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WIK-Consult • Final Report

Study for the European Commission, Directorate General for Internal Market and Services

The Role of Regulators in a More Competitive Postal Market

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The views and opinions expressed in this study are those of the authors and do not necessarily reflect the position of the European Commission.

Bad Honnef, September 2009

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Terms and Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
ANACOM	National Communications Authority (Portugal)
ANCOM	National Authority for Management and Regulation of Communications (Romania)
ANRC	National Regulatory Authority for Communications (old name of Romanian NRA ANCOM)
ANRCTI	National Regulatory Authority for Communications and Information Technology of Romania (old name of Romanian NRA ANCOM)
APEK	Post and Electronic Communications Agency of the Republic of Slovenia
ARCEP	Regulation Authority for Electronic Communications and Posts (France)
ART	Regulation Authority for Telecommunications (old name of French NRA ARCEP)
Art.	Article
Arts	Articles
AT	Austria
B2B	Business-to-business
BdKEP	Bundesverband der Kurier-Express-Post-Dienste e.V.
BE	Belgium
BEREC	Body of European Regulators for Electronic Communications
BG	Bulgaria
BIPT	Belgian Institute for Postal Services and Telecommunications
BNetzA	Bundesnetzagentur (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway, Germany)
CCMAU	Crown Company Monitoring and Advisory Unit (New Zealand)
CEER	Council of European Energy Regulators
CEN	European Committee for Standardisation
CEO	Chief executive officer
CERP	European Committee for Postal Regulation
CGAB	European Code of Good Administrative Behaviour
CNSP	Comisión Nacional del Sector Postal (Spain)
ComReg	Commission for Communications Regulation (Ireland)
CTT	Correios de Portugal, S.A.
CTU	Czech Telecommunication Office
CY	Cyprus
CZ	Czech Republic
DBP Telekom	Deutsche Bundespost Telekom
DE	Germany
DG	Directorate General (of the European Commission)
DGRSP	General Direction of Postal Services Regulation (Italy)
DK	Denmark
DPAG	Deutsche Post AG

e.g.	Exempli gratia (for example)
EC	European Commission or European Community
EC Treaty	Treaty establishing the European Community
ECA	European Competition Authorities
ECJ	European Court of Justice
ECN	European Competition Network
ECR	European Court Reports
ed	Editor
eds	Editors
EE	Estonia
EEA	European Economic Area
EETT	Hellenic Telecommunications And Post Commission (Greece)
EFTA	European Free Trade Association
EL	Greece
ELTA	Hellenic Post
ENTSO	European Network of Transmission System Operators
EPT	Entreprise des Postes et Télécommunications Luxembourg
ERG	European Regulators Group
ERGEG	European Regulators Group for Electricity and Gas
ERGP	European Regulators Group for Postal Services (a possible future organisation proposed by this report)
ERRA	Energy Regulators Regional Association (Central/Eastern Europe)
ES	Spain
etc.	et cetera
ETOE	Extraterritorial office of exchange
EU	European Union
Eurostat	Statistical Office of the European Communities
FAQs	Frequently asked questions
FEDMA	Federation of European Direct and Interactive Marketing
ff.	And the following pages
FI	Finland
Ficora	Finnish Communications Regulatory Authority
FMO	Full market opening
FR	France
FSC	Fastest standard category
GA	General authorisation
HU	Hungary
i.e.	Id est (that is)
Ibid.	Ibidem (at the same place)
ICN	International Competition Network
IE	Ireland
IERN	International Energy Regulation Network

ILR	Luxembourg Institute for Regulation
IMPC	International mail processing centre
IMPC code	Code for international mail processing centres issued by the UPU
IRG	Independent Regulators Group
IS	Iceland
IT	Italy
LI	Liechtenstein
LP	Letter post
LT	Lithuania
LU	Luxembourg
LV	Latvia
MCA	Malta Communications Authority
MIT	Ministry of Industry and Trade (Czech Republic)
MNV Zrt.	Hungarian State Holding Company
MoU	Memorandum of Understanding
MS	Member State (EU)
MT	Malta
NARUC	National Association of Regulatory Utility Commissioners (USA)
NCA	National competiton authority
NCPA	National consumer protection authority
NHH	National Communications Authority (Hungary)
NL	The Netherlands
NMa	Nederlandse Mededingingsautoriteit (Dutch competition authority)
NO	Norway
No.	Number
NPT	Norwegian Post and Telecommunications Authority
NRA	National regulatory authority
NZ	New Zealand
OCCP	Polish Office of Competition and Consumer Protection
OCECPR	Office of the Commissioner of Electronic Comm. and Postal Regulation (Cyprus)
OECD	Organisation for Economic Co-Operation and Development
OFT	Office of Fair Trading (United Kingdom)
OJ	Official Journal of the European Union
OPTA	Independent Post and Telecommunications Authority (Netherlands)
p.	Page
PIB	Principles of implementation and best practice
PL	Poland
POL	Post Office Limited (United Kingdom)
Postcomm	Postal Services Commission (United Kingdom)
PostEurop	Association of 48 European public postal operators

