ERGP Report on online platforms and e-retailers: implications for the future regulatory framework

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Disclaimer/General introduction

The growth in e-commerce, stimulated by the online platforms, has contributed to the increase of delivery of physical goods. Although this trend has been accentuated by the COVID-19 pandemic that accelerated the transition to digital transformation and led to the adoption of new digital purchasing behaviours by the consumers, the general landscape of digital platforms vertically integrated has not undergone substantial changes since last ERGP report on online platforms. In this context, the ERGP agreed on a follow up report, based on the referred 2021 ERGP report on online platforms, enriched and updated with data from a recent questionnaire. As a result, for ease of reference and to facilitate reading, new entries and updated text have been highlighted in bold.

1. BACKGROUND

The significant increase of marketplaces bringing together demand and supply in e-commerce is one of the developments that is shaping the postal sector.

Online platforms are gradually evolving from simple match-making intermediaries to full-service providers integrating activities along the value chain and offering multiple services to senders and users, such as the recipients of postal items.

Therefore, it is important to clarify to what extent the providers involved in platformisation and their delivery models fall within the scope of postal sector. Platforms engaged in delivery activities may gain a competitive advantage, on the supply side, arising from their vertical integration and, on the demand side, from the countervailing buying power that they can exercise as buyers of delivery services. For these reasons, there is the possibility that, in the future, the growth potential of the parcel delivery market deriving from the development of e-commerce will go mainly, if not exclusively, to the benefit of vertically integrated platforms, with competitive consequences to postal operators.

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On December 2021 the ERGP published a report on online platforms and e-retailers and the implications of considering them in the scope of the sector in the future in case they carry out postal activities.

This report is a follow-up of the version of the December 2021 ERGP Report, which updates the information of the previous report, namely with developments of the market and recent regulatory and legislative cases.

The main sources of information of this report are the ERGP questionnaires launched in 2021 and in 2022 with the specific purpose of capturing the consequences to the postal market sector of online platforms involved in delivery, which were answered by 32 National Regulatory Authorities (NRAs) of the following countries: Austria (AT), Belgium (BE), Bulgaria (BG), Croatia (HR), Cyprus (CY), Czech Republic (CZ), Denmark (DK), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Hungary (HU), Ireland (IE), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), Malta (MT), Netherlands (NL), North Macedonia (MK), Norway (NO), Poland (PL), Portugal (PT), Romania (RO), Serbia (RS), Slovakia (SK), Slovenia (SI), Spain (ES), Sweden (SE), Switzerland (CH), Turkey (TR).

Chapter 2 presents an updated analysis of the new entrants in the postal market, focusing on the implications of new developments for the postal market and on the specific case of AMAZON.

Chapter 3 provides and overview on the platforms and e-retailers as postal operators, elaborating on the national law, the regulation on cross border parcels and the authorization regimes investigates legal cases, as well as a summary of recent legal cases.

Chapter 4 gives an updated assessment of the Competition implications of considering platforms in the scope of the postal sector, including a new section on the online platforms working conditions whereas Chapter 5 focuses on the end users’ implications under the same conditions. Chapter 6 analyses the NRAs’ power to collect data, conduct investigations and control compliance with authorisation regime.

Chapter 7 addresses the implications of the recently adopted Digital Services Act (DSA) and Digital Markets Act (DMA) and their implications for the postal sector.

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3 Switzerland and Finland answered only in 2021.
Chapter 8 points out the conclusions and addresses the implications of the online platforms in the future regulation of the sector.

For the purpose of this report:

- the scope of the postal sector is limited to physical deliveries of items addressed in their final form up to 31,5 kgs⁴;
- online platforms are those that sell and deliver physical goods;
- digital platforms include a broader category of online services, comprising not only the online platforms referred above, identified as marketplaces in the DMA, but also other online platforms in different layers of the Internet value chain, including search engines, browsers, app stores, social networks and operating systems, among others.

### 2. MARKET DEVELOPMENT

#### 2.1. ONLINE PLATFORM DEVELOPMENT

Over the past decade, digital platforms have established their presence as important economic players connecting economic actors (including small and medium enterprises) amongst themselves and with end-users, boosting efficiency as well as fostering innovation and the development of new business models. They play an important role in many sectors, allowing buyers and sellers of goods and services to trade and communicate with each other. However, some of them benefit from strong advantages, including network effects⁵, economies of scale and scope and unmatchable access to users’ data, or are organized into ecosystems, that allow them to leverage their power to other services and businesses in which they operate and/or have control over key inputs and assets; these may lead to market distortions and raise concerns related to fairness and transparency⁶.

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⁴ As reported in other ERGP documents, namely the ERGP (20) 7 Report on postal definitions.

⁵ For an introduction to the economics of network effects, see, e.g., Belleflamme and Peitz, “Platforms and net-work effects” in Corchon and Marini (Eds), Handbook of Game Theory and Industrial Organization, vol. II (Edward Elgar, 2018), pp. 286–317.

⁶ As referred in economic literature, such as the Report *Unlocking the Competition* (March 2019), known as The Furman Report and CERRE *Report on Digital Markets Act: Making economic regulation of platforms fit for the digital age* (December 2020), coordinated by Alexandre de Streel.
Digital platforms are active in a great variety of sectors, in particular e-commerce, app stores, social media, financial services, transportation and hospitality. Serving as an intermediary between businesses and end-users, digital platforms mediate large trade flows inside and between countries (e.g. e-commerce sales and purchases). Indicators of the volume of trade mediated by platforms clearly show the role they play in facilitating international trade.

According to the observatory on the online platform economy, the 50 top online platforms, representing an average of over 60% of traffic share across the European Union (EU) Member States (MS), achieved worldwide revenues of almost 276 billion euros in 2018 and employed almost 600,000 people. From a business perspective, enterprises are increasingly engaging with the online economy: in 2019, almost 20% of enterprises in the EU27 conducted online sales and this trend increased by 1% in 2021. In certain countries, such as Ireland, Denmark and Sweden, more than 30% of enterprises were engaged in online sales. In terms of the actual number of enterprises selling online, the leaders were France, Spain and Germany.

### 2.2 WHAT DO THESE DEVELOPMENTS MEAN FOR THE DELIVERY AND THE POSTAL MARKETS?

In the last two years, in some countries, the postal services providers have been facing directly or indirectly an increase in competition also from digital platforms. In fact, according to the ERGP questionnaires, most European countries (24 out of 32) have noticed new entrants in the delivery sector and/or in the delivery of postal items, mainly from the digital world.

The growth in the logistics and delivery markets due to rise of on-line purchases introduced a great pressure on the postal providers, as the end users’ demand is changing, evidencing a greater concern with sustainability and time management, which partly explains the investment of the postal

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7 Electronic commerce.
8 According to the EU Observatory on the Online Platform Economy (EU Observatory), available at: https://platformobservatory.eu.
9 Idem, according to the EU Observatory, in 2019 the UK was the biggest Business-to-Consumer (B2C) e-commerce market in Europe with over 200 billion euros spent on online purchases and accounting for almost 8% of the country’s gross domestic product (GDP), followed by France (over 100 billion e-commerce revenue and 4.3% of GDP), and Germany (almost 60 billion revenue and 1.7% of GDP).
10 Available at https://platformobservatory.eu.
11 AT, BE, BG, CH, CY, CZ, FI, DE, EL, ES, HR, IE, IT, LT, LU, MT, NL, NO, PL, PT, RO, RS, SI, TR.
operators in the provision of some facilities more oriented to the customer, like parcel lockers and extended delivery schedules.

Since last year report, 12 NRAs (40 %) observed further developments, such as: a wider usage of parcel lockers for delivery by on line platforms (i.e. “EKupi.hr” in Croatia), food delivery providers who started to deliver also parcels (Slovenia), new business model (in the Netherlands, for example, the largest Dutch e-commerce platform “Bol.com” took-over a company active in parcel delivery by bike in large cities named “Cycloon Fietskoeriers” and in Ireland, a new e-commerce platform emerged, named “Shippo”, offering to e-commerce businesses and marketplaces connection to multiple shipping carriers around the world from a single API\(^\text{12}\) and dashboard. Two further NRAs indicated that Amazon started delivery under its brand (Netherlands and Ireland). Moreover, in the last year, super-fast delivery services emerged in Europe in the logistics and delivery markets, like “Getir” and “Gopuff” in Spain, among other countries, providing essentials through door-to-door delivery in few minutes in urban areas. These last online platforms have developed their own marketplace in which users can order products from traders that participate in the platform and assure the delivery either through their own means or through other courier companies. One NRA reported an increase in the number of platforms vertically integrated in delivery activities (Greece), providing para-pharmaceutical products, toys, cosmetics and pet products.

In the parcel delivery segment, there is a variety of players active in B2C delivery of goods/products bought online. In 2022, there were ten European countries\(^\text{13}\) with e-commerce online platforms vertically integrated in delivery activities (three more than in 2021), in alternative to traditional postal operators (USPs and other operators). Note that in some countries there are online platforms\(^\text{14}\) that have applied for a license as postal operators, which is under analysis by the NRA.

Recently, in Greece, Luxembourg and Turkey, some digital platforms entered the delivery market: for example, Trendyol and Hepsijet are Turkish e-commerce platforms vertically integrated, with their own delivery networks, responsible each for less than 5% (in 2020) and 9% (in 2021) of the B2C

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\(^{12}\) Application Programming Interface.

\(^{13}\) AT, CZ, DE, EL, ES, IT, LU, MT, PL, and TR.

\(^{14}\) Like Ananas, in Serbia.
parcel delivery market share, which is expected to increase in the next years. Trendyol Express is the largest courier company in Turkey in 2022.

In 2022, five NRAs reported that in their country\(^\text{15}\) the marketplace Amazon delivered through its own infrastructure parcels containing the goods sold on its marketplace and/or used private third-party delivery contractors to make the delivery, being both a competitor of the established parcel delivery services providers (PDSP) and a customer of these companies. Furthermore, Amazon was already present with its own delivery network in two more European countries\(^\text{16}\), also resorting either to the use of it or to subcontracting. In Italy in July 2022 Amazon launched ‘Amazon Shipping’, which allows retailers outside of Amazon Marketplace to send parcels through the Amazon network.

In some countries, like in Austria and Germany, Amazon direct delivery represents a small percentage of parcels generated via its online platform (below 15%, according to the NRA answers), as Amazon also uses several other parcel delivery providers (please see Box 1 on Amazon delivery activities), nevertheless direct delivery is expected to grow rapidly. Yet, in other countries, Amazon holds a market share in the B2C parcel delivery market that is not at all negligible, like in Italy, where Amazon already had a market share of 36% in that market in 2020.

Lastly, even if UK is not among the respondents to the questionnaire, it is important to mention that, according to a Report recently published by Ofcom, Amazon is one of the four\(^\text{17}\) largest operators in the UK B2C\(^\text{18}\) segment of bulk domestic parcel, having developed a large-scale parcel delivery operation through vertically integrating its own delivery services with its position as a large online retailer (and therefore buyer of parcel services from a variety of operators). Amazon delivers both its own parcels and those of other retailers which sell items on the Amazon Marketplace platform. In addition, it offers the service called ‘Amazon Shipping’ to retailers outside of Amazon Marketplace to send parcels through the Amazon network.

\(^\text{15}\) AT, DE, ES, IT and LU.

\(^\text{16}\) IE and NL.


\(^\text{18}\) Ofcom estimates that B2C accounted for between 70-80% of total domestic parcels volumes across operators.
Box 1: Amazon delivery activities

Amazon’s business models differ across European markets.

