



EUROPEAN
REGULATORS GROUP
FOR POSTAL SERVICES

Response to the Public Consultation on the PSD Evaluation

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1 Background

ERGP welcomes the public consultation of the European Commission (EC) on the evaluation of the Postal Services Directive (PSD) which aims to assess whether the Directive is still fit for purpose and achieves its original aims, namely whether it has contributed to the objectives of economic and social cohesion, consumer protection, innovation and market integration, and at better understanding the needs of the postal sector, especially in the light of the transformations caused by the rapid growth of e-commerce.

ERGP considers that the process of the evaluation of the current PSD is key to allow a future regulatory approach to strike the right balance among flexibility, predictability and proportionality, given the importance of the postal services for the European economy and society, which became more evident with the challenges of the covid-19 outbreak and the acceleration of the digitalization and e-commerce delivery.

Having underlined the importance of this public consultation, ERGP believes that it has a static approach, looking exclusively to the suitability of the current provisions and missing essential forward-looking points that should be covered in the future review.

Finally, ERGP would like to stress its willingness to further cooperate with the EC and to continue to work with the European institutions and other relevant stakeholders on this topic. ERGP provided relevant documents for discussion in recent years,¹ and will continue to do so in the forthcoming years, envisaging to continue to support the EC in the review process. For next year, ERGP will work on this topic, namely on topics like the consequences of the covid-19 pandemic on the postal sector, the role of online platforms and e-retailers, market monitoring, contractual relations of consumers and the green deal.

1 Regulatory principles and questions

ERGP considers it urgent and essential to review the current regulatory framework as the PSD was drafted more than 25 years ago, in a still analogue world hence not reflecting the new reality of the postal sector. The PSD as it stands does not address issues emerging after the directive came into

¹ Please refer to the all documents in the ERGP website at: https://ec.europa.eu/growth/sectors/postal-services/ergp_en.

force in 1997, such as digitisation, platformisation, e-commerce nor it consider the profound changes that occurred in communication and consumer behaviour.

Indeed, the increasing level of digitization of society has caused changes in the postal sector: on the one hand, the availability of immediate, easy-to-use and low-cost digital solutions for interpersonal communications in the majority of Member States determined a drastic reduction in the volumes of traditional letter post services (so-called "e-substitution"), particularly in the X2C segment, even though they will remain an essential postal service in the coming years. On the other hand, following the development of e-commerce, parcels' volumes have grown and continue to grow at a rapid pace.

These trends have been modifying the characteristics of the postal market, whose main core is gradually shifting to the delivery of parcels rather than the correspondence. Moreover, the postal sector is being reshaped by the emergence of marketplaces bringing together demand and supply in e-commerce. Online platforms are gradually evolving from simple match-making intermediaries to full-service providers (or even gatekeepers) integrating activities along the value chain (e.g., match-making, ordering, (traditional) fulfilment, payment) and offering multiple services to senders and customers as the recipients of postal items. These developments confirm the need to reconsider the scope of the postal sector in a forward-looking perspective to deal with these new players and business models.

The regulatory framework needs therefore to adapt to this new situation to be able to continue to guarantee the development of a competitive market and to keep protecting, at the same time, both users who continue to rely on traditional communication means as well as users whose needs have changed.

To ensure that the future regulation meets the requirements imposed not only by the future upcoming but also by current market circumstances and changing user demand, ERGP calls for the adoption of a new approach ("greenfield approach") rather than a mere revision of the existing framework.

ERGP considers that clarity on the objectives of the postal services regulatory framework will contribute to a consistent and coherent implementation and application by Member States and NRAs.

ERGP also considers that the future regulatory framework needs to approach the market from a holistic perspective, considering the fundamental changes that are and will be taking place in the coming years.

ERGP believes that it is necessary to maintain a sector specific regulation for the postal sector and, given the changes occurring in the market, a new framework should adopt a market perspective in complement to the objective of the provision of universal postal service. To this end, to avoid inconsistencies, all pieces of legislation, including those arising from the Digital Services Act, the Green Deal, the future postal regulatory framework and any related legislation, should be aligned, where appropriate.