pp.	Pages
PPO	Public postal operator
PT	Portugal
PT	Project team (of CERP)
PTA	Post And Telecom Administration (Iceland)
PTS	National Post and Telecom Agency (Sweden)
PTT	Ministry of posts, telegraphs, and telecommunications (traditional name for postal administrations)
QoS	Quality of service
RegTP	Regulatory Authority for Telecommunications and Post (old name of German NRA BNetzA)
RO	Romania
RRT	Communications Regulatory Authority (Lithuania)
RTR	Austrian Regulatory Authority for Broadcasting and Telecommunications
SE	Sweden
SI	Slovenia
SK	Slovakia
SKR	Swedish Krones
SKS	Svensk Kassaservice (former Swedish postal bank)
SMEs	Small and medium enterprises
SNELPD	Syndicat national des entreprises de logistique et de publicité directe (French trade association representing mail-preparation firms). In 2006, this name changed to SELCED (Syndicat des entreprises de logistique de communication ecrite directe)
SOE	State-owned enterprise
SOI	Statement of corporate intent
SPPL	Singapore Public Postal Licensee (public postal operator of Singapore)
TAXUD	Directorate-General for Taxation and Customs Union (of the European Commission)
TKK	Telekom-Control Commission (Austria)
TKKP	Postal Regulation of Telekom-Control Commission (Austria)
TNT	TNT International Mail in the Netherlands
TPG NV	Dutch postal operator (formerly public postal operator, now privatised)
UK	United Kingdom
UKE	Office of Electronic Communications (Poland)
UNCTAD	United Nations Conference on Trade and Development
UPU	Universal Postal Union
US	Universal service
USO	Universal service obligation
USP	Universal service provider
UVK	Competition Protection Office

VAT	Value added tax
Vol.	Volume
WIK	WIK Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste GmbH
ZNER	Zeitschrift für Neues Energierecht (German journal)

Executive Summary

Overview

The purpose of this study is to identify appropriate next steps for the regulators of postal services in the Member States of the European Union (EU) and European Economic Area (EEA) in light of the evolution of postal markets, best regulatory practices, and the ongoing transposition of the 'Third Postal Directive'.

In the last two decades, postal services — collection and delivery services offered by public and private operators — have undergone a period of rapid and fundamental evolution. Advances in electronic communications, information processing, and transportation systems have precipitated basic changes in the supply and demand for postal services. These market developments have been overlain by legal and institutional changes accompanying the creation of a single European market.

Beginning with the Postal Directive adopted in 1997, Community legislation has sought to harmonise and improve postal services in the Member States. The directive requires Member States to regulate postal markets to ensure a universal postal service meeting minimum specified criteria, while at the same time embarking on a course of 'gradual and controlled liberalisation' and giving basic protections to users (senders and addressees) of universal services. To implement these obligations, the directive requires Member States to establish one or more 'national regulatory authorities' (NRAs) for the postal sector.

The Postal Directive has been amended twice. The 'Second Postal Directive' (the original Postal Directive as amended in 2002) has been transposed into national law by all Member States of the EU and EEA. The 'Third Postal Directive' (the Second Postal Directive as further amended in 2008) must be transposed by 31 December 2010 at the latest (some Member States have until 31 December 2012). The Third Postal Directive completes the program of liberalisation begun in the original Postal Directive by requiring Member States to end all postal monopolies and implement other changes consistent with 'full market opening'.

This study seeks to assist the NRAs and other regulators of postal markets — i.e., ministers, legislators, national competition authorities, etc. — to establish a sound basis for implementing the Third Postal Directive by:

- reviewing the manner in which Member States have implemented the original Postal Directive and its 2002 amendment;

- summarizing the role of the competition authorities and general competition law in regulating European postal markets;
- describing preparations and studies undertaken or planned for implementation of the Third Postal Directive;
- identifying 'best practices' in the regulation of postal markets by postal and competition authorities, where 'best' reflects the objectives and requirements of the Third Postal Directive; and
- identifying potential gains and appropriate mechanisms for cooperation among national regulatory authorities in order to implement the Third Postal Directive most efficiently and effectively.

Overall conclusions and recommendations

Key regulatory tasks

In summary, we believe that, to implement the Third Postal Directive effectively, the Commission, Member States, and NRAs must focus first on the following six overarching regulatory tasks:

- *NRAs must develop accurate and appropriate regulatory accounts for postal services jointly produced by a postal service provider that possesses significant market power in the provision of universal postal services.* The directive sets out many important tasks for the NRA. Nonetheless, development of regulatory accounts deserves particular emphasis. Accounting regulation is the most technically challenging task faced by the NRA. At the same time, accounting regulation serves as the foundation for the benefits foreseen for end users because it is critical to both ensuring universal service and achieving full market opening.
- *Member States and NRAs must periodically evaluate and adapt the best postal regulatory practices developed by other industrialised countries.* No country or regulator has a monopoly on the supply of sound ideas and good practices. A wide range of countries and regulators have developed approaches that are worthy of consideration by all. At the same time, few Member States and regulators have developed a process for regularly evaluating and adapting the best practices of other countries. Such a process should be incorporated into the regulatory approaches of all Member States.

- *Member States and national regulatory authorities must develop a new view of their role as regulators of the postal services market, one that is both broader and more limited.* The original Postal Directive primarily emphasised ensuring universal service through regulation of designated 'universal service providers' (USPs). The Third Postal Directive has adopted a more balanced emphasis on three objectives: ensuring universal service, full market opening, and protection of users of all types of postal services. Member States need to ensure that NRAs broaden their focus accordingly. At the same time, in adopting a broader regulatory focus, national regulatory authorities will also need to develop a reasoned doctrine of 'forbearance'. That is, postal regulators, like regulators in other sectors, should develop reasoned criteria that identify circumstances in which regulatory controls should not be exerted even though they may be available.

- *Member States and NRAs must develop analyses and procedures that will allow them to ensure universal service by reliance upon market forces where feasible and appropriate and to employ designation procedures or public procurement where necessary to supplement market forces, while choosing among and administering such mechanisms in a manner that is transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion.* In accordance with the Third Postal Directive and the principles of sound administrative practice, Member States should rely upon market forces — i.e., the commercial self-interest of postal service providers — to ensure universal service where it is feasible and appropriate to do so. Where it is not feasible and appropriate to rely on market forces, Member States should introduce designation procedures and/or public procurement contracts. Each decision with respect to ensuring universal service should be taken in a manner that is transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion.