In Italy, Amazon adopts the following approaches:

(i) acts as a vendor express, by directly buying products from vendors to resell them on its platform. Then, delivers parcels to clients through its subsidiary Amazon Italia Transport (AIT) or using third-party postal operators/express couriers;

(ii) acts as a marketplace offering to third-party sellers the possibility to reach the platform’s users of the other side. For the delivery of goods sold through the platform Amazon offers them two options:

- to join the program Fulfilment by Amazon (FBA). By joining, vendors entrust their products to Amazon, and Amazon assures the delivery to the consumer: it sorts products among its logistics sites, packages them, labels them (with the name and the address of the receiver) and delivers the parcels, through its subsidiary AIT or using third-party postal operators/express couriers.

- to manage independently orders generated on the marketplace stipulating delivery contracts with third-party postal operators/express couriers (in these cases they do not join FBA).

AIT organizes and coordinates a network of local parcel delivery operators, acting in every way like an express courier in direct competition with other postal operators. AIT also owns the largest parcel-lockers network in Italy, which is used exclusively by both Amazon local couriers and other couriers and postal operators, which deliver for Amazon.

In addition, Amazon is in partnership with several Pick-up and Drop-off (PUDO) points in order to increase delivery and return options for customers.

It is also important to emphasize that, in Italy, while managing and coordinating the activities of local couriers, Amazon acts as a “parent company”, like if Amazon and local couriers were totally integrated in the same company, deeply influencing the work of the local couriers. In fact, Amazon:

(i) plans local routes and delivery stops (through a smartphone app); (ii) sets the technical and economic conditions of delivery, including the tariffs; (iii) decides performance indicators, establishing service level agreements and controlling the quality of vehicles used for delivery. In these cases, the level of economic dependency of some domestic postal operators on parcel delivery services’ demand by Amazon is significantly high.

In Germany, Amazon (which is also the largest e-commerce retailer) usually uses its own delivery network for its entire product range. The logistics network, which includes clearance, sorting and distribution centers, is operated by Amazon itself. To ensure reliable and fast parcel delivery to customers, Amazon has invested significantly in upstream logistics infrastructure, thus has many upstream steps in its own hands and is not dependent on the networks of the established parcel delivery services. In addition, it has also been active in the last mile delivery for several years as a competitor to the established parcel delivery services and delivers parcels via a network of subcontractors. Parallel to home delivery, Amazon offers its customers delivery of ordered goods to automated parcel pickup stations (“Amazon lockers”) or to special counters in local retail stores (“Amazon counter”). In addition to its own delivery, Amazon also relies on third-party parcel delivery services for delivery and return.

It is worth noting that, in Germany, Amazon is the largest customer of parcel services deliveries: a good third of the parcel volume in Germany is attributable to Amazon. However, simultaneously, Amazon deliveries through its own delivery network have increased sharply over the past several
years. With this logistics network, Amazon succeeds in meeting customer requirements such as fast delivery and a reliable and short delivery window. These quality targets are achieved not only by investing in the company's own logistics infrastructure, but presumably also by setting precise targets for the contracted parcel delivery services. Programs such as "Prime for Sellers" do the rest to bundle quality requirements as targets vis-à-vis the established parcel delivery services.

In Spain, through its subsidiaries Amazon Spain Fulfillment, S.L. and Amazon Road Transport Spain, Amazon offers last mile delivery service (home delivery or in locker), including pick-up points, using subcontractors and third-parties’ operators. Amazon operates in the Spanish market through its own network and third-parties’ networks, to cover the various phases of the postal cycle. Third-party operators are mainly used for the last mile delivery (Amazon Flex collaborators, postal operators specialized in parcel and express shipments, as well as the services of the universal service postal provider, “Correos”). In addition, for the delivery of the parcel in its final phase, Amazon has also deployed a network of parcel lockers known as Amazon Lockers, owned, managed and controlled by the Amazon group.

In Austria, Amazon, which is considered a postal provider since 2018, is both competitor and client of other postal providers depending on geographic areas: in the area of Vienna it delivers inbound-parcels (coming mainly from its hubs located in neighbouring countries), while in other areas of Austria parcels are delivered by other postal providers.

In the Netherlands, in 2021, Amazon started its own delivery services under its brand. Notwithstanding, the company goes on collaborating with small and medium-sized independent local delivery companies in addition to its existing carrier partners DHL, PostNL and Redjepakkertz to carry out deliveries outside the big cities. In July 2021, Amazon opened a new distribution centre in Schiphol Logistics Park that employs over 200 people. This Amazon centre sorts packages and manages deliveries in Amsterdam, Rotterdam, The Hague, Haarlem and Utrecht. In addition, in July 2021, Amazon launched its first delivery station in the Netherlands, in Rozenburg, which adds more speed and flexibility to Amazon’s delivery network.

In Ireland, in summer 2022, Amazon opened a fulfilment centre in Baldonnell Business Park, in Dublin. This site has created over 500 new jobs and once fully operational is expected to provide faster delivery for customers across the country seven days a week, including one-day delivery on hundreds of thousands of items.

The Dublin fulfilment centre, the first of its kind in Ireland, will hold millions of items to be picked, packed and shipped to customers across the island of Ireland and the rest of Europe. The fulfilment centre in Dublin joins the two Amazon delivery stations, based in Rathcoole and Ballycoolin. In these delivery stations parcels are sorted and loaded onto a delivery vans, which may be driven by independent contractors until the parcels’ delivery to the customer.

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19 The sorting activity carried out within Amazon’s logistic centers is “sequential”: a first sorting is aimed at distributing parcels among all couriers, both Amazon Italia Logistica (through AIT) and other postal operators/express couriers (DHL, BRT, UPS, etc.). The latter will deliver the parcels directly to the final customer. The other sorting activities take place within the delivery service managed and coordinated by Amazon Italia Logistica, consisting in distributing parcels between various Amazon’s Logistics Delivery Stations. At the Delivery Stations, parcels are then sorted again among the local couriers who will then deliver to the final customer.
3. ONLINE PLATFORMS AS POSTAL OPERATORS

As online platforms and e-retailers are progressively vertically integrating and putting their parcel delivery systems at the service of third-party sellers/users, the issue on whether considering them as postal operators has been tackled by several NRAs.

The fact that these platforms develop or carry out by themselves, or with the help of subcontractors or partners, certain phases of the postal cycle and that they deploy and manage a network that is not different from those of other postal operators, has led various NRAs to carefully examine their activity, not only in the light of national legislation but also of European legislation. This section presents the analyses of the different NRAs in this respect and the conclusions reached so far.

In 2022, nine NRAs20 reported that in their countries there are online platforms that provide postal services, beside the universal service postal providers and other national and multinational operators, such as DHL, DPD or UPS.

So far Amazon is considered a postal operator in four European countries (AT, DE, ES and IT).21 In Romania, other type of online platforms considered as postal operators have recently experienced a great increase; these platforms resell, in their own name, postal services of the most important postal service providers, through applications available on their websites. In Romania, over 20 online platforms are considered postal operators (i.e. eMAG, Tazz by eMAG). These e-commerce marketplaces do not fulfill vertical integration in the delivery sector, contracting postal operators to ensure distribution to the customer, but these are postal operators because they assume, on contractual basis, the full liability in relation to the sender regarding the delivery of items. This business model is regulated in Romania, the resellers of postal services being considered postal operators.

3.1 NATIONAL LAW

In 2022, 9 countries had online platforms vertically integrated in the delivery sector considered postal operators (AT, CH, DE, EL, ES, IT, LU, RO, TR) according to national law.

The number of NRAs that consider online platforms as postal operators increased compared to last year (they were 8 in 2021).

20 AT, DE, EL, IT, LU, RO, ES, MT and TR.

21 In France, a subsidiary of Amazon (Amazon France Transport) is registered as a parcel delivery service provider (PDSP) according to the Regulation (EU) 2018/644.
<table>
<thead>
<tr>
<th>Country</th>
<th>Platforms considered Postal Operators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria, Italy, Germany, Spain, Luxembourg</td>
<td>Amazon</td>
</tr>
<tr>
<td>Romania</td>
<td>Over 20 online platforms (e.g. eMAG, Tazz by eMAG, Colete online, woot.ro, Sezelia, AllPacka)</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Uber Portier B.V</td>
</tr>
<tr>
<td>Turkey</td>
<td>Trendyol</td>
</tr>
<tr>
<td>Greece</td>
<td>GREEN AND GO Sto ferno and Wolt</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>NAP</td>
</tr>
</tbody>
</table>

Those NRAs that assert that online platforms can act or be considered as postal operators have reached this conclusion by examining both national and European legislation. Some of these conclusions or decisions were based on the analysis of the Amazon case, since it is one of the online platforms that operate as a postal provider in most countries of the European Union, even if through different business models.

Although the market share of online platforms in parcel delivery markets varies significantly from country to country, there is an expectation that it will grow steadily.

In the questionnaire circulated in 2022, the ERGP asked NRAs: i) if there are controversial cases concerning the qualification of vertically integrated online platforms as postal operators according to their national law or any other relevant provisions. 8 NRAs\(^{22}\) out of 30 reported they are investigating the issue and monitoring online platforms’ delivery activities; ii) how the NRAs distinguish between logistics and postal activities when the vertically integrated online platforms are considered as postal operators. One of the decisive criteria for two NRAs is the weight limit\(^{23}\), for other NRAs\(^{24}\) if the item can be qualified as a postal item, the activity can be considered postal.

In Austria, Amazon was asked to notify as postal operator as it runs a sorting centre and delivers parcels through subcontractors. In this regard, each subcontractor has also to notify as an individual postal operator. Amazon is considered as a postal operator since October 2018. Amazon itself delivers

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\(^{22}\) BE, CZ, EE, HR, MT, NO, RS, SI.

\(^{23}\) MT, SK.

\(^{24}\) DE, EE, EL, ES, PL.
in the Vienna area while in other areas of Austria, Amazon parcels are delivered by other postal providers.

In Italy, Agcom’s decision n. 400/18/CONS of July 25th, 2018, established certain activities carried out by some companies belonging to the Amazon group (Amazon Italia Logistica S.r.l, Amazon Italia Transport S.r.l., and Amazon Italia Service S.r.l.) qualify as a postal provider. Agcom stated that the companies of the Amazon group have put in place a delivery service to the final customer which in no way differs from the delivery service provided by other postal operators, such as express couriers, and which includes the ordinary phases of the postal value chain - from the sorting phase to the delivery to the final customer, either at the address of the recipient or at the Amazon’s parcel lockers. In compliance with the decision, the three companies belonging to the Amazon group requested and obtained the general authorization as postal operators.

In Germany, online platforms which provide postal services, e.g. processing and delivering consignments in the interest of third parties, are considered postal operators/providers since 2016. This currently only concerns Amazon.

In Spain the regulator CNMC approved a resolution on 24 September 2020 (file STP/DTSP/006/20), stating that the companies of the Amazon Group, Amazon Spain Fulfillment S.L. and Amazon Road Transport Spain S.L., meet the circumstances to be considered postal operators, so they must proceed to the presentation of the corresponding affidavit to be registered in the General Register of Postal Service Providers managed by the Ministry of Transport (MITMA). The resolution concludes that online platforms, as well as alternative business models based on the collaborative economy, should be subject to postal regulation if their objective of providing a comprehensive service to the consumer encompasses courier and parcel services into their own organisation. Currently, the CNMC’s decision has been judicially appealed, but the Court, after rejecting partially the request for precautionary measures, has considered that the two subsidiaries of the Amazon group must be already included in the corresponding Register (which happened on 4 May 2021).

In Switzerland, PostCom, with decision n. 11/2020, stated that the Uber Portier B.V., a company providing food delivery services called Uber Eats, has to notify as postal operator.

Resolution, press release and unofficial translation of the resolution available at: https://www.cnmc.es/expedientes/stpdtsp00620

The decision is based on the following conclusions. According to Art. 4, par. 1, of the Postal Act, anyone who offers postal services to customers on a commercial basis in its own name must register its activity. Companies that are required to register bear overall responsibility for the postal service (activities included in the postal chain – acceptation, collection, sorting,
In Lithuania, only one platform named “Zitycity”, which provides not only food, but also flowers, e-shop goods at the same day, registered as postal operator by its own initiative.