2 Scope of the sector and definitions

ERGP clearly considers that there is the need of rethinking the scope of the sector and the postal definitions, as it has been concluded in the ERGP “Report on the postal definitions”², in the “Report on developments in the postal sector and implications for regulation”³ and in the “ERGP Opinion on the review of the regulatory framework for postal services”. The latter also explicitly recommends to the European Commission “to set a clear scope of the postal sector”.

ERGP considers that a clear scope of the postal sector should be set and it would be fundamental to have consistent, harmonized and future-proof definitions in the European postal framework.

Scope of the sector

During the last few years, specific country cases, new regulations and court cases decisions have challenged conventional views on the scope of the postal sector. Boundaries between postal services, on the one hand, and transport, logistics and online intermediation services offered through platforms, on the other hand, have become more blurred. Therefore, it is not always clear which sectoral framework applies for these services.

ERGP notes that, as there is a lack of consistency among national, European and international legislation referring to the specific weight limit that demarcates the postal sector from other sectors, it should be defined a unique weight limit in all sources of legislation. ERGP considers that it should be analysed if a clear and consistent weight limit, jointly with other parameters (namely address, physical component and operational stages), could be a suitable set to demarcate the postal sector, or if other criteria are needed.

² ERGP PL (18) 49 ERGP Report Developments in the postal sector and implications for regulation.

³ ERGP PLI (20) 6 Report on the possible definitions in the postal service – public consultation version. The final report is expected to be approved in the end of November.

ERGP considers that in case a logistic undertaking offers one or more services related to the postal value chain (i.e. clearance, sorting and distribution excluding the transport alone), that undertaking should be considered a postal operator according to the postal regulatory framework.

The emergence of marketplaces bringing together demand and supply in e-commerce (platforms) is one of the main recent developments that is reshaping the postal sector. ERGP considers that there is no reason to exclude platforms that engage in traditional postal activities from the postal sector, regardless of whether they deliver their own (self-provision) or third party's goods (marketplace).

The scope of the sector should clarify to what extent new operators arising in the context of platformisation and new delivery modes due to technological developments, fall within the scope of the postal sector. In theory, looking into the Confetra case, e-retailers or food deliverers could be described as "postal service providers", except when their activity is limited to the transport of postal items. ERGP considers that there is no operational difference, for example, between delivery operators delivering a wide range of goods and delivery operators delivering exclusively food, even though there might be specific national legislations limiting the items that can be handled by postal providers.

ERGP considers that the scope of the postal market should include physical items containing communications, information or goods, being processed for the purpose of their conveyance from one location to another. ERGP considers that digital services relying exclusively on electronic communications are not postal services.

Postal Definitions

The future regulatory framework needs to outline clear and unequivocal definitions and concepts in order to easily determine whether specific markets and services can be considered to have a postal nature. To this end, the future regulatory framework should determine and clarify the parameters that are used to identify the services and products that fall within its scope.

The current PSD definitions need to be updated in order to reflect the new market reality: the postal sector is not as centered on the universal service provision, though it remains important, and on the activities of the universal service provider, but is rather highly influenced by digitization and delivery of parcels. Also, possible inconsistencies with the scope and definitions in the Regulation on cross-border parcel delivery services should be clarified.

ERGP considers it necessary to tackle the current discrepancies in the transposition of the definitions of the PSD into national laws and the inconsistencies between various pieces of legislation. The PSD

definitions do not clearly indicate when a service is a postal service, which has implications on market definitions and access regimes.

The main inconsistency in the transposition of the definition of postal services is related to the cumulative requirement of the four operational stages (clearance, sorting, transport and distribution) comprised in the definition of the PSD, as one third of the countries require the cumulative provision of all four operations, while the others do not. The future regulatory framework should be clear about the cumulative requirement, guaranteeing the harmonization amongst Member States, also in light of the ECJ decision in the Confetra case.