- *Member States and NRAs must develop the analyses and procedures necessary to ensure that the scope of the universal service obligation is aligned with the changing needs of users and the evolving technical, economic, and social environment of the postal services market.* Under the Third Postal Directive, regulators have a significant degree of discretion in deciding which postal services are ensured and regulated as universal services, provided that at a minimum universal services must include a basic letter post service and basic parcel post service. Regulators should exercise this discretion deliberately, taking into account the changing needs of the general public and the objectives of the directive.

- *The Commission, Member States, NRAs must ensure that postal and non-postal laws do not create barriers to entry that are inconsistent with the requirements or objectives of the Third Postal Directive.* Key non-postal laws that distort postal markets include value-added tax and customs laws. In addition, Member States

must avoid introducing new legal barriers to entry, such as authorisation requirements that prevent genuine competition or sector-specific labour laws which are designed to impair new entrants.

Key institutional tasks

Effective and appropriate regulation of postal markets also depends upon effective and appropriate institutions. As Member States prepare to implement the Third Postal Directive, it is timely, indeed necessary, for the Member States to reconsider, and where appropriate, reform the institutional arrangements for regulation of the postal market. To this end, we believe that Member States and the Commission should focus on three key institutional issues.

- *Member States must allocate responsibility for the regulation of postal services among separate institutions in a manner that ensures objective and impartial policies and regulation*. The first step in developing an effective institutional framework for regulation of postal services is an appropriate definition of the roles of the agencies involved. To promote objective and impartial policies and regulation in the postal sector, regulatory authority should be appropriately allocated among four separate institutions: (1) a ministry that determines public policy for the postal sector; (2) a ministry or agency that exercises the ownership rights of the government in the public postal operator, if any; (3) an independent regulator of the postal sector; and (4) a national competition authority.

- *Member States must specifically reconsider the role, resources, and independence of the national regulatory authority in light of the Third Postal Directive.* As the Postal Directive has evolved over the last decade, the role of the postal regulatory authority has come into clearer focus. Amendments to the Postal Directive have increased reliance on the impartiality and expertise of the regulator as the guarantor of universal service, enforcer of fair competition, and protector of users' rights. In reviewing the institutional arrangements for the NRA, Member States need to consider its authority, independence, and resources. The authority of the NRA should encompass all tasks which, according to the Postal Directive or good administrative practice, should be discharged transparently, non-discriminatorily, objectively, and proportionately. Enforcement powers should be adequate to ensure the effectiveness of regulatory decisions. Institutional arrangements should foster the independence of NRA from both public postal operators and political direction. At the same, Member States must ensure that NRAs have adequate financial resources, skilled personnel, and access to external consultants.

- *To implement the Third Postal Directive effectively, the Commission and national postal regulators need to develop an efficient mechanism for consultation and*

coordination. Effective implementation of the Third Postal Directive will depend upon more substantive coordination between NRAs and the Commission. Enhanced coordination would allow NRAs to improve regulatory practices through mutual assistance and promulgation of best practices. Better coordination and enhanced cooperation will also create a more harmonised regulatory environment for Community postal services and thus promote development of an internal market and improved regulation of cross border services. To achieve better coordination among postal regulators, the Commission should establish an advisory group of independent postal regulators, a European Regulators Group for Postal Services (ERGP). An ERGP should be functioning well before the end of 2010, the date of full liberalisation.

Evolution of the role of regulators in perspective

More broadly, implementation of the Third Postal Directive should be informed by an appreciation that technological advances offer the traditional postal sector only two choices for the long term: reform or obsolescence. The Third Postal Directive offers the Community and Member States an enlightened way forward, but it is not the end of postal history. In our view, implementation of the Third Postal Directive should proceed with an appreciation of fundamental long term changes taking place in communications and transportation markets. To preserve the best of the long tradition of national postal systems in the future, Member States will need to implement the Third Postal Directive not with reluctance and half-measures but with an appreciation that the Third Postal Directive is a necessary step in a longer term effort to adapt postal markets to the — still unknowable — demands of twenty-first century society.