In 2020 the large e-commerce platform Allegro.pl has entered the delivery sector in Poland by registering as a postal operator.27 Allegro.pl decided itself to apply for the registration in the Postal Operator Registry held by the NRA (UKE), becoming a regular postal operator. In 2020 Allegro.pl has announced plans to invest in parcel lockers throughout Poland (ca. three thousand lockers in the first phase of rollout) and opened in early 2021 first few test lockers in the centres of largest towns.

The Romanian NRA (ANCOM) reported that several resellers of postal services have been authorized under postal law: they are both competitors and customers of postal service providers. In Romania, eMag is a postal service provider, which mainly resells the postal services provided by Sameday Courier (Delivery Solutions S.A.), a postal operator largely owned by eMag, which ensures the delivery of postal items including through parcel lockers. Ride-sharing platforms offer delivery services in the cities where they are present with the passenger transport service. The resources initially only used for passenger transport services, provide now the operational chain for the delivery of postal items.28 In Hungary the platform www.eMag.hu registered its subsidiary “eMag Delivery Solution Kft” as a postal operator since it provides delivery services to the parcel lockers called “easy box” created by it.

transport and delivery of postal items) to the sender. This means that the provider maintains a business relationship with the sender who determines the content of the shipment. Whether the provider offers the services himself or whether he engages subcontractors for them is not decisive for the question of the obligation to register. Food package with cold or warm dishes, the final form of which enables postal processing, namely collection, transport and delivery to clearly identifiable recipients, also meet the criteria of a postal item. The nature of the content is not important to consider a package as a postal item. To be considered postal items, the items do not have to be cumulatively processed in the whole postal chain (acceptation, collection, sorting, transport and delivery). E.g. direct journeys where a postal item is transported directly from the sender to the recipient, sorting is completely cancelled. Even if no sorting takes place, courier services fall within the scope of the postal law. If the customer’s order is delivered to a specific location, a classic courier service within the meaning of postal legislation is offered, since the provider or its subcontractor collects the shipment in the restaurant from the sender and delivers it to the recipient to the specified address. In this case, Uber provides – like other food deliverers registered with PostCom - a postal service within the meaning of Art. 2 let. a of the Postal Act. A final criterion for the existence of postal services is whether a commercial service is provided for the benefit of a third party, i.e. whether there is a profit-oriented activity for customers. The delivery costs are charged by Uber Portier B.V. and are borne by the restaurants. If an order with subsequent delivery is received, Uber Portier B.V. contact via their platform one of their delivery partners who takes on the order. The service is fully determined by its terms and conditions set by Uber Portier B.V. who controls the whole process and is responsible for it. PostCom concludes that, the criteria for offering postal services in one’s own name are met. The delivery service offered by Uber Portier B.V. with the “Marketplace Method” represents the offer of a postal service.

27 Allegro is an e-commerce platform on which more than 100 thousand small and medium retailers, producers and importers sell to more than 20 million registered users. It is allowed to trade everything except fresh food, dangerous items, etc.

28 The food delivery platforms which also deliver non-foods goods, like Tazz by eMag, have taken steps to be authorized as postal providers. The delivery of food products prepared for immediate consumption, including the beverages that accompany these products, is not consider a postal service according to Romanian law.
In Malta three parcels forwarding service platforms (intermediary service providers) have been authorized by MCA to carry out delivery of cross-border goods ordered online, namely “Sendon” by MaltaPost, “ShipLowCost” by Express Trailers and “YouShopWeShip” by Miles Express. These providers use their delivery network to distribute postal articles to their customers in Malta (e.g. the delivery in Malta of items purchased by its customers from an overseas retailer) providing a postal service falling outside the scope of the universal postal service.

Apart from the above specificities, we can observe that in the countries where online platforms and e-retailers are considered postal operators, there are a number of common requirements or elements that appear in all the cases, namely: \( i \) the service or activity provided concerns an object falling within the definition of postal item, \( ii \) the activity concerns one or more phases falling within the postal value chain and which do not relate exclusively to transport, \( iii \) the service in question is provided on behalf of a third party and \( iv \) the organisation, management and development of the network for the provision of the parcel delivery service is not different from that used by other traditional operators in the postal sector.

In terms of authorisation regimes, none of the countries that confirmed having online platforms and e-retailers as postal operators have referred to a special type of authorisation. This is because European and national legislation does not regulate these new business models. These normative acts only consider the classic postal services. These new developments should be the subject of future legislation. Where prior authorisation is required under national postal law, it is also required for these new entrants, and the same is applicable in cases where prior registration or the submission of an affidavit is required. Note that to the extent that the postal services provided by these operators do not fall within the scope of the universal postal service, many countries do not require an individual licence as such for the prior exercise of the activity, but simply a general authorisation, involving the communication or the fulfilment of some requirements that are mitigated compared to those demanded for the provision of the universal postal service.

3.2 EU REGULATION ON CROSS-BORDER PARCELS

Some NRAs have based their conclusion or decisions regarding the qualification of online platforms parcel delivery service provider (PDSP) on the Cross-Border Parcel Delivery Regulation. More precisely,
in six countries (AT, DE, ES, FR, IT, LU\textsuperscript{29}) Amazon (or its subsidiarity companies) is also considered as a parcel delivery service provider as defined in Regulation (EU) 2018/644 and it falls within the scope of the reporting obligations set in article 4(3) of this Regulation.\textsuperscript{30}

In Arcep’s and BnetzA’s opinion, the fact that an online platform does not have a public list of tariffs for the delivery of single-piece postal items only entails that it does not fall under article 5 of Regulation (EU) 2018/644 obligations.

In Hungary, “eMag Delivery Solution Kft”, the subsidiary of the platform eMag, is registered as postal provider since October 2020, but has less than 50 employees, so it does not fall under the obligations of the Regulation.

CNMC (Spain) also based its decision on the Confetra judgment\textsuperscript{31} and in the EU Postal Regulatory framework (Postal Services Directive (PSD) and Cross-Border Parcel Delivery Regulation) which the NRA considers as key elements for drawing up a checklist to decide whether a given company qualifies as a postal operator (irrespective of its business model or whether it is a brick-and-mortar or an online business).

The relevant part of the Regulation, which has been considered by the different countries as an element to qualify platforms and e-retailers as parcel delivery service providers, is Recital 17 that states: “Providers of parcel delivery services using alternative business models, for example those drawing on the collaborative economy and e-commerce platforms, should be subject to this Regulation if they provide at least one of the steps in the postal delivery chain”. In this regard it also foresees that: “Transport alone that is not undertaken in conjunction with one of those steps should fall outside the scope of parcel delivery services, including when it is carried out by subcontractors, either in the context of alternative business models or not, as it should in that case be assumed that this activity is part of the transport sector, unless the undertaking concerned, or one of its subsidiaries or linked undertakings, otherwise falls within the scope of this Regulation.”

This recital leads also to the Confetra case, as this judgment of the European Court of Justice has been another decisive element in considering online platforms as postal operators (see chapter on legal cases).

\textsuperscript{29} In Italy, Amazon claims it does not provide cross border deliveries services.

\textsuperscript{30} An exception is France where Amazon’s subsidiarity is not considered as a postal operator but only as a PDSP according to the parcel Regulation.

\textsuperscript{31} C.J., Confetra et al., 31 May 2018, C-259/16 and C-260/16.
Both recital 17 of the Regulation and the Confetra judgment point out that the postal activity may concur as main or ancillary activity within an undertaking which in turn may provide other services such as transport or logistics. Hence, it is important to establish the boundaries with adjacent markets (such as those mentioned above) to distinguish the applicable regime and also in order to identify the obligations and consequences for this operator towards users in terms of contract conditions, complaints, compensations, etc.

The reflection on differentiation with respect to other neighbouring or adjacent markets is found in the ERGP's Report on postal definitions, where the need to be able to clearly separate these markets was noted in order to determine the applicable legislation, avoid possible conflicts between them, and to which the possible choice of a more favourable rule for the operator but less guaranteeing for the user can be added (law shopping).

### 3.3 LEGAL CASES

**Over the last two years**, most NRAs did not report legal cases regarding platforms and e-retailers as postal operators. However, some NRAs mentioned the "Confetra Case".

In its Confetra judgement, the Court of Justice established that haulage and freight-forwarding enterprises offering, as their principal business, a service entailing the transport of postal items and, as an ancillary activity, services entailing the clearance, sorting, and distribution of postal items do not fall outside the scope of the directive. For the Court of Justice, Directive 2008/6/EC did not make any change to the original text of the Postal Directive 97/67/EC, regarding any distinction between the provision of postal services as a principal activity and the provision of those services as an ancillary business. All other interpretation might cause legal uncertainty. Therefore, haulage and freight-forwarding enterprises that also provide at least one of the services of clearance, sorting, transport and distribution services for postal items are indeed postal service providers within the meaning of Article 2.1 bis) of the Postal Directive, unless the activity is limited to the transport of postal items.

This similar reasoning is the one that has been applied to platforms and e-retailers.

Even if, in compliance with the NRAs’ decisions, in Italy and Spain, Amazon registered as postal operator, it appealed NRAs’ decisions which are still pending in both countries.

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32 ERGP PL II (20) 7 Report on postal definitions.

33 Judgment of the European Union Court of Justice of 31 May 2018 in joined Cases C-259/16 and C-260/16.
Other relevant national cases, reported by IT and NL, concern labour contracts and consumer protection (transparency obligations of online platforms). In Italy, in the last few years, the legal qualification of the employment relationship between some food delivery platforms and the riders has been the subject of numerous court rulings at the request of individual workers: the courts have been asked if the riders must be considered autonomous workers or direct employees of the platform. Even if there is not a unique interpretation, it seems to prevail an orientation in favour of an employee contract.

In the most recent years, the regional labor authorities of Catalonia investigated whether Amazon’s subcontracting practices comply with the Statute of Workers Rights. They fined Amazon in 2020 and 2022 for breaching labor laws.

It is important to mention that in the last year there have been several antitrust cases concerning Amazon’s activity as an online intermediation platform. All of them concern both general competitive issues and issues directly linked to Amazon’s activity as a platform vertically integrated in the delivery sector. The latter are briefly summarized in the following paragraphs.

3.3.1 European Commission cases

On 10 November 2020, the EC opened an investigation concerning Amazon’s buy box and Amazon’s prime programme. The Commission’s attention has been drawn to alleged self-preferencing practices taking into attention that Amazon has a dual role as a platform: (i) it provides a marketplace where independent sellers can sell products directly to consumers; and (ii) it sells products as a retailer on the same marketplace, in competition with those sellers.

In the Commission’s preliminary view, Amazon artificially favors its own retail offers as well as offers of retailers using its marketplace and delivery services: the EC found that the rules and criteria for the Buy Box and Prime unduly favour Amazon’s own retail business, as well as marketplace sellers that use Amazon’s logistics and delivery services, breaching the EU antitrust rules and distorting competition in online retail markets.

34 The former is a tool which displays the offer of one single seller and allows products to be swiftly purchased by directly clicking on a buy button; the selection for the “Buy Box” display makes the respective product and retailer more visible for end customers and grants them a competitive advantage compared to other competing products and operators. In that sense, the “Buy Box” option functions like a “must-have” infrastructure for retailers. The latter is a program which offers premium services to customers for a monthly or yearly fee and allows independent sellers to sell to Prime customers under certain conditions.
In July 2022, to address the EC's competition concerns, Amazon has offered the following commitments:

- to apply equal treatment to all sellers when ranking their offers for the purposes of the selection of the winner of the Buy Box and in addition, to display a second competing offer to the Buy Box winner if there is a second offer that is sufficiently differentiated from the first one on price and/or delivery. Both offers will display the same descriptive information and provide for the same purchasing experience. This will enhance consumer choice.