ERGP considers that the future definitions should be multi-dimensional, considering a combination of the various parameters. The weight limit, the address, the physical component and the operational stages seem the more relevant parameters to be used, in combination, in the future postal definitions. ERGP recommends to use these different parameters in a multi-dimensional way in order to have future-proof definitions and ensure their consistent application in all Member States to enhance the internal postal market, to have legal certainty, to guarantee a level playing field and to avoid competition problems.

3 Universal Service

ERGP believes that in a forward-looking perspective the regulatory framework needs to ensure that the US corresponds to the existing needs of the users. Moreover, it should be evaluated whether a proper functioning of markets and competition will sufficiently provide the postal services that are needed by users, or whether it is necessary to ensure a postal universal service in its current form.

The most important aspects of the universal service obligation (USO) in the current PSD are safeguarding a basic set of postal services, otherwise not provided by the market, with adequate quality, accessible and affordable for all EU citizens, thus contributing to social and territorial cohesion, even in times of crisis, as demonstrated by the importance of the US provision during the Covid-19 pandemic. In the current postal framework US provision complies with a number of principles including transparency, non-discrimination and proportionality which should prevent distortions of competition.

ERGP maintains its view that such principles are and will continue to be valid, hence also in the future USO should align with these principles by ensuring that a minimum set of postal services is available to users, with a certain level of quality and price, capable of satisfying the changing needs

of users and of taking into account the transition from a sender-oriented to a receiver-oriented model, considering the increasing importance of e-commerce (where the receiver is usually the e-shopper). In doing so it will be necessary to evaluate for which users (individuals, small companies, large senders), or groups of users, this minimum set is relevant, distinguishing between correspondence and goods. 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 would take place only in case of actual or potential market failures. The designation of one or more universal service providers should be envisaged in case market forces do not guarantee the availability of the minimum set of services, with the referred characteristics, to all users.

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. If the latter is the case, the framework should provide harmonized rules.

Given the differences between Member States in terms of market developments and in accordance with the principles of subsidiarity, ERGP considers that the 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 rules and principles. 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 leave enough room for Member States and NRAs to provide for any national market specificities.

Distortion of competition on postal markets or on adjacent markets as a result of financing the USO is undesirable (e.g. cross subsidization). ERGP considers that the framework should continue to adopt a competition-wise non-intrusive approach, in order to prevent cross subsidization, to ensure a level playing field. Also, the 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 distortions.

4 Level playing field

ACCESS

The European postal market is still highly concentrated, especially in the letter segment, despite almost 10 years have passed from market opening.

Regulated access to postal networks, which is safeguarded by Articles 11, 11a and 12 of the PSD, is a crucial instrument for promoting competition. However, 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 legislation⁴.

In order to establish a level playing field allowing innovative services to emerge and promote a fair and competitive European postal single market, ERGP considers that NRAs need to have the competence to apply pro-competitive regulatory tools like access to postal networks and services.

ERGP believes that, for the foreseeable future, it is necessary to maintain sector specific regulation for the postal sector and a new framework should 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 entails sufficient powers to define, monitor and analyse markets (including adjacent markets – e.g. logistics and transport) and, in particular, the competence to impose regulatory obligations such as: access to the network and its components at cost orientated prices, the publication of a reference offer, non-discrimination and development of margin squeeze tests following an analysis of the relevant market. Consequently, NRAs should have specific powers determining how the access to the network has to be provided (e. g. defining access prices, processes, interfaces, formats); to this end, a possible tool could be the SMP assessment. 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, to ensure the possibility of a more coherent application of the framework in the European markets. Therefore, NRAs should have the power to impose, if they decide so, ex-ante obligations in case of market failures, including obligation on providing access to the network.

ERGP considers that a new regulatory framework should facilitate, or at least leave room for, the introduction of innovative solutions. This has consequences for several aspects of the regulatory

⁴ ERGP (18) 49 Report on developments in the postal sector and implications for regulation.

framework such as the way delivery obligations are described in the PSD 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 investments⁵.

TECHNICAL STANDARDS

Due to the constant evolution of the postal sector, ERGP recommends the European Commission to publish and keep an updated list of the technical standards applicable to the postal sector, specifying the particular aspects they refer to (letter mail, parcels, some particular activity of the postal value chain, etc). This would facilitate the NRAs' monitoring tasks regarding the standards compliance by the postal operators, improving the market effectiveness.