Overview of the regulation of postal services

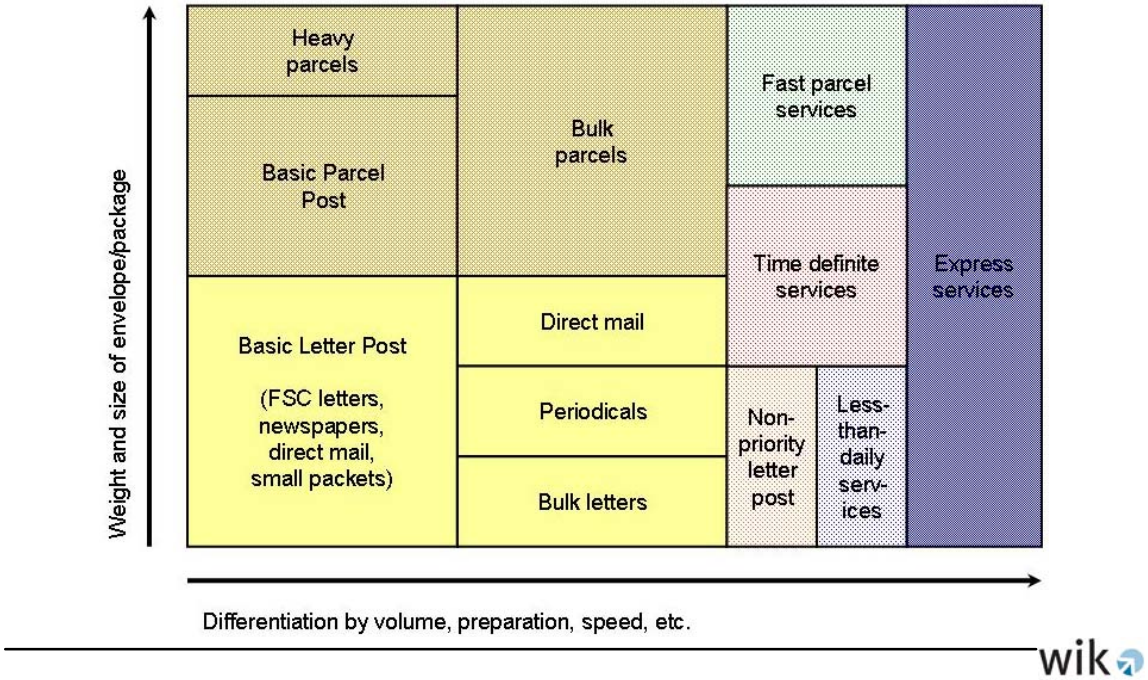
This study begins by clarifying terms and concepts used to describe the regulation of postal services. In general, this study uses terms as defined in the Third Postal Directive. The term ‘postal services’, therefore, includes all public and private ‘services involving the clearance, sorting, transport and delivery of postal items’.

There are many submarkets in the total postal services market. One way of describing these submarkets is illustrated in figure ES-1. The traditional services provided by public postal operators are described in this study as: basic letter post, bulk letters, periodicals (newspapers, magazines, etc.), direct mail (identical printed advertisements), non-priority letter post (not offered in all Member States), basic parcel post, and bulk parcels.

Not all postal services are 'universal services'. Under Article 3 of the Postal Directive, a 'universal service' is a postal service that is *ensured* and *regulated* by the Member State. The directive makes clear that express services and services for heavy weight parcels are not universal services. With respect to other services traditionally offered by public postal operators, the situation is less clear. It appears that Member States have a significant degree of discretion in deciding which services are ensured and regulated as universal services under the terms of the directive. There is disagreement among Member States, however, as to precisely how much flexibility the Postal Directive allows in defining the range of universal services.

Based on the responses of NRAs to a survey undertaken for this study, every Member State ensures and regulates provision of two services as universal services: basic letter post and basic parcel post. Few Member States treat bulk parcels as a universal service. One third to one half of the Member States treat services for bulk letters, periodicals (newspapers, magazines, etc.), and direct mail (identical printed advertisements) as a universal service. In several Member States USPs and NRAs have different understandings of the scope of the universal service obligation.

Figure ES-1 Postal services market



The Postal Directive provides for regulation of *non-universal postal services* as well as *universal postal services*. Regulation of non-universal services features more prominently in the Third Postal Directive than it does in the Second Postal Directive,

due partly to changes in provisions and partly to the implications of full market opening. The Third Postal Directive provides for regulation of *universal service providers* in instances that are not limited to provision of universal services (special tariffs, terminal dues, accounting). In addition, the directive provides for regulation of some elements of postal services by all *postal service providers* (user protection, access to postal infrastructure, statistics, etc.).

In light of changes introduced in the Third Postal Directive, it is necessary to take special care in use of the term *universal service provider* or 'USP'. In the Second Postal Directive (as in the original Postal Directive), the term 'USP' referred to a postal operator designated as a universal service provider under Article 4. In the Third Postal Directive, the term 'USP' appears to refer to any postal service provider that provides all or part of the universal service through the operation of market forces, designation, or public procurement pursuant to a notice provided under Article 4(1).

Implementation of the Second Postal Directive

This study reviews in detail how Member States have implemented provisions of the Second Postal Directive, taking into account clarifications introduced in the Third Postal Directive. Topics covered include the following:

- the regulatory framework and allocation of responsibility for implementing the Postal Directive among national agencies;
- independence, development, and tasks of the national regulatory authority;
- definition of the universal service obligation;
- quality of service monitoring;
- exclusive and special rights;
- licensing/authorisation procedures;
- use of compensation funds to support universal service;
- regulation of the accounts of USP(s);
- regulation of prices for universal service; and
- protection of users' rights.

Broadly speaking, in most Member States there is significant room for improvement in the regulation of postal services. NRAs need to be more independent of political authorities and reinforced in terms of resources and authority. Basic tasks such as the development of regulatory accounts or the specifics of the universal service obligation

must be addressed with greater care and technical expertise. In addition, there is considerable — in our view, undue — divergence among Member States in how requirements of the directive are interpreted. While Member States and their NRAs have expended considerable efforts to implement the Postal Directive effectively and efficiently, these efforts must be redoubled in implementing the Third Postal Directive.

The main body of the study offers a detailed discussion of current implementation of the Second Postal Directive. Summary conclusions with respect to some of the most important topics follow.

- The Postal Directive provides that a minimum range of regulatory functions should be committed to an independent regulator and not resolved by political agencies. Most Member States have determined most major policy issues by primary legislation or ministerial regulation and committed most administrative tasks to the NRA. There appears to be cause for concern in some Member States where a ministry or the Council of Ministers has a significant role in technical or competitively sensitive areas such as regulation of prices, accounting, cross subsidy, or the compensation fund.

- In many Member States, the postal minister appoints all or most of the board of directors and/or the chief executive officer of the public postal operator. It appears questionable whether these arrangements provide an appropriate level of separation between regulatory and policy making authority, on the one hand, and ownership and control of the public postal operator, on the other.