- regarding Prime, Amazon commits to set non-discriminatory conditions and criteria for the qualification of marketplace sellers and offers to Prime; to allow Prime sellers to freely choose any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice; not to use any information obtained through Prime about the terms and performance of third-party carriers, for its own logistics services. This is to ensure that carriers' data is not flowing directly to Amazon's competing logistics services.

The offered commitments cover all Amazon's current and future marketplaces in the European Economic Area. The commitments would remain in force for five years. Their implementation would be monitored by a monitoring trustee who would report regularly to the EC. The EC asked all interested parties to submit their views on Amazon's proposed commitments before 9 September 2022.

3.3.2 Italian Amazon Antitrust case

The Italian Competition Authority (hereinafter "AGCM"), with decision n. 29925 of 30 November 2021 (case A528 - Amazon FBA), fined five companies of the Amazon group for abuse of dominant position in breach of Article 102 of the Treaty on the functioning of the European Union.

According to AGCM, Amazon exploited its position of "super-dominance" in the Italian e-commerce intermediation market to establish itself in the e-commerce logistics market, including "warehouse logistics" and "distribution logistics"; the latter consisting in parcel delivery services for B2C e-commerce. The abusive conduct consists in tying some advantages for sellers active on

35 They exclude Italy for the commitments related to Buy Box and Prime in view of the decision of 30 November 2021 of the Italian competition authority which already imposed remedies on Amazon with regard to the Italian market.
its marketplace to the use of its own logistics service ("Fulfillment by Amazon" or "FBA").

According to AGCM, thanks to this "self-preferencing" conduct, Amazon has acquired increasing market shares in the logistics services for e-commerce market to the detriment of competitors; in addition, it has further strengthened its dominant position in the e-commerce intermediation market.

AGCM, therefore, has imposed obligations on the five companies of the Amazon group to restore fair and undistorted competitive conditions in the relevant markets of intermediation services and logistics services for e-commerce.

In particular, AGCM imposed that Amazon:

- within 1 year will have to refrain from any intermediary role in the relationship between sellers and delivery operators, and sellers will be free to choose the operator;
- will have to adopt a system for evaluating sellers’ offers for the purposes of allocating commercial advantages that does not depend on the logistics operator chosen by the seller to process the order but is based on uniform, transparent and non-discriminatory criteria and standards, known as "standard prime" (a trustee will be responsible for monitoring compliance with the standards and any changes to them).

### 3.3.3 German Amazon Antitrust case

On July 2022 the German Antitrust Authority "Bundeskartellamt" formally determined that Amazon.com, Inc. based in Seattle, USA, is an undertaking of paramount significance for competition across markets and, according to Section 19a of the German Competition Act (GWB), it and its subsidiaries need to be subject to extended abuse control. Amazon’s turnover-based market share in marketplace services for commercial sellers in Germany amounts to over 70%.

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36 The advantages for FBA customers, consisting of increased visibility on the marketplace and better sales opportunities, resulted from the disapplication of the performance evaluation system used for the other sellers.

37 Section 19a GWB, which entered into force in January 2021 as part of an amendment to the GWB, enables the Bundeskartellamt to prohibit undertakings which are of paramount significance for competition across markets from engaging in anti-competitive practices. The validity of the decision of the Bundeskartellamt is limited to five years in accordance with statutory provisions. According to the Bundeskartellamt Amazon’s paramount significance for competition across markets within the meaning of Section 19a GWB confers the company a position of power which gives rise to a scope of action across markets that is not sufficiently checked by competition.
which in the view of the Bundeskartellamt amounts to a dominant position (the validity of the decision is limited to five years).³⁸

Furthermore, the Monopolies Commission³⁹ recommended in its 12th Sector Report Post⁴⁰ to investigate on the role of vertically integrated on-line sellers (especially Amazon) in the parcel delivery market. It constitutes that the importance of Amazon in the parcel delivery market is increasing substantially, which initially has a positive impact on competition in the relevant market. Amazon’s strong position in online trade market in the combination with its vertical integration to the parcel delivery market may enable Amazon to leverage its market power from the upstream market to the parcel delivery sector. This could lead to less competition. Therefore, the Monopolies Commission recommends monitoring the future behavior of Amazon as a vertically integrated platform operator to be able to intervene with suitable means under the competition law.

3.3.4 UK Amazon Antitrust case

On 5 July 2022, the UK Competition and Markets Authority (hereinafter “CMA”) launched an investigation under Chapter II of the Competition Act 1998 into suspected breaches of competition law by Amazon. The investigation concerns the way in which non-public third-party seller data may be used within Amazon’s retail business, how Amazon sets criteria selecting which product offer is placed within the ‘Buy Box’ and which sellers can list products under Amazon’s ‘Prime label’ on its Marketplace in the UK.

³⁸ The Authority observed that the enormous significance of Amazon’s trading platform has been increased even further by its own retail activities (so-called “hybrid structure”). Amazon has combined its wide business portfolio to form a highly integrated digital ecosystem, which facilitates the retention of user groups within it and Amazon Prime plays an important role in this respect. In addition, having control the access of other companies to sales and procurement markets and thanks to its dual role as a seller and as a marketplace, Amazon has the power to set rules and influence the business activities and business success of other companies.

³⁹ Whereas the Bundeskartellamt is an independent competition authority whose task is to protect competition in Germany, the Monopolies Commission is a permanent, independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation.

3.3.5 Conclusions

The competition cases briefly analyzed in the previous paragraphs confirm that Amazon acts with different roles in different markets: it is a major on-line marketplace operator, a demander of parcel services, a logistics company and a parcel service provider.

On the one hand, it is true that, in these roles, Amazon stimulates competition on the parcel market and improves the quality of services (e.g. its service Amazon Prime exerts a competitive pressure on other on-line sellers and it enforces higher quality of parcel services). On the other hand, its position in the on-line trade and logistics also enables it to redirect significant quantities of parcel demand to its own parcel delivery network changing the competitive conditions in the delivery market.

To sum up, from all the Antitrust cases it emerges that Amazon has a competitive advantage that can be used to increase its market share, *inter alia*, in the parcel market. Even if this initially intensifies competition in the parcel market, concerns may arise, as Amazon is a powerful platform operator and therefore may offer other on-line sellers advantages on its on-line marketplace if they use parcel services from Amazon and in this way, it can consolidate its market power, by leveraging its power on on-line market into parcel market.

4. COMPETITION IMPLICATIONS OF CONSIDERING ONLINE PLATFORMS IN THE SCOPE OF THE POSTAL SECTOR

The antitrust cases concerning namely Amazon, briefly summarized in the previous chapter, have identified the competitive implications arising from the presence in the market of online intermediation platforms that act as gatekeepers for several adjacent markets, including the parcel delivery market of interest here.

4.1 GENERAL COMPETITIVE ISSUES

Online platforms are key enablers of digital trade. The EC since 2019 observed how “the growing intermediation of transactions through online platforms, combined with strong indirect network
effects that can be fuelled by data-driven advantages by the online platforms, lead to an increased dependency of businesses on online platforms as quasi "gatekeepers" to markets and consumers."  

Online platforms are able to gain market power in the intermediation market and in adjacent markets as they are in a position allowing them to determine the rules of the marketplace and possibly also the rules based on which their clients/competitors interact. More precisely, they run marketplaces where independent sellers can sell products directly to consumers and, at the same time, they sell products on their platform as a retailer, in competition with independent sellers. As a result of this dual position, online platforms may: i) favour their own goods and services (e.g. by presenting themselves as the default sellers) and ii) appropriate large sets of data about third party sellers' activities, including non-public business data. Consequently, online platforms may be able to engineer their ranking algorithm to favour their own products, as well as those sold by merchants that receive preferential treatment.

To a larger extent, an online platform active in many businesses can make use of its ecosystem (e.g. cloud and delivery services) to further attract rents from third party sellers.

There are several reasons why permitting online platforms to discriminate against and appropriate sensitive business information from third parties might be harmful, namely the risk to undermine innovation, deter entry and compromise dynamic efficiency.

Given the important role that platforms can play in spurring innovation, protecting the integrity of online platforms as innovation catalysts should be a key goal of policy in digital markets. This would include preventing online platforms from engaging in forms of discrimination, exclusion, appropriation, and self-privileging.

4.2 COMPETITIVE ISSUES WITH PLATFORMS VERTICALLY INTEGRATED IN THE DELIVERY SECTOR

The increasing importance of certain e-commerce platforms, namely those that are integrated into ecosystems (like Amazon) and/or enjoy a gatekeeper status, and the resulting dependencies tend


42 In the meaning of the Digital Markets Act (DMA) proposal. The DMA establishes the following three cumulative criteria for the definition of a gatekeeper provider (Art. 3(1)): (i) to have a significant impact on the internal market; (ii) to operate a core platform service which serves as an important gateway for business users to reach end-users; and (iii) to enjoy an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future. Available in https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en.
to lead to strong bargaining positions of certain of them (see Box 2). This is partly due to the fact that the provision of other services by e-commerce platforms, like delivery services, allow them to benefit from leverage effects and strengthen the entrenched position they have in their core activity in which they have a gatekeeper status (e.g. by tying/bundling their services and combining data sets within a close ecosystem). In addition, as these e-commerce platforms serve as critical intermediaries, the relations/integration across business lines allow them to control the essential infrastructure needed to perform their business activities and the information available/collected on companies and consumers that use their services.

This means that even if the multiplication of e-commerce platforms has positive effects in the delivery market, as it benefits e-commerce buyers, having a positive influence both on services’ quality (e.g. faster delivery, more reliable and shorter delivery window) and on price competition (i.e. cheaper delivery and return), it may also have negative effects, as e-commerce platforms with a gatekeeper status are in a position which entails the risk of unfair practices with possible harm to business and end users as platforms are, at the same time, customers of postal service providers (demand side), and providers of postal delivery services (supply side).

Hence, on the demand side, platforms may be able to: i) negotiate better terms and conditions with postal operators (low fees or high levels of quality of service\(^{43}\) for assuring the delivery of goods purchased on the platform), which may constitute a burden to traditional postal operators, depending on how their conditions go beyond the limits the postal operators could really implement, squeezing them; ii) make use of parity clauses prohibiting postal providers from offering better conditions through any other sales marketplace; iii) unfairly favor some postal services providers to the detriment of other competing postal services providers. Therefore, traditional postal operators’ profitability may risk being compromised and small online sellers could have to pay higher prices for delivery, becoming less attractive for customers.

On the supply side, platforms vertically integrated in the delivery sector may leverage their market power from the online intermediation market onto the parcel delivery market, redirecting significant quantities of parcel demand to their own parcel delivery network. As the antitrust Amazon cases have demonstrated, this leverage may be determined also by unfair practices such as self-preference. Moreover, platforms may use relevant information/data from users to benefit the businesses that integrate the ecosystem or with which they have commercial agreements.

\(^{43}\) Or even minimum wage for local couriers’ workers, as referred in the ERGP questionnaire by AGCOM
On top of that effects, sometimes platforms activities may also entail harm for consumers arising from online purchases, deriving from: i) insufficient or no complaint management system related to the quality of service of the postal delivery (e.g. only standard responses not related to the concrete issue at stake or unfair unilateral closure of complaints); ii) lack of information regarding the choice and the identity of the postal provider delivering the parcel as well as of clarity about the delivery (especially in terms of quality of service); iii) possible bias of the choice of products by consumers (the online platform has the possibility of choosing what product to reference – as it may have attractive delivery conditions -e.g. very low price, better quality of service and this would hold the consumer captive). In case e-commerce platforms use both their own network and third parties’ delivery services, they have an incentive to cherry-picking, for example by providing delivery activities in most profitable areas, leaving delivery in remote and less attractive area to the traditional postal operators. In this way, the USPs that have an obligation to deliver in all areas might be heavily impacted by the activities of online platforms with market power.

