market.

5. Recommendations

In considering and designing a future European regulatory framework for postal services, ERGP presents the following recommendations to the European Commission.

1. Use a greenfield approach in establishing a new regulatory framework

Base a future regulatory framework on a thorough consideration and analysis of all relevant, current and future developments in society and the sector.

Since the developments of the postal market represent fundamental changes in society and in the market, a forward looking-framework, in ERGP's opinion, cannot simply take existing regulation as a starting point but needs to depart from the question "what would require regulation if no such regulation would currently exist?". In that sense ERGP proposes a 'greenfield' approach in establishing a new regulatory framework.

2. Reorient the focus of the regulatory framework from the universal service provision to a proper functioning of the postal market and of competition

Given the reorientation of the market, the new regulatory framework should ensure a proper functioning of the internal postal market, sustainable competition and a high level of consumer protection.

3. Set a clear scope of the postal sector

Clarity is necessary on the postal character of services and products. Hence, the future regulatory framework should determine and clarify the parameters that are used to identify the services and products that fall within its scope, such as weight or dimensions and parameters related to collection, sorting, transport and delivery modes, with a view to technological developments linked to e-commerce logistics.

In ERGP's opinion the services covered by the framework need to entail at least a physical component. Inclusion of digital services connected to such components needs careful consideration.

4. Bring comparable services together in the same regulatory framework

In a forward-looking perspective there is no rationale for having separate regulatory principles for letters (documents) and parcels (goods), although there are differences in these markets, as the latter is more competitive. This does not mean that within the regulatory framework different provisions could not apply depending on the nature of the service.

5. *Strengthen and ensure minimum harmonization of NRAs' powers to intervene in the market in order to promote competition and address market failures.*

NRAs should have the powers to impose ex-ante obligations in case of market failures, including obligation on providing access to its network. The obligation to assign such powers to NRAs in each Member State should be laid down unconditionally in the new framework (this should concern the procedure as well as the substance of the access), leaving the option of its implementation to the consideration of the NRAs.

6. *Guarantee that a minimum set of postal services is available to all European citizens, taking into account the national circumstances.*

Universal service should cover only those basic services that are *objectively* needed by users under certain specified conditions that would otherwise not be provided on a regular commercial basis, either in parts of or in the entire national territory. The inclusion of bulk mail (letters and parcels) within the scope of the universal service may no longer be considered as tenable, depending on national circumstances.

In order to adequately respond to further changes in the market and in user demand, the US should be defined at European level but Member States and NRAs should have sufficient flexibility to adapt their application of universal service according to specific national circumstances and developments.

7. *Ensure the consistency of the new regulatory framework with other regulatory frameworks such as those on consumer rights, VAT and customs, data protection, UPU, freight transport, security of goods, etc.*

Not all regulatory provisions that may apply to the postal sector fall within the sphere of influence of the new regulatory framework. Nevertheless, these need to be taken duly into account in order to promote coherence and unnecessary duplication.

8. *Strengthen and harmonize NRAs' powers and instruments*

NRAs should have powers on market monitoring, (collection of information covering all the

players in the market), enforcement and application of sanctions, consumer protection, regulatory powers and regulatory tools, including the interdependence with adjacent markets (e. g. platformisation) and ensure and strengthen an independent performance of their tasks.

9. *Strengthen the institutional framework for ensuring cooperation between NRAs and a consistent and coherent implementation and application of the regulatory framework*
10. *NRAs tasks and the role and function of ERGP as an independent advisory body to the European institutions could be recognized by the new regulatory framework.*