- In several cases, Member States need to do more to ensure institutional separation between the NRA, on the one hand, and agencies of government which are responsible for the conduct of national postal policy and the commercial success of the USP, on the other.

- Financial and staff resources available to national regulatory authorities vary significantly among the Member States, even if comparison is limited to those with postal markets of comparable size. The 6 largest NRAs should be able to perform substantially more extensive analysis than other NRAs, although in fact some large market NRAs have done much better than others. In the 15 Member States with medium and small postal markets, well established NRAs have similar levels of resources. This convergence suggests that a NRA requires a basic minimum level of resources to do its job, including, on average, a staff of about 9 to 10 persons. The relatively low level of resources available to NRAs in some medium to small postal markets, and even more in very small markets, suggests that these NRAs may lack the minimum tools needed to regulate postal markets effectively.

- All Member States except Germany have designated the public postal operator or its successor as the universal service provider. Germany has maintained a high standard of universal postal service but not designated a universal service provider.

- Virtually all Member States have established quality of service standards for letters and/or other basic letter post services, but only slightly more than half have established quality of service standards for basic parcel post service even though it, too, is considered a universal service in all Member States. Less than half of the Member States have established quality of service standards for bulk mail services. Most Member States monitor quality of service performance, but a significant minority do not.

- Currently the only significant sources of financing for the net cost of the universal service obligation (if any) are the reserved area and direct payment to the USP. In those Member States that make use of one of these means of public financing (some do not use either), there appears to be no clear relation between the level of financing and the net cost of the universal service obligation, if any. In Spain and Italy — both Member States lacking a NRA independent of the postal ministry — high levels of public financing may exceed the net cost of the universal service obligation significantly, potentially raising a red flag under the rules governing state aid.

- Today about 57 percent of the total EU/EEA postal market (by volume of letter post) is provided without a reserved area (or with a largely ineffective reserved area in Spain). There is no evidence that elimination of the reserved area has led to a decline in the quality of universal service; if anything, the contrary appears to be the case.

- Different VAT regimes for universal service providers and other postal operators continue to distort postal markets. The recent (April 2009) ruling by the European Court of Justice in the *TNT Post UK* case clarifies but does not resolve this problem.

- International postal markets continue to be distorted by a number of practices unique to international postal affairs. Chief among these are practices related to terminal dues (especially outside the REIMS area), restrictions on remail and ETOEs (extraterritorial office of exchanges), special customs rules for postal items conveyed by universal service providers, and restrictive use of IMPC (international mail processing centres) codes. With few exceptions, NRAs have not implemented the principles set out in Article 13 of the Postal Directive with regard to terminal dues.

- Member States employ a variety of authorisation procedures for services within the universal service area. While 11 Member States require an individual license for all

services within the universal service area, 7 Member States, representing almost two thirds of the EU/EEA postal market, require an individual license only if the postal operator is conveying letter post items, and 6 Member States require only a general authorisation. In 4 Member States, it appears that universal service obligations have been imposed on postal operators other than designated USPs. Such conditions will have to be reconsidered in light of provisions introduced in the Third Postal Directive. Two other types of conditions are relatively rare but also raise questions under the Postal Directive: financial guarantees and technical expertise.

- Separation of accounts of USPs as required by the Postal Directive remains a work in progress. A substantial number of NRAs — representing a majority of the EEA/EA postal market — were unable to affirm that they have approved the number and organisation of the USP's product accounts. Few NRAs can confirm separate accounts for upstream and downstream services, yet it appears that some method of separating upstream and downstream accounts is required to implement the 'avoided costs' requirements of Article 12. Overall, NRAs express only a moderate level of satisfaction (7.3 out of 10) with the separation of costs currently presented by regulatory accounts.

- Although there are some notable exceptions, few NRAs appear able to allocate costs according to the four broad categories prescribed by Article 14 of the Postal Directive (direct costs, common costs assignable by direct analysis, common costs assignable by indirect linkage, unassignable common costs). Similarly, few NRAs appear to have developed a reasoned approach towards the allocation of delivery costs according to these four categories. This cannot be considered an acceptable implementation of the directive and reiterates the concerns noted in the Commission's reports on the application of the Postal Directive and earlier consultant reports to the Commission ('main developments studies'). The high level cost categories set out in Article 14 are only the first step in the development of more detailed regulatory product accounts which are the foundation of many of the elements of postal regulation required by the directive. On average, NRAs express only a moderate level of satisfaction (7.2 out of 10) with the cost allocation data available to them.

- Half of the Member States do not issue a periodic statement confirming USP compliance with Article 14 of the Postal Directive even though this statement is required by the directive.

- All Member States control tariffs for basic letter post services, and the great majority, but not all, Member States control tariffs for basic parcel post services. Member States generally regulate prices of additional postal services if the services are ensured as universal services, although in some cases they do not (notably in the case of basic parcel post). In addition, a number of Member States regulate the

rates of bulk postal services provided by the national USP even though these services are not ensured as universal services. (Note that *regulated* prices may not be *cost-oriented* prices if the regulator lacks complete and reliable cost data).

- The requirement that prices of universal services must be 'geared to cost' is interpreted in fundamentally different ways by NRAs. Most NRAs consider that, in order to be 'geared to cost', the rate for each product must cover its fully allocated cost. On the other hand, the three largest NRAs (DE, FR, UK), representing almost 60 percent of the EU/EEA market, consider that the minimum cost that must be covered by each rate should be the long run incremental or long run marginal cost, a standard more consistent with economic theory.