Box 2: Amazon’s Antitrust Paradox, Lina Khan

According to Lina Khan, in her Amazon’s Antitrust Paradox paper44, Amazon has translated its dominance as an online retailer into significant bargaining power in the delivery sector, using it to secure favourable conditions from third-party delivery companies. This, in turn, has enabled Amazon to extend its dominance over other retailers by creating the Fulfillment-by-Amazon service and establishing its own physical delivery capacity. This strategy illustrates how a company can leverage its dominant platform to successfully integrate into other sectors, creating anticompetitive dynamics: retail competitors either try to compete with Amazon at a disadvantage or become reliant on a competitor to handle delivery and logistics.

The way that Amazon has leveraged its dominance as an online retailer to vertically integrate into delivery is a textbook example of how the company can use its dominance in one sphere to advantage a separate line of business. This dynamic is not intrinsically anticompetitive. However, it has to be considered that Amazon achieved these cross-sector advantages in part due to its bargaining power, because Amazon was able to demand heavy discounts from FedEx and UPS, while

other sellers faced price hikes from these companies, which positioned Amazon to capture them as clients for its new businesses.

According to this author, by overlooking structural factors like bargaining power, modern antitrust doctrine fails to address this type of threat to competitive markets.

The answers to the ERGP questionnaire in 2022 show already some signs of the impact of e-commerce platforms on the competition of the postal market as a whole and the associated concerns identified by the NRA in some European countries which are detailed in the paragraphs below.

On the one hand, e-commerce platforms have contributed to increase choices for users (both as senders and as receivers) and have introduced innovative concepts, quite different from the traditional PDSPs (sustainable delivery, focus on same-day-delivery, evening delivery)\(^{45}\), which have had a positive impact on competition, not only directly, through their offer of conditions more user convenient, but also indirectly, as traditional postal operators tend to follow some of that trends.

On the other hand, some NRAs\(^{46}\) referred that concerning behaviors related to cherry picking and labour conditions have been observed but within legal framework (as there were some cases against subcontractors regarding labour conditions). Other NRAs (such as NKOM and Ratel) highlighted that they are very concerned with the undefined legal status of the e-commerce platforms that also provide delivery services, as this uncertainty may by itself conduct to a lack of competitiveness in the parcel delivery market.

According to some NRAs\(^ {47}\), there is the risk that Amazon, as the biggest platform operator in some European countries, may leverage its market power from the platform market to the parcels services market. Therefore, it is important to monitor the market intensively. Furthermore, Amazon, through its activities as a seller and in fulfillment can make optimal use of its own network, which may lead to cost advantages over the other PDSPs.

\(^{45}\) Namely start-ups and scale-ups in Netherlands.

\(^{46}\) Like ACM, ARCEP, BIPT, ILR, MCA and RTR.

\(^{47}\) Like BNetzA.
Additionally, ANACOM that has no powers to supervise online platforms’ activity\textsuperscript{48}, stated that it has recently received complaints regarding lack of transparency of e-commerce platforms - mostly regarding service terms and conditions – which raises concerns on the possible impact on consumers and on competition (e.g., lack of transparency in service terms and conditions, practice of discriminatory conditions to remote and less populated areas).

Indeed, several NRAs outlined the importance of considering online platform that provide postal services as postal providers for guaranteeing a level playing field in the parcel market. According to them the main benefits arising from a well-functioning market, in which the same rules apply to all market participants providing identical activities, would be: (i) enabling NRAs to monitor the full market and intervene, if necessary; ii) favouring a more equal treatment of workers in the delivery sector; (iii) achieving better services and lower prices.

A specific competitive issue arises when online platforms that focus mainly on food delivery provide postal services. Food companies have increasingly implemented delivery services based primarily on third-party food-delivery platforms through which consumers can order and receive food products. These platforms can operate as gig economy services and they have spread through platforms such as Getir, TrendyolGo, Banabi. The problem is that these firms rely on self-employed workers ("independent contractors") which may result in lower service quality and less customer satisfaction compared to traditional service companies. In addition, there is a high turnover among workers of food-delivery platforms, which therefore need to retain workers and offer enough providers to guarantee deliveries. NRAs are mainly concerned about equal treatment for all postal service providers and avoidance of competition distortion practices (EL) and the protection of workers' rights by the government (TR).

Some NRAs (AT, CY, DE, FR, LT, NL, NO and SK) also observed or foresee some competition concerns in the delivery sector arising from practices of the USP. The main concern of the NRAs is that the USPs in their countries have a dominant position (with exception of SK) and have developed a nationwide network which makes them an attractive partner for online platforms. Additional issues are cross- subsidization from “letter post” (AT) and exploitation of independent subcontractors by the USP (NL).

\textsuperscript{48} As according to the current interpretation of the Portuguese Postal Law, for an entity to be considered a postal services provider in Portugal, it must provide (either directly or through third parties) all four operations involved in the postal activity, namely the clearance, sorting, transport and distribution of postal items.
In the countries of the NRAs that provided negative answer the USP has low market share (MK) and they do not have any evidence to suggest that the USP uses practices that competition distortion (BG, SE, HU, LV, MT).

As deliveries by online platforms compete with the postal delivery activities of postal operators, it should be essential to ensure that equivalent services are subject to the same principles to avoid potential market distortions. Certain characteristics of the platform ecosystem might affect competition rules, by encouraging consumers to use the services offered by the consulted platform. This could be Search Engine Optimization (SEO) techniques favouring the products and services proposed by the online platform. As such, the implementation of a level playing field favours consumers’ free choice.

### 4.3 SELF PROVISION

A particularly relevant issue that NRAs must address when considering online platforms’ delivery activities is the concept of “self-provision”, as in some cases, vertically integrated online platforms consider their delivery activities as self-provision, hence excluded from the application of the postal services’ legal framework.

In this regard, it is necessary to clarify at the outset that both the PSD and the cross-border parcel regulation consider self-provision as a postal service. More precisely, despite Recital 21 of the PSD does not include self-provision in the scope of universal service, it defines it as: “provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person.” Moreover, according to Recital 18 of the cross-border parcel Regulation, the Regulation: “should not apply to undertakings that are established in only one Member State and that have domestic in-house delivery networks only in order to fulfil orders of goods that they themselves have sold under a sales contract within the meaning of point 5 of Article 2 of Directive 2011/83/EU of the European Parliament and of the Council (5). Undertakings that also use domestic in-house delivery networks for the delivery of goods sold by third parties should be subject to this Regulation.”

If these two provisions are read together, an online platform’s delivery service can be considered as self-provision if:

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• (i) the online platform delivers only its own goods through its own network; or

• (ii) the online platform delivers only its own goods through third-party companies but, working exclusively for the online platform.

Generally, online platforms deliver both their own-goods and third-party sellers’ goods (e.g. Amazon cases in Italy and Spain), therefore, their deliveries cannot be considered as self-provision within the meaning of the European legislation.

That said, another important issue concerning self-provision is whether NRAs should take it into account when analysing postal market. Useful hints on this aspect come from the electronic communications regulatory practice, where one criterion used to determine whether self-provision should be included in the calculation of the vertically integrated operator’s market share is whether self-provision poses competitive constraints on other market players. As the BEREC observed, “the consideration of self-supply has the final aim of describing in the most appropriate manner the relevant competitive constraint faced by operators in the relevant market. In some case, considering only services provided to third parties could mislead the conclusions of the analysis”.

Following this reasoning, if an online platform delivers high parcel volumes that were previously delivered by third-party providers, the establishment of its own delivery structures and the shifting of its own volumes to its own delivery network definitely poses a competitive constraint to the market.

A final issue that deserves consideration is related to the authorisation regime. As previously noted by ERGP, when an authorization regime is in place, the self-provision undertaking benefits of an exemption treatment as it does not need an enabling title (authorization). Therefore, in a fully liberalized market, it can operate in a more favourable condition than postal providers. However, the self-provision company cannot carry out activities in competition with other providers in the reference markets. Put differently, the right to self-provision is not absolute as it encounters limits in the need not to alter the structure of the market at the expense of competition. At the same time, the concept of self-provision implies that as soon as a digital platform integrates vertically into delivery of other sellers’ goods (that is, moving away from self-provision), the platform indeed already can be

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52 While, in a monopoly situation, the notion of self-provision used to be subject to specific external requirements aimed at avoiding the expansion of the reserved area, nowadays the notion of self-provision is subject to requirements aimed at ensuring the competitiveness of the market.
regarded as a PSP. Furthermore, if the platforms are authorized as postal service providers they would be one of the postal service providers in a fully open postal market with the same rights and duties as all other alternative postal service providers according to the PSA.

4.4 PLATFORMS WORKING CONDITIONS

The postal sector represents a significant part of the European workforce. According to the EC, the sector employs around 1.8 million people, which represents 0.8% of total employment in the EU. Labour costs are an important cost element for traditional operators. New players, such as platforms, have a more favourable cost structure as they have more freedom to offer alternative contractual arrangements to their workforce. In fact, platforms that do not qualify as postal operators within the meaning of Directive 97/67 are not subject to the same worker protection obligations as postal operators. In general, traditional operators have to comply with European legal obligations. European postal regulations allow Member States to impose certain obligations on postal operators in relation to working conditions.

Article 9§1 of Directive 97/67, which deals with postal services outside the scope of the universal service, thus allows Member States to introduce «general authorizations», «to the extent necessary to guarantee compliance with the essential requirements». Article 9§2 on universal service allows to introduce authorization procedures, including «individual licences», «to the extent necessary in order to guarantee compliance with the essential requirements and to ensure the provision of the universal service». It is expressly stated that the granting of authorizations may «where appropriate, be made subject to or impose an obligation to respect working conditions laid down by national legislation».

Article 2, 19) of the Directive 97/67 defines these «essential requirements» as «general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services». These reasons are in particular «respect for the terms and conditions of employment, 

54 Recital 53 of Directive 2008/6 of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services states that: «This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which is in conformity with Community law. Equally, this Directive does not affect the social security legislation of the Member States. Where necessary, Member States may reflect working conditions in their authorization procedures in line with the principles of transparency and proportionality». 
social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement negotiated between national social partners, in accordance with Community and national law».

Some Member States have introduced regulatory measures related to the labour force of new entrants and competitors. This may include, for example, the introduction or extension to competitors of a minimum wage requirement55. Three Member States (AT, BE, NL) have adopted specific legal provisions concerning working conditions in the sector56. Several Member States (AT, BE, DE, FI, FR, NL) have adopted measures for the postal sector aimed at countering social dumping and social or tax fraud57.

These regulatory provisions are frequently supplemented by collective labour agreements between the incumbent and the unions. New entrants and competitors are sometimes invited to participate in collective agreements with the incumbent, to join other collective agreements or to conclude their own collective agreements. The USPs have such collective labour agreements in 14 European countries (AT, BE, DE, FI, FR, IE, IT, LU, NL, PL, PT, ES, SE and UK), while alternative operators in eight of the European countries (AT, BE, DE, FI, FR, IT, PT and ES)58.

The absence of labours obligations may represent a competitive advantage for new entrants and platforms compared to USPs. The regulatory requirements mentioned, whether statutory or enshrined in collective agreements, generate additional costs, which platforms are not subject to59. Platforms that compete with traditional operators sometimes benefit from lower costs and greater labour cost flexibility, which is a competitive advantage. In a 2021 Communication, the Commission states that: «Currently, however, some digital labour platforms build part of their competitive advantage not only on the innovation of their services, but also on the low cost of their labour, by contracting people who should be workers as self-employed. Misclassification results in fewer costs than what would be due otherwise: on average, companies employing their workers face 24.5% higher costs in the form of tax and social protection contributions»60.