Quality of service standards have to be set and published in relation to the universal service in order to guarantee a postal service of good quality and have to focus, in particular, on transit times and on the regularity and reliability of services.

On the other hand, the harmonisation of the conditions governing the provision of letter post and parcel delivery services is key to provide a level playing field for all providers, whether they are courier, express providers, universal service providers that also fall under the UPU framework, transport and logistics providers or on-line platforms as far as the EU postal regulatory framework is concerned.

Via standardized electronical and physical interfaces, sortation and delivery process in a multi-carrier environment can be optimized. Thus, parcels can be reliably tracked and traced in the case of handover to other parcel operators⁶.

Network security and standard aspects should continue to be acknowledged within a new regulatory framework. 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

⁵ ERGP (18) 49 Report on developments in the postal sector and implications for regulation.

⁶ ERGP PL I (19) 10 Report on the development of postal networks.

consideration in the new regulatory framework.⁷ ERGP will produce a report in 2021 regarding the harmonised measures related to standardised cross border parcel delivery.

5 Consumers

Current state of consumer protection in the Postal Sector

ERGP clearly considers that there is the need that provisions in a new regulatory framework will have to reflect the reorientation in postal markets from a “sender-oriented” to a “receiver-oriented” service provision as it has been concluded in the ERGP report on key Consumer issues.

Although the current PSD includes, in principle, certain provisions relating to the addressee, it is certain that consumer protection schemes do not always prevent certain phenomena that are specific to the postal sector (for instance, the right to protect the postal items that could not be delivered). In particular, article 19 of the PSD imposes a complaint procedure for all users while the provisions of the UPU allow the addressee to receive compensation from the provider delivering the item. Specifically, when the reference is made to e-commerce, it is usually the e-retailer who concludes a contract with the postal service provider, whereas it is often the addressee who has a ground for complaint. In these cases, consumers are confronted with limitations of the extra-contractual liability of the postal service provider, particularly in the event of a late delivery, damage, loss or theft of a postal item. The Consumer Rights Directive (CRD) establishes that consumers exclusively contract with the e-retailer and that the transfer of ownership happens when the parcel is delivered. The e-retailer is also encouraged to conclude its delivery contracts with undertakings on a contractual basis but are not obliged to grant additional rights to the addressee pursuant to the postal regulation. In case of complaint, a number of postal operators systematically refer the addressee to the sender, as they judge that they only have a contractual obligation to the sender.

Compensation schemes are often determined by the postal operators and included in the contract for the provision of services. The compensation is also subject to civil law. Furthermore, in some cases, the terms and conditions from some postal operator may refer to compensation schemes based on transport regulations, making it difficult to determine the boundaries between the transport and the postal sector.

Impact of e-commerce on consumer protection

⁷ ERGP (18) 49 Report on developments in the postal sector and implications for regulation.

Following the impact of e-commerce and platformisation the influence of recipients of postal items on the delivery process is increasing, as compared to traditional postal services, where the sender usually determines the delivery conditions. In the majority of e-commerce transactions, the ultimate receiver orders and pays for delivery, but the sender (e-shop) has the full protection stemming from the contract with the delivery provider. This may constitute a potential risk for protecting the recipient's consumer rights. Consumer rights' risks are mitigated to some extent by the market itself. In an increasingly competitive online marketplace, where consumer loyalty is difficult to gain and maintain, substantial market power lies with the e-consumers. How an e-shop handles and manages the delivery problems is one of the deciding-factors for the shopper's experience. The most important consumers' expectations are that the purchased item is not damaged, the shipment is delivered at the agreed place and date.