- *Price caps* (regulatory limits on price changes without requiring approval of specific prices) are used to regulate rates of basic letter post services in 9 Member States, representing 62 percent of the total EU/EEA postal market. Sixteen Member States, representing 35 percent of the postal market, regulate basic letter post services by *ex ante* review (approval of specific prices before they can be implemented). Basic parcel post rates are also regulated by *price caps* in 7 Member States accounting for more than half of the postal market. Other Member States use *ex ante* and *ex post* (evaluation of prices according to regulatory standards after the prices have become effective) methods roughly equally. Rates for unreserved bulk postal services are less strictly regulated. In general, there appears to be a consensus among NRAs that forward-looking price regulation — either *ex ante* review or *price caps* — is appropriate for universal service products where there is no significant competition.

- Half of the Member States authorise both the NRA and NCPA (national consumer protection authority) to enforce user protections in the postal sector. Another third rely solely on the NRA for user protection. Most Member States have extended user protection measures to all postal operators (not only the USP) within the universal service area. However, implementation of effective user protection procedures appears to be uneven. Seventeen USPs publish the annual report on handling of user complaints required by the Postal Directive. Eleven NRAs also issue their own reports on user protection procedures.

Current Application of Competition Law

Since 2000, there have been several significant decisions by the Commission applying the competition rules in the postal sector. In 2003, the Commission approved a terminal dues agreement among public postal operators (REIMS II) that would have otherwise violated restrictions on price agreements. In three cases, the Commission considered

that a public postal operator had abused its dominant position. Two cases involved Deutsche Post (predatory pricing of business parcels; unlawful interception of remail) and one La Poste of Belgium (price discrimination used to eliminate competition). And in several cases, the Commission acted against measures by Member States that extended the monopoly of the incumbent beyond reserved services or encouraged anti-competitive discriminatory behaviour by incumbents.

Since decentralisation of the enforcement of competition law in 2004, NCAs have adopted several decisions holding that the incumbent USP abused its dominant position by using monopoly power to impede entry into newly liberalised markets or to enhance its position in markets for unaddressed items. NCAs have also condemned anti-competitive practices used by incumbents including tying reserved and non-reserved products, loyalty rebates, predatory prices for non-reserved markets, and refusals to give access to postal networks.

After full market opening, the role of antitrust policy is expected to increase. Antitrust law will support and complement sector regulation to ensure effective competition. New entrants are likely to rely on enforcement of antitrust provisions to resist efforts by incumbents to protect their markets. In other network industries, liberalisation has been accompanied by an increased application of antitrust policy.

In principle, it appears preferable to have both a sector regulator (NRA) and national competition authority (NCA) protecting the competitiveness of postal markets. Granting an NRA exclusive authority to enforce the competition rules would risk regulatory capture. As provided by Article 22 of the Third Postal Directive, the NRA and NCA should consult and coordinate using such procedures as the following: (i) mechanisms, applicable under strict deadline, to ensure clear case allocation and division of task between the NCA and the NRA; (ii) reciprocal consultation when deciding cases having antitrust aspects; (iii) extensive exchanging information, including confidential data, provided that both NCA and NRA respect business secrecy and that information is solely used for the purpose for which it was obtained; and (iv) uniform interpretation and application of common terms, either used under competition law or under sector-specific regulation. In particular, the NCA should consult the NRA when deciding a antitrust case in the postal sector. Consultation may relate to market definition, competitive assessment or choice of remedies (including behavioural remedies in merger reviews).

Application of European state aid rules has been extensive in the postal sector. The majority of the cases relate to compensation for the provision of services of general interest, and most have been authorised by the Commission after only a preliminary examination. Although the legal framework for compensation for provision of services of general interest is sufficiently clear since the *Altmark* case of 2003 and the Commission

Decision and Community Framework of 2005, implementation involves difficult and complex cost calculations.

After the Third Postal Directive, control of the compensation for public service will rely more on a net cost calculation by the NRA and less on a review of state aid by the Commission. Nonetheless, if compensation for the universal service obligation does not meet the four *Altmark* criteria, such compensation is a state aid that should be notified to the Commission unless the conditions of the 2005 decision on public service compensation are met. The fact that an NRA endorses a net cost calculation does not immunise the compensation from Commission control. If the NRA allows overcompensation to the USP, the Commission may declare the aid illegal under the state aid rules. Therefore, NRAs and the Commission should cooperate in evaluating the lawfulness of any compensation for the net cost of the universal service obligation.

Preparations for the Third Postal Directive

For most Member States, the deadline for adopting national legislation to implement the Third Postal Directive is 31 December 2010. For 11 Member States — Czech Republic, Cyprus, Greece, Hungary, Lithuania, Latvia, Luxembourg, Malta, Poland, Romania, and Slovakia — the deadline is 31 December 2012. As of March 1, 2009, two Member States, Estonia and the Netherlands, report that they have transposed the Third Postal Directive into national law. Fourteen of the remaining Member States report current plans to transpose the directive before 2011.

The Third Postal Directive represents a significant step in the continuing evolution of the Postal Directive. As such, it presents both new flexibilities and new challenges for Member States and their NRAs. In addition to requiring an end to the reserved area and full market opening, the Third Postal Directive provides three mechanisms for ensuring universal service: reliance on market forces, designation of universal service providers(s), and public procurement of services. In choosing one mechanism or a combination of mechanisms to ensure universal service, the directive requires Member States to respect ‘the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market’.