56 Labour related regulation, Cullen, 30.09.2022.
57 Labour related regulation, Cullen, 30.09.2022.
58 Labour related regulation, Cullen, 30.09.2022.
60 Communication from the Commission, Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work, 09.12.2021, p.13.
The ability of platforms to provide services in several countries creates legal uncertainty as to which national jurisdictions and national law apply in relation to employment or social security.

The issue of working conditions for delivery personnel has received particular attention from the authorities in recent years. The automation and streamlining of procedures have led to staff reductions. The USPs have sought to introduce changes in employment conditions. Flexible part-time or short-term contracts have thus multiplied. Platforms offer new employment opportunities for low-skilled workers, but in 2021, the Commission states that: «certain types of platform work are also associated with precarious working conditions, reflected in the lack of transparency and predictability of contractual arrangements, health and safety challenges, and insufficient access to social protection»[61]. The working conditions applicable to delivery personnel employed directly or indirectly by platforms have thus attracted attention in the Member States in recent years. The European Commission has identified more than 100 court decisions and 15 administrative decisions concerning the employment status of people working via platforms in the EU[62]. Most people working for platforms are genuinely self-employed, but it is estimated that 5.5 million of them are misclassified as self-employed[63]. The protection of the rights of platform workers is thus more than ever in the spotlight.

In response to this situation, the EC published, on 9 December 2021, a proposal for a directive on improving working conditions in platform work[64]. The aim is to ensure that people who work through digital work platforms are entitled to the employment rights and social benefits to which they are entitled[65]. The proposal provides a list of criteria for determining whether the platform is an « employer ». Where two of the criteria are met, the platform is rebuttably presumed to be an employer. A platform is considered to be an employer unless the platform provides evidence of the contrary.

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62 European Commission, Improving working conditions in platform work, Fact Sheet, December 2021.

63 European Commission, Improving working conditions in platform work, Fact Sheet, December 2021.


65 Article 2§1, 2) of the proposed Directive defines the notion of «platform work» as : «any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service». 
In its 2021 Communication, the EC specifically states in relation to the proposal that: «The rebuttable presumption and criteria of employment put forward by the Directive will ensure that digital labour platforms operating through false self-employed people follow the same regulations as platforms and traditional businesses employing their workers, and therefore do not benefit from an unjustified competitive advantage»66. It is therefore also a question of establishing a level playing field between platforms and traditional businesses67. The proposed measures also contain calls to national authorities, social partners and all relevant stakeholders to take further action to improve the working conditions of people working through platforms68.

5. IMPACT ON END USERS OF CONSIDERING ONLINE PLATFORMS IN THE SCOPE OF THE POSTAL SECTOR

Parcel delivery services are a key element of the development of e-commerce69. The lockdown period associated to pandemic COVID19 intensified the switch to online shopping, which in turn increased the power of large platforms and led to a strong growth of e-commerce. According to some authors, certain behaviours adopted during the lockdown may therefore become permanent70. Strengthening consumer confidence is therefore more relevant than ever.

The general European consumer protection mechanisms are not always sufficient to prevent and resolve certain issues specific to the postal sector, namely in terms of contractual liabilities and transparency in the terms of service and contracts, so that a clarification of the European legal framework seems desirable71. The end users may be thus confronted with limitations in terms of extra-

67 European Commission, Improving working conditions in platform work, Fact Sheet, December 2021.
71 For merchants, the wide variety of applicable legal regimes in the Member States, particularly in the field of contract law, is an obstacle to the development of e-commerce. V. ALLOO and O. HRUBA, E-commerce consumer protection rules: challenges and opportunities for parcel operators, Cullen, Brussels, 06.02.2020.
contractual liability of the postal service provider, in the event of a late delivery of a parcel, damage, loss or theft of a postal item\textsuperscript{72}. The postal consumer issues have been discussed previously by the ERGP,\textsuperscript{73} being the focus of this Report the impact of the online platforms on the sector.

Certain NRAs recognize that online platforms could have a positive impact on innovation, quality of service and on the growth of the postal sector value chain\textsuperscript{74} and that, in some cases, their practices, for example in terms of assistance to consumers, could be considered as best practices\textsuperscript{75}. Nevertheless, the majority of NRAs consider that applying the postal framework to vertically integrated online platforms is necessary to avoid any kind of unequal treatment of consumers and enhance consumers’ choice\textsuperscript{76}.

The provision of delivery services, as regards online platforms, implies the involvement of several players, to different levels of intervention, pursuant to various regulations, which may give rise to some confusion. Within the framework of e-commerce, generally, it is the e-retailer who concludes a contract with the postal service provider, whereas it is often the addressee who has a ground for complaint\textsuperscript{77}. This lack of protection of the addressee, as well as the lack of mandatory refund rules and clear standards for the processing of appeals, impede the efficiency of complaint procedures\textsuperscript{78}. Certain large online platforms use cheap parcels addressed as regular mail, with no bar code and which cannot be tracked\textsuperscript{79}.

\textsuperscript{72} E-commerce consumer protection rules: challenges and opportunities for parcel operators, Cullen, Brussels, 06.02.2020.
\textsuperscript{73} ERGP PL II (20) 8, Report on Key Consumer Issues.
\textsuperscript{74} AT, DE, BG, ES, IT, LT, MT, RO.
\textsuperscript{75} According to the German regulator (BNetzA), the development by Amazon of its own delivery network seems, for instance, to bring benefits for users regarding complaint management, as Amazon is the single point of contact for users. Large platforms also strive to simplify procedures for customs clearance. They use Import One Stop Shop (IOSS), which allows European consumers to avoid paying the VAT when the goods are imported in the European Union. Digital vendors and platforms outside the European Union collect VAT and then transfer the amounts received to the European tax authorities.
\textsuperscript{76} The 2021 ERGP questionnaire reveals that several regulators (AT, BE, BG, CH, CZ, EL, ES, HR, HU, IT, PT, RO, RS, SK) are in favour of including the platforms offering postal services in the postal regulatory framework. The implementation of a level playing field should strengthen consumer protection by allowing the adoption of common quality and interoperability standards, as well as the implementation of harmonised appeal procedures to fight against unfair and abusive practices.
\textsuperscript{77} D. KRONEGGER, German ministry publishes key points on major revision of the Postal Act, Cullen, Brussels, 12.08.2019.
\textsuperscript{79} Knowing that the UPU regulation (Convention Manual, June 2019, art. 21-22) does not provide for inquiries nor compensation for these parcels in the event of a problem. See: Belgian Office of the ombudsman for the postal sector, Annual report 2020, p.26.
This lack of transparency of online platforms results partially from legal uncertainty. For example, two thirds of these online platforms do not comply with their obligations regarding consumer rights as far as information on the right of withdrawal, compensation or delivery price are concerned. At EU level, the parcel shipment service was deemed unsatisfactory by online shoppers. Hence, clear rules should be adopted regarding consumer protection in terms of tariffs transparency, quality of service and information on additional services, like track and trace. Increased transparency of tariffs and postal services should help to reinforce market competition, improve consumers’ confidence and help to develop e-commerce.

This issue was partly addressed in Article 6a of Directive 2011/83, by imposing additional information requirements for contracts that are concluded on online marketplaces. Platforms are invited to make clear to consumers which operator (third-party provider or online marketplace) is responsible for ensuring the consumer rights linked to the contract (right of withdrawal or legal guarantee).

In addition to the responsibility issue, the one regarding the choice of service provider is particularly sensitive. Users do not know exactly which options (if any) and services are offered and at what price.

80 Within the framework of the Commission’s questionnaire adopted in the context of the 2015 study, more than half of the online vendors admitted they charged buyers a higher amount than the one paid to operators responsible for the delivery. Cullen, EU rules on delivery of goods ordered online, 01.04.2020; European Commission, Online shopping: Commission and Consumer Protection authorities urge traders to bring information policy in line with EU law, Press release, 31.01.2020; Cullen, E-commerce consumer protection rules: challenges and opportunities for parcel operators, Brussels, 06.02.2020; WIK Consult, Development of Cross-border E-commerce through Parcel Delivery, European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 04.2019; J. HEARN, “Regulation. Quo vadis ?”, in The Contribution of the Postal and Delivery Sector: Between E-Commerce and E-Substitution, Topics in Regulatory Economics and Policy, Springer, 2018, p.86.


84 Directive 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, pp. 7–28. Recital 27 particularly clarifies on this matter that: "The information to be provided about the responsibility for ensuring consumer rights depends on the contractual arrangements between the providers of online marketplaces and the relevant third-party traders. The provider of the online marketplace could indicate that a third-party trader is solely responsible for ensuring consumer rights, or describe its own specific responsibilities where that provider assumes responsibility for certain aspects of the contract, for example, delivery or the exercise of the right of withdrawal."
and a growing number of consumers wish to choose the delivery method\textsuperscript{85}. Online consumers are also concerned about security and the respect of their privacy. The number of unfair, misleading and fraudulent online practices seems to be sharply increasing. The issues of data security and data confidentiality are outlined\textsuperscript{86}.

Despite the undeniable benefits that the platforms may bring to customers, it is clear from the foregoing that the measures adopted by the online platforms in terms of transparency, competition and security may also harm consumer rights. **The fact that a growing number of countries are recognizing vertically integrated online platforms offering delivery services as postal operators could, thus, enhance consumers’ confidence as it allows the imposition of transparency and quality of service obligations**\textsuperscript{87}. Several regulators are in favour of including the platforms offering delivery services in the postal regulatory framework\textsuperscript{88}. The implementation of a level playing field would strengthen consumer protection by allowing the adoption of common quality and interoperability standards, as well as the implementation of harmonised appeal procedures to fight against unfair and abusive practices. In the ERGP members’ view the main consequences of assimilating online platforms to postal service providers are the following: first, platforms’ activities would be entirely covered by the postal rules on consumer protection, so that these users would not be treated differently than users of other traditional postal operators in terms of rights, complaint procedures and transparency rules (BE, CH, IT); second, this would allow to generalise transparency measures regarding prices; third, it would expand the choice offered to consumers, allowing them to compare the delivery services conditions offered in terms of prices, environmental impact, providers’ commitment, etc (AT, PT, MT, SE, ES). The guarantee of a level playing field would also strengthen competition and positively impact end-users by favouring a broader or more flexible offer, with lower prices **namely because the online platforms would also have to comply with the transparency**
obligations regarding prices from regulation 2018/644 on cross-border parcel delivery services.

Finally, assimilation would allow regulators to gather more control monitoring data (NL and BG).

A few NRAs (EE and FI) consider that the designation of certain online platforms as postal operators does not create real advantages in terms of consumer protection, the existing regulation (competition, consumers, P2B regulation regarding platform-to-business relations) being already satisfactory. Furthermore, the compensation granted to the addressee of a parcel in case of problems, pursuant to consumer law, is often more advantageous than a compensation within the postal framework.
The entrance of online platforms in the postal market poses new challenges to the regulators, namely if their current competences, defined when the market was mainly the correspondent segment, are still fit for the initial purpose.

Furthermore, because of technological development, the boundaries between the postal sector and the electronic communications sector are getting blurred, therefore the regulatory framework must ensure that NRAs can collect all the necessary data and have consistent and appropriate regulatory tools to investigate and regulate the postal market. As noted by BNetzA, in the reply to the 2021 questionnaire: “Given the convergence of postal, telecommunications and e-commerce activities, the current focus of the legal framework on the network sector insufficiently takes into account the potential market power phenomena as well as the vertical integration and abusive behaviour strategies of the platform providers. Eventually, the behaviour of the postal incumbent must be reassessed in the light of the omnipresence of the platform providers.”

According to the answers received in 2021, in 17 countries the NRAs have full or limited regulatory powers to conduct investigations about online platforms acting in the delivery and postal sector and about delivery models or cases and to collect the relevant data. In all the countries where NRAs have limited powers, it has been mentioned that greater competences and clearer provisions are needed.