De lege ferenda Proposals in the field of consumer and user protection

ERGP considers that any provision in a new regulatory framework may reflect the reorientation in postal markets from a "sender-oriented" to a "receiver-oriented" service provision and hence consider users' rights and interests also in relation to the digital services associated with the provision of postal services. It should identify the minimum requirements needed to protect postal users in terms of, e.g. 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 options, corrective properties of complaint and redress procedures to be offered by postal operators. As the CRD encompasses provisions regarding the delivery of goods in "distance sales" or "off-premises contracts", the future postal framework would need to decide whether those general provisions are sufficient or whether specific or additional provisions are needed for the entire postal sector or just for different categories of postal users. The new framework should also analyse the Directive 2013/11/EU on alternative dispute resolution to assess if additional special provisions need to be implemented for the postal sector.

Given the triangular nature of delivery services in the context of e-commerce (e-retailer, postal operator, e-buyer), the ERGP stresses the need for adoption of clear rules on consumer protection. In any case, it seems that a number of specific rights should be provided for recipients, who should also have the right to receive information, make a complaint and, when justified, receive a compensation for damaged suffered. The concept of postal service user as a sender and as an addressee should be delimited. The concept of "recipient/addressee" should be clarified to develop the rights the addressee could benefit from. This definition should clarify who are the sender and the addressee of returning parcels.

Hence, any concrete proposal or recommendation for the future regulatory framework requires an analysis of the situation of consumers in the field of postal services with a special focus on recipients.

In this sense, the new regulatory framework might indicate that parcel delivery service providers should mention in their contractual conditions the postal regulatory framework at EU and domestic level as they usually refer to the domestic transport legislation. Nevertheless, prior to adopt any regulatory change, necessity and proportionality tests should be carried out.

6 Governance

NRA independence

ERGP considers that the independence requirements on NRAs is a key element that should be preserved and reinforced in the future framework.

The national regulatory authorities of Member States are generally able to act independently under article 22 of the PSD. ERGP considers the independence requirements on NRAs are of utmost importance for the performance of their duties. ERGP notes the importance of NRAs' ability to ensure a coherent regulatory approach in their respective national markets, and that all NRAs around the table have the same set of competences, to enable ERGP to pursue coherent harmonisation initiatives.

The ERGP emphasises that the independence of the NRAs is of paramount importance for impartial and effective decision-making, safeguarding the internal postal market to promote sustainable competition, secure the provision of universal postal services and ensure affordable and quality postal services to all consumers.

In this context, ERGP stresses that it is indeed imperative that regulators fulfil their obligations in an efficient and transparent manner. The regulators' independence contributes to an effective application of the regulatory framework, as it increases their authority and decision predictability. By contrast, the effectiveness of regulation is hindered when they are not sufficiently independent and their competences and room for manoeuvre are too limited.

Their independence is a precondition for protecting them from any outside influence of market players and other government bodies. As NRAs seek to promote the EU's objectives as enshrined in the PSD, it is also desirable to promote a consistent approach of the regulators, while considering the particularities of national markets.

Harmonisation of minimum competences

The regulators' independence also stems from their capacity to use appropriate tools. ERGP considers that the obligation to entrust the NRAs with all the required competences to fulfil their



duties of monitoring compliance and regulation should be strengthened and that a broader minimum set of core competences can be defined.

The future regulatory framework should give NRAs, in a clear, precise and complete manner, improved competences regarding the collection of information from all postal market players, the enforcement of the entire postal services' regulatory framework, the obligation to provide access to services within the scope of the universal service, elements of the postal infrastructure and the postal network. Independence is also affected by an NRA's ability to enforce regulation through the application of proportionate sanctions through penalties and orders, without having to resort to national courts, and the future postal regulatory framework should confirm that this power should be given to the sectoral NRA.

Therefore, ERGP sees need to have more prescription on the duties of NRAs, the appointment and dismissal of members of NRAs, the political independence and accountability of NRAs and the regulatory capacity of NRAs.

ERGP

The new regulatory framework should confirm the lead role of the ERGP as an advisory body at the EU level. The evolution of the ERGP towards a greater independence from the European Commission should be encouraged. Independence should be central to ERGP's effectiveness and value-added. As well as bringing together the collective expertise of its constituent members for the exchange of regulatory practices, ERGP needs to strengthen its role not only to the European Commission but also to other EU Institutions.