For the most part, most Member States and their NRAs have not yet focused clearly and analytically on new issues presented by transposition of the Third Postal Directive. Some potential ‘gaps’ in preparations for implementation of the Third Postal Directive include the following:

- Most NRAs have not analysed the possibility of relying upon market forces to ensure universal services. On the other hand, when asked to identify portions of the universal service for which there is a significant risk of inadequate service by the market forces, most NRAs identified only limited portions of the market that appeared to be at risk, usually services in remote or sparsely populated areas. Some large NRAs, including France and the United Kingdom, offered no opinion. Based on this impressionistic and incomplete response, it appears that reliance upon market forces to ensure universal service may potentially be a viable option for ensuring the universal service in many Member States. A notable exception to this pattern is Germany. Its postal law provides procedures for ensuring universal service that closely follow the options set out in the Third Postal Directive. Germany currently relies on market forces for ensuring 100 percent of the universal service, while at the same time providing mechanisms that will safeguard the universal service if market forces do not suffice.

- Most Member States do not appear to have fully analysed how to implement revisions in designation procedures of Article 4 introduced by the Third Postal Directive. Revised Article 4 requires that the designation of USP(s) for all or part of the national universal service must be 'based on the principles of transparency, non-discrimination and proportionality'.

- With the exception of Sweden, Member States have no experience with the public procurement of universal postal services. Several Member States, however, plan to introduce the possibility of public procurement in the foreseeable future.

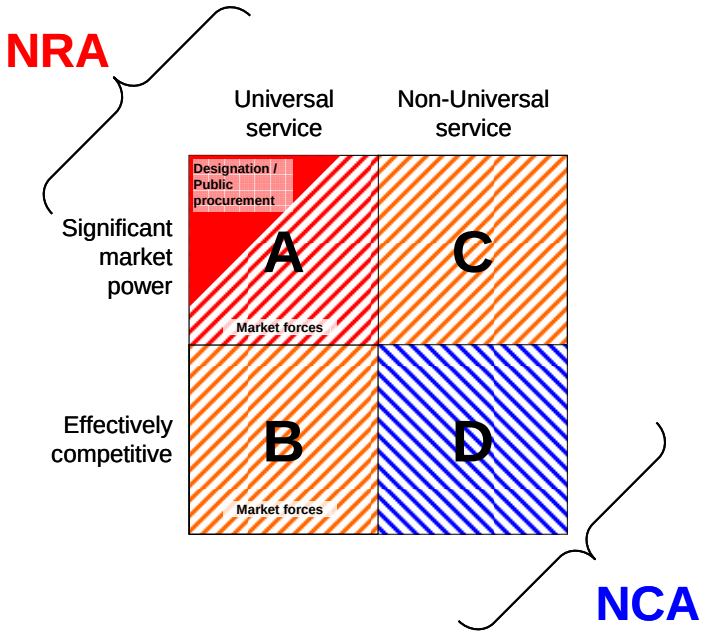
- No Member State with a reserved area has adopted an orderly phase-out schedule for the reserved area, but 4 of the 11 Member States which can retain the reserved area until the end of 2012 have indicated plans for identifying a phase-out strategy.

- Few Member States or NRAs (with the exception of Postcomm in the UK), appear to have addressed — or to be planning to address — the potential barriers to entry posed by non-postal laws or the extent to which such laws may be inconsistent with the objectives of the Third Postal Directive.

- Most Member States will need to take significant steps to open access to the postal infrastructure in implementing the Third Postal Directive, where necessary. Only 6 Member States provide access to four or more of the six elements of postal infrastructure mentioned in new Article 11a (postcode system, address database, post office boxes, delivery boxes, information on change of address, re-direction service and return to sender).

- Relatively few Member States have considered the problems of interoperability, although there are several notable exceptions, including Sweden and Germany, and especially the UK NRA, Postcomm.
- In several cases, Member States are not actively seeking to identify the needs of users, a necessary step in a reasoned review of the need for universal services in the future.
- Few Member States which have, or plan to have, uniform rate requirements, have considered the effects that the Third Postal Directive will have on these requirements. Only the largest NRAs, notably in France and the UK, seem to be developing the analytical tools necessary to evaluate the implications of maintaining uniform rate requirements in a liberalised, multi-operator environment.
- Most NRAs do not have well-developed views on which services the USP would choose to avoid in the absence of a USO. Such an evaluation is, however, central to determining which universal services may be ensured by reliance on market forces and to evaluating the net cost, if any, of the universal service obligation.

Figure ES-2 Model of postal/competition regulation of postal markets



As noted, another facet of implementation of the Third Postal Directive will be increased reliance on the competition rules. Hence, the Third Postal Directive requires a new level of cooperation and consultation between NRAs and national competition authorities (NCAs). Currently, most NRAs and NCAs informally share information and consult to a moderate degree. In many Member States, however, it appears that there is no obligation for these agencies to consult or coordinate their activities. Regular consultations appear to occur in about one third to one half of Member States. Most NCAs declare that sector regulation is needed in addition to enforcement of the competition rules, citing, for example, the market dominance of the incumbent and the need to protect universal service.

The relationships between postal regulation and competition regulation may be clarified by focusing on the overlapping sets of postal services defined by (i) the universal service obligation or lack of a USO, (ii) existence of a postal service provider with significant market power or, alternatively, effective competition, and (iii) the use or non-use of designation or public procurement to ensure universal service. See figure ES-2. In this figure, the postal sector is divided into four quadrants. Quadrants A and B represent postal services ensured and regulated as universal services in accordance with the national universal service obligation. Quadrants C and D represent other, non-universal postal services. Services in quadrants A and C are provided by a postal operator with significant market power, likely, but not necessarily, the public postal operator or its successor. Quadrants B and D are provided under conditions of effective competition.

Quadrant A is divided into two parts. The solid red (dark) triangle represents universal services which are ensured by means of designation of one or more USPs and/or by public procurement of postal services. In the diagram, the red triangle covers only a portion of quadrant A and none of quadrant B because, we suggest that the best practice in implementing the Third Postal Directive will be to rely upon market forces as much as possible.