There are cases where the provisions related to the NRAs powers could be enforced only if the online platforms are subject to the authorization regime (ES, HR, PL, PT, RO, CH). Therefore, it could be useful to clarify that NRAs should have the powers to collect data and investigate any entities to the extent necessary to determine whether they are acting as postal services providers.

However, in several countries, the postal service definition does not include the provision of all the four operational stages. In this way, the provision by an online platform of any operational stage will be considered as postal service and will therefore be subject to postal legal obligations except in the cases when it only transports its own goods. As a consequence, the NRA could enforce all the provisions setting the powers to collect or investigate this segment of the market.

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89 AT, CH, ES, EL, HR, HU, IT, LT, LU, MT, NL, NO, PL, PT, RO, SE, SK.
90 HU, NL, SE.
In all the cases the data collected from the online platforms and the power to monitor these platforms are strictly related with the regulatory scope and the NRAs duties regarding the postal markets’ investigations with the aim to maintain a good functioning of the postal market.

Following the responses received to the ERGP’s questionnaire, the NRAs of 13 countries\(^{92}\) mentioned that they do not have powers to collect data and to conduct investigations related to the online platforms delivery activities as well as other platform data that could have an impact on the postal sector, but are not directly related to it (adjacent markets). This is because the legislation only allows to regulate and investigate postal providers, not other entities that cannot be considered as such; therefore, only by extending the powers through a new legislation it could be possible to conduct these investigations.

Furthermore, it is considered that the tools provided to regulators should be subject to flexible use, with a view to adopting the decisions which are the most appropriate to the problems identified.

The Significant Market Power (SMP) analysis refers to a set of ex-ante regulatory instruments, implemented under the European legislation on electronic communications\(^{93}\). This analysis includes a regulatory procedure under which the NRAs have the power to: conduct market analyses, designate one or more operators with significant market power and impose appropriate remedies intended to resolve any competition problem(s) identified on the market.

There are different opinions among NRAs regarding the tools that are mainly used in other regulated sectors, these being generally considered to be effective to promote competition as SMP concept\(^{94}\). As regards the postal sector, in only two countries (MT and NL) this regulatory mechanism is used, while another two NRA mentioned the possibility to evaluate the relevance of introducing this type of regulatory mechanism or, at the very least, to strengthen the possibilities of intervention by the national regulatory authorities (BE). On the other hand, Estonia and Finland consider that regulating the online platforms delivering their own goods is neither necessary nor appropriate and these should evolve in free market conditions.

In conclusion, even if there is not a common position on which is the best instrument to assess the postal market competition and the impact of online platforms vertically integrated on it, most NRAs

\(^{92}\) BG, BE, CZ, CY, DE, EE, FR, FI, IE, NO, SI, RS, PL.


\(^{94}\) According to the ERGP PL II Report (20) 25 on the suitability of regulatory tools to promote competition

recognise that the new regulatory framework should give to the regulators some leeway to consider technical or economic developments in their national market. The future legal framework should provide the necessary tools for NRAs to be able to investigate cross-sectoral market phenomena (for example dealing with cases of market power transfer arising from adjacent non-postal sectors) and its influence on the postal sector and take the necessary measures within the postal sector according to their findings).

7. EC DIGITAL PACKAGE

7.1 DSA AND DMA - BRIEF DESCRIPTION

The European Commission (EC) adopted two fundamental acts regarding digital regulations:

- the Digital Services Act (DSA)\(^{95}\), **adopted and published in the official journal in October 2022\(^{96}\)**, which reviews the e-commerce directive and regulates the digital services, rebalancing the rights and responsibilities of users, intermediary platforms and public authorities, with the aim of creating a safer digital space for all European Union (EU) users of digital services and protecting the fundamental rights of users; and

- the Digital Markets Act (DMA)\(^{97}\), **adopted in July 2022\(^{98}\)** and **published in the official journal in October 2022\(^{99}\)**, that aims at establishing a level playing field and foster innovation, growth and competitiveness in the EU’s single market, by addressing the competitive concerns raised by large digital platforms that act as gatekeepers, which are currently not addressed by competition rules.

The DSA seeks to make online marketplaces safer and transparent and address illegal content to the benefit of both consumers and companies. It sets out the following enforceable obligations and


\(^{96}\) Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A277%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A277%3ATOC)


\(^{99}\) Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC)
increased accountability rules that apply to all intermediary service providers, that connect consumers
to goods, services or content\textsuperscript{100}:

- single contact point (Art. 11): made publicly available for MS authorities, the European Board
  for Digital Services and the EC to communicate with, and sets the language for
  communications (must be an official EU language, including a language of the MS where the
  service provider has its "main establishment" or legal representative);
- EU legal representative (Art. 13): due to the extra-territorial scope of the DSA, providers that
do not have an "establishment" in the EU, but offer their services in the EU, must appoint an
EU legal representative. The DSA representative will act as a point of contact but can also be
held legally liable for the provider's non-compliance with the DSA. Under the DSA "one stop
shop", a provider will be under the jurisdiction of the MS where its DSA representative is
established; if it fails to appoint a DSA representative, it will be subject to the jurisdiction of
every MS - this should incentivize non-EU providers to appoint representatives. The details of
the representative should be notified to the Digital Services Coordinator (DSC) in the MS
where the representative is established;
- terms and conditions (Art. 14): shall include information on any restrictions on user-provided
information, including details of any policies, procedures and tools used for content
moderation, including algorithmic decision-making and human review. Additionally, providers
are obliged to enforce these restrictions in a diligent, objective and proportionate manner;
- transparency (Art. 15): publish reports (at least annually) on any content moderation activities
during the reporting period, containing certain minimum information (exemption for micro
and small enterprises).

Besides the above-mentioned obligations, others are applied to the other intermediary service
providers - these being the very large online platforms and the very large online search engines,
subject to the most onerous obligations under the DSA.

\textsuperscript{100} Notwithstanding, the DSA recognizes that the size of different "intermediary services" and the scope of their user base
warrants different obligations and responsibilities. Therefore, the proposed wording of the DSA seeks to match the
obligations and responsibility of intermediaries to the role, size and impact of the organization in the market – naturally
these become more onerous for the larger players. Thus, the proposal introduces the following categories of intermediary
services: (i) providers of hosting services, including online platforms; (ii) "online platforms" only (excluding other types of
"hosting services"); and (iii) "very large online platforms and very large online search engines". The last category is defined
as those online platforms and very large online search engines that provide services to 45 million or more active users in the
European Economic Area, on a monthly average basis, and which are designated as very large online platforms or very large
online search engines pursuant to (Art. 33(4)).
The supervision of this regulation will be composed of national regulatory authorities to be appointed by each MS and a national DSC, who should perform its functions independently, with extensive investigative and sanctioning powers. The competent national authorities should coordinate their work within a new European Board for Digital Services, as well as other coordinating entities that already exist, for example, in the electronic communications sector.

Complementarily, the core goal of the DMA is to restore fairness and contestability in digital markets where digital platforms acting as ‘gatekeepers’ are present. In brief, gatekeepers are large digital platforms that play a particularly significant role in the economy because of their size and their importance as gateways for business users to reach end users, position which is foreseeable they will enjoy soon.101

According to Art. 2, the DMA is applicable to gatekeepers with activity in the following ten Core Platform Services (CPS): online intermediation services (including, but not limited to marketplaces, app stores and sector specific intermediation services; e.g. mobility, transport or energy); online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; web browsers; virtual assistants; cloud computing services; and advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, offered by a provider of any of the CPS referred previously.102

The DMA states103 that the EC shall regularly review: (i) whether the designated gatekeepers still satisfy the requirements laid out in Art. 3(1)104; (ii) if there are new CPS providers that satisfy the requirements laid out in Art. 3(1). Such a review is supposed to take place regularly, at least every three years or when there have been substantial changes in the circumstances on which the decision was based.

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101 The DMA establishes the following three cumulative criteria for the definition of a gatekeeper provider (Art. 3(1)): (i) to have a significant impact on the internal market; (ii) to operate a core platform service which serves as an important gateway for business users to reach end-users; and (iii) to enjoy an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future. Linked to these criteria, Art. 3(2) of the DMA introduces quantitative thresholds for each of them, above those a rebuttable presumption that the qualitative criteria are established. Furthermore, if the CPS provider does not satisfy each of the thresholds and criteria above mentioned, the EC, according to Art. 17, may conduct a market investigation for the purpose of examining whether a provider of CPS should be designated as a gatekeeper considering qualitative criteria.

102 According to Art. 17, the EC may also conduct a market investigation with the purpose of examining whether one or more services within the digital sector should be added to the list of CPS of this Regulation.

103 In Art. 4.

104 Such a review is supposed to take place regularly, at least every three years or when there have been substantial changes in the circumstances on which the decision was based.
requirements\textsuperscript{105}, and (iii) if the list of the relevant CPS provided by the gatekeepers need to be adjusted. \textit{Such a review is supposed to take place at least every three years.}

The DMA foresees a wide range of directly applicable obligations\textsuperscript{106} to which the platforms designated as gatekeepers will be subject to, including the following:

- prohibition of using any data that is not publicly available when the platforms compete with business users and, in particular, data that is generated by the activity of those users on the CPS;
- prohibition of certain practices considered unfair, such as preventing users from uninstalling pre-installed software or applications;
- obligation to guarantee effective data portability, allowing, in particular, end users to exercise the data portability right;
- prohibition of more favorable treatment of services or products offered by the gatekeeper or by group companies, to the detriment of third-party services or products;
- obligation to make free available to digital advertisers, at their request, performance data and all necessary information related to their ads on the platforms; and
- obligation to provide professional users, or third parties authorized by a professional user, free of charge, with access to data provided or generated in the context of the use of essential platform services.

Other articles, such as Art. 12 and 13 of the DMA, also contain obligations with regards to the notification of concentrations and obligation of having profiling techniques audited, which both aim to reduce asymmetry of information.

This Act gives the EC exclusive competence to assess the status of a gatekeeper, benefiting from the support of an advisory committee (\textit{the Digital Markets Advisory Committee})\textsuperscript{107} in the control of the fulfilment of the foreseen obligations.

\textsuperscript{105} Whether new undertakings providing core platform services satisfy those requirements shall be examined at least every year.

\textsuperscript{106} Listed in Art. 5 and 6. And also includes two mechanisms to update the gatekeeper’s obligations set out in those articles, via either: (i) delegated acts according to Art. 12 and 49 of the DMA, and market investigations according to article 19; or (ii) a legislative review of the DMA initiated by legislative proposals by the EC based on review evaluations to be conducted every three years according to Art. 53.

\textsuperscript{107} In accordance with Art. 50 and within the meaning of Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011.

7.2 P2B REGULATION

The EU Regulation on platform-to-business relations (P2B Regulation) is the first ever set of rules for creating a fair, transparent and predictable business environment for smaller businesses and traders on online platforms. It is part of the EU’s Digital Single Market Strategy initially proposed in December 2015.

It entered into force in July 2019, became effective from 12th of July 2020, and aims to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities.

The P2B Regulation applies to providers of 'online search engines' and 'online intermediation services' that enable businesses to sell goods or services to consumers located in the EU, regardless of where that business is based. It impacts the content of their terms and conditions.

The gateway position of online platforms, which enables them to organize millions of users, entails, on the other hand, the risk of harmful trading practices, against which businesses have no effective redress.

With the P2B Regulation, there’s a commitment to take actions against unfair contracts and trading practices in platform-to-business relations, and so to create greater confidence in E-commerce. As such unfair contracts and trading practises may affect the delivery services (e.g. postal delivery contracts between the platform and its business users), the P2B regulation may represent a useful tool also for the postal sector.

In 2022 only 5 NRAs (HR, MT, NL, TR, IT) reported having competences regarding the P2B regulation. In Croatia the competence is shared with the Ministry of Economy and Sustainable Development. In the Netherlands the NRA has been selected as the competent authority but the legal basis for public supervision has not been arranged by law. At the moment, an implementing act that is being prepared to provide for oversight by the NRA is expected to enter in force in the second part of 2023. Until that moment the NRA formally does not have powers. Moreover, in Czech Republic and in Portugal the NRA is the entity that is appointed to have competences, but the national legislation has not been approved yet.

In the other cases the competence is assigned to the Competition Authority (AT, NO, BE, FR, HU), the ministry (SK, SI, EL, ES, IE, SE are competent) or the Consumer Protection Agency (LV, RO).

In Germany the P2B regulation is not enforced by authorities but the enterprises have to comply with the provisions of the P2B regulation; non-compliance can be enforced through civil law
instruments. In the Republic of Macedonia there is no specific competent government authority, except State market Inspectorate, pursuant to Law on trade. In Poland is still not defined. The same in Portugal where the NRA is accompanying the legislative procedure concerning the act that will implement Regulation P2B. As the act has not been approved yet, it is too soon to know if the NRA will have competences in respect to P2B regulation.

7.3. COULD THE DSA AND THE DMA BE APPLIED TO THE POSTAL SECTOR?

None of the Regulations makes in its text reference to postal services providers, nor identifies this type of services as being part of their scope. Notwithstanding, considering that: (i) new players in the postal sector often come from the e-commerce sector and use innovative business models to enter, namely by integrating the delivery phase in their value chain (please see chapter 20); (ii) in nine European countries large digital platforms have already been considered postal services providers\(^\text{108}\); (iii) one of the large digital platforms is considered a postal service provider (Amazon) in four different European countries\(^\text{109}\); (iv) the referred large digital platform is eligible to DSA and DMA, those proposals for regulation may be applied to postal services providers, which may lead to the application of different regulatory tools by different regulatory authorities towards postal service providers, eventually with impact on the postal market.

To this aim, the specific relation among the DSA, the DMA and the postal regulatory framework deserves careful consideration to avoid conflicts and guarantee the consistent application of obligations by different authorities. In this regard, it is important to observe that, in the European parliamentary debate on the DMA, several amendments have been presented aimed at mentioning explicitly postal delivery services among the “ancillary services” and at considering ancillary services when establishing obligations for gatekeepers\(^\text{110}\).

\(^{108}\) AT, CH, DE, ES, IT LT and RO.

\(^{109}\) AT, DE, ES and IT.

\(^{110}\) The amendment is the Draft report of Andreas Schwab, available at: https://www.europarl.europa.eu/doceo/document/IMCO-AM-695196_EN.pdf. “Ancillary service’ means services provided in the context of or together with core platform services, including payment services as defined in point 3 of Article 4 and technical services which support the provision of payment services as defined in Article 3(j) of Directive (EU) 2015/2366, fulfilment, parcel delivery as defined in Article 2 paragraph 2 of Regulation (EU) 2018/644, freight transport”. On 27 September 2021, the Members of the European Parliament lead Internal Market and Consumer Protection (IMCO) committee took into consideration this amendment to the DMA.
From a different perspective, a more specific remark could be made concerning the designation of gatekeepers according to the DMA. The provision of postal services (and especially delivery services) may lead e-commerce platforms to benefit from leverage effects and strengthen the entrenched position in the core platform services (CPS) in which they have a gatekeeper status (e.g. by tying/bundling their services and combining data sets within a close ecosystem), notwithstanding this type of approach seems to be lacking in the DMA, which includes, in the case of e-commerce platforms vertically integrated with delivery services, both digital and physical markets.

7.4 MAIN CONCERNS POTENTIALLY RELATED WITH THE POSTAL SECTOR

The increasing importance of certain e-commerce platforms for business users and the resulting dependencies have led to strong bargaining positions of certain e-commerce platforms, and especially when these platforms are gatekeepers. On that basis, these platforms are in a position which entails the risk of unfair practices to the detriment of business users which go beyond fair business practices. When these e-commerce gatekeepers provide traditional postal services, through which they ensure the delivery of parcels, some of the following concerns may arise:

- imposition of unreasonable terms to postal services providers, like very low fees or high levels of quality of service\(^{(111)}\) for assuring the delivery of goods purchased on the platform;
- use of parity clauses prohibiting postal providers from offering better conditions through any other sales marketplace;
- unfairly favorable treatment of some postal services providers to the detriment of other competing postal services providers;
- insufficient complaint management system related to the quality of service of the postal delivery (e.g. only standard responses not related to the concrete issue at stake or unfair unilateral closure of complaints);
- imposition of pressure on postal providers, not only on their delivery network, but also on their costs as a whole;
- lack of information regarding the postal provider delivering the parcel as well as of clarity about the delivery (especially in terms of quality of service) for the end users.

In the case of the gatekeepers that are both vertically integrated in an ecosystem and active in the delivery services, they are able and have the incentive to self-preference for their delivery services

\(^{(111)}\) Or even minimum wage for local couriers’ workers, as referred in the ERGP questionnaire.
benefiting from it (according to their business strategies). For example, by differentiating geographically the delivery, when the digital platform is both competitor and client of other postal providers.

Even if some of the concerns referred above are generally considered in the DMA, and the directly applicable obligations previewed can swiftly address some of them, their specificities being much more complex and requiring a more detailed analysis, do not seem to be considered. E-commerce platforms with a gatekeeping status acting also as postal services providers are not directly addressed by the DMA, as it mainly focusses on gatekeepers’ providers of CPS having this status whereas postal services are not identified in the DMA as a CPS.

This means that the DMA only impacts indirectly on the postal services, even if some gatekeepers have the possibility to leverage the power they have in some CPS to postal services and vice-versa. The current DMA proposal does therefore not address the issues raised in this report, especially the ones resulting from the vertical integration of certain market players with a gatekeeping status.

The legal qualification of an e-commerce platform as a gatekeeper, according to the DMA designation mechanism, and the concerns referred above, that derive from the relation between the e-commerce platforms and the postal services providers (many times integrated into an ecosystem) may serve as an indicator of the significant intermediation power those platforms have, which justifies the imposition of ex-ante remedies under the DMA framework in circumstances where classic market analysis methodologies may be difficult or insufficient when online platforms are concerned.

The obligations under the DSA are transversal to all sectors, whereby they are also applicable to all intermediary services providers that operate in the postal sector. However, they tend to complement the current postal services regulatory framework, thus, an overlap between these two frameworks should be avoided.

In conclusion, online platforms (independently of their dimension and designation in the DSA and DMA regulations) that are registered in some countries as postal services providers will have to comply with

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the rules applicable to postal providers, while they will also have to comply with the obligations set in the DMA and the DSA, where applicable, that will be enforced and supervised at EU level (in the DMA case) or even by other MS, if the online platform has its main establishment located there (in the DSA case).

In this respect, it is important to ensure clear competencies among the different entities involved, to reduce regulatory uncertainty for market players and consumers and to safeguard the effectiveness of the measures applied at different levels. Namely, overlap of competences as for as, for example, in what concerns access to the postal networks, should be avoided. Therefore, it would be relevant to strengthen the role of NRAs, as they are also in a good place to identify emerging challenges related to digital platforms and advise the EC namely when there are market investigations into new practices affecting the efficient performance of the postal market.
8. CONCLUSIONS: IMPLICATIONS FOR THE FUTURE REGULATORY FRAMEWORK

Digital platforms are active in a great variety of sectors, such as e-commerce, apps, software, social media, financial services, transportation and hospitality. Serving as an intermediary between businesses and end-users, they mediate large trade flows inside and between countries (e.g. e-commerce sales and purchases).

Online platforms and e-retailers operating in e-commerce sector faced a huge growth in recent years in all European countries, even if at different pace. E-commerce’s demand of delivery services has boosted parcel volumes’ growth. Consequently, an increasing number of online platforms, that used to be traditional postal operators’ customers, have developed their own delivery networks, thus also becoming competitors of traditional postal operators.

Having developed their own delivery network and put it at the service of third-party sellers/users, the issue on whether considering online platforms as postal operators has been tackled by several NRAs. The fact that these platforms develop or carry out by themselves, or with the help of subcontractors or partners, certain phases of the postal value chain and that they deploy and manage a network that is not different from those of other postal operators, has led various NRAs to carefully examine their activity, not only in the light of national legislation but also of European legislation.

Several regulators are in favour of including the platforms offering delivery services in the postal regulatory framework as it could enhance consumers’ confidence through the implementation of a level playing field. Thus, a growing number of countries are recognizing vertically integrated online platforms offering delivery services as postal operators.

In 2022, according to the ERGP data, there are nine European countries with online platforms providing postal services, in alternative to the universal service postal providers and other national and multinational operators, such as DHL, DPD or UPS.

Considering the economic power that online platforms exert both on the demand and supply sides, their entrance in the postal market has indubitably implications for the competitive conditions in it. There is a consensus on the idea that online platforms should be treated as any other PSP when entering postal activities to guarantee a level playing field in the parcel market. It seems essential to ensure a level playing field in terms of working conditions between platforms offering parcel delivery services, universal service providers and other traditional postal operators. Furthermore, the

\[^{114}^{114}\text{AT, DE, EL, IT, LU, RO, ES, MT and TR.}\]
application of the postal framework to vertically integrated online platforms would also benefit consumers avoiding any kind of unequal treatment and enhancing their buying’s choice.

In the countries where online platforms are considered postal operators, there are a number of common points: i) the service or activity provided concerns an object falling within the definition of postal item, ii) the activity concerns one or more phases falling within the postal value chain and which do not relate exclusively to transport, iii) the service in question is also provided on behalf of a third party and iv) the organisation, management and development of the network for the provision of the parcel delivery service is not different from that used by other traditional operators in the postal sector. Therefore, online platforms and alternative business models based on the collaborative economy may be subject to postal regulations as long as they provide postal services and parcels delivery services, as defined respectively by the Postal Services Directive and by Regulation 2018/644.

As the postal services provided by such operators might not fall within the scope of the universal postal service, many countries do not require an individual licence but simply a general authorisation, involving the communication or the fulfilment of some requirements prescribed by the applicable postal act. The exception of the self-provision regime would not be applicable to these operators when they are not at the origin of a part of the goods or shipments they manage.

As labour costs are an important cost element in the postal sector, new players, such as platforms, have an advantage on competitors in terms of more favourable cost structure as they have more freedom to offer alternative contractual arrangements to their workforce. Most people working for platforms are genuinely self-employed, but it is estimated that 5.5 million of them are misclassified as self-employed. Some Member States have, thus, introduced regulatory measures related to the labour force of new entrants and competitors. This may include, for example, the introduction or extension to competitors of a minimum wage requirement. Furthermore, the European Commission published, on 9 December 2021, a proposal for a directive on improving working conditions in platform work providing a list of criteria for determining whether the platform is an «employer».

Considering the role of online platforms in developing an innovative postal market, the postal framework should allow NRAs to monitor and/or to regulate the online platforms acting in the delivery sector or at least to collect the data considered to be relevant for the postal sector. This should also include the possibility of collecting data from online platforms that could have an impact on the postal sector but are not directly related to it (adjacent markets). It is also important for NRAs to have the necessary tools to address the cross-sectoral nature of online platforms’ activities that provide postal services. NRAs tools and competences regarding the online platforms acting in the postal sector
should be flexible enough to allow the implementation of measures, if it is the case, according to the national circumstances and in the benefit of the users and the postal market in general.

Finally, being the digital platforms also the object of some important recent of EU regulation, the specific relation among the DSA, the DMA and the postal regulatory framework deserves careful consideration to avoid conflicts and guarantee the consistent application of obligations by different authorities. In this regard, it is important to observe that, during the European parliamentary debate on the DMA, several amendments have been presented aimed at mentioning explicitly postal delivery services among the “ancillary services” and at considering ancillary services when establishing obligations for gatekeepers.