Best regulatory practices

Based on our review of postal regulation in the Member States, as well as consideration of postal regulation outside the Community and regulation of non-postal sectors in the Community, this study identifies 32 best practices for postal regulation. Practices are considered ‘best’ if, in our judgment, they are specifically required by the Third Postal Directive or appear necessary to a balanced attainment of the three primary objectives of the directive: ensuring universal service, full market opening, and user protection. Secondarily, in identifying best practices, we have tried to take into account the need for

postal regulation to (i) respond to ongoing changes in postal markets, (ii) respect generally accepted economic analyses of postal markets, and (iii) conform to Community norms respecting good administrative behaviour.

A summary of the best practices identified in this study follows. In the main body of the study, the reasoning underlying each best practice is explained and specific examples are provided of best practices and practices of concern.

Best practices with respect to the establishment and operation of postal NRAs

- Primary regulatory authority should be appropriately allocated among four separate institutions: (1) a ministry that determines public policy for the postal sector; (2) a ministry or agency that exercises the ownership rights of the government in the public postal operator, if any; (3) an independent regulator of the postal sector; and (4) a national competition authority. In particular, the NRA should be entrusted with all tasks which, according to the directive or good administrative practice, should be discharged transparently, non-discriminatorily, objectively, and proportionately.

- The NRA should be a structurally independent and impartial agency with jurisdiction over multiple network industries.

- The NRA requires adequate resources to perform the tasks assigned to it in a competent and efficient manner. For a NRA in a medium-sized or smaller national postal market, the minimum level of resources needed for the basic tasks of postal regulation appears to be, on average, about 9 to 10 full-time persons, including regulators (heads of NRA), qualified legal and economic professionals, and support staff. In addition, for such NRAs, effective regulation will very likely require (1) a reasonable budget for studies by outside consultants and (2) efficient application of analytical techniques developed by the largest NRAs. NRAs in larger postal markets or with broader responsibilities (e.g., enforcement of competition rules or review of user complaints) will require appropriately greater resources.

- The NRA should be authorised to collect from postal service providers such information it considers necessary to ensure conformity with the provisions of the Postal Directive and should be granted adequate means to enforce its orders, including authority to impose substantial fines, if necessary.

- In judicial-type proceedings, the NRA should comply with Community norms of good administrative practice such as found in the European Code of Good Administrative Behaviour.

- The NRA should use open public consultations to thoroughly investigate and evaluate the effects of major proposed regulatory actions on affected parties, including postal operators, employees, users, and the general public.

- The NRA and NCA should consult on a regular basis, and each agency should require a written opinion of the other before acting in a matter that affects the application of competition rules to the postal sector. NRAs should provide NCAs with detailed sector information to facilitate enforcement of the competition rules.

Best practices with respect to striking a balance between the universal service obligation and full market opening

- Universal service should be ensured by relying upon market forces where the Member State may, with a high degree of confidence, rely upon postal operators motivated by normal commercial considerations to provide universal services which will meet or exceed the USO set by the Member State.

- The range of services included within the universal service obligation (USO) should be limited to the minimum range that is (i) demonstrably required to protect the general public interest in universal service and (ii) consistent with the minimum level of universal service required by the Postal Directive.

- In general, Member States should not require uniform tariffs for universal services unless they are (i) clearly consistent with the Third Postal Directive and (ii) required by a demonstrated and substantial need to protect general public interests.

- Where necessary to ensure provision of universal services meeting the requirements of the national USO, designation and public procurement procedures should be introduced where justified and administered by the NRA in a manner that is transparent, non-discriminatory, fairly compensatory (where appropriate), and consistent with the principles of proportionality and least market distortion.

- If a postal service provider is *designated* as a 'universal service provider' under Article 4, then the specific obligations to provide universal services should be imposed on the postal service provider as part of the designation procedure and not as conditions attached to an authorisation to provide postal services issued under Article 9.

- Authorisations issued under Article 9 to provide postal services *within the universal service area* should be introduced only if, and only to the extent, necessary to guarantee compliance with the essential requirements, ensure provision of universal service, or implement other provisions of the Postal Directive. Where necessary,

authorisations should be in the form of general authorisations applicable to all postal operators.

- Conditions on authorisations issued under Article 9 for services within (or outside) the universal service area should be introduced only if, and to the extent that, they are (i) strictly consistent with the types of conditions permitted by Article 9 of the Postal Directive or necessary to implement other provisions of the Postal Directive and (ii) consistent with the principles of proportionality and least market distortion, taking into account the multiple objectives of the Postal Directive.

- In general, the NRA should ensure that postal operators that provide universal services with significant market power maintain cost and revenue product accounts for (i) each universal service or other postal service provided pursuant to a designation or public procurement contract and (ii) each non-universal service that is produced jointly with a service covered by (i).

- Where the accounts of a postal operator are regulated, the NRA should ensure that the direct and common costs associated with production of universal services are allocated to product accounts in a manner that is clear, economically valid, and consistent with Article 14.

- The NRA should ensure that (i) cost accounting practices of USPs are verified at least annually by either the NRA or by a competent independent body retained by the NRA; (ii) a statement verifying the compliance of USPs with Article 14 is published at least annually; (iii) a summary of the regulated product accounts of universal services provided by a postal operator with significant market power is published at least annually (taking into account the need for adequate protection of commercially sensitive information); and (iv) a full explanation of methodology used in cost accounting is published at least annually.

- Standards for access, affordability, and quality of service should reflect the minimum level of service that is (i) objectively required to protect the evolving public need for universal services and (ii) consistent with the minimum level of universal service required by the Directive.

- Exceptions to the scope of universal service should be interpreted with respect to overall conditions prevailing in the Community as a whole and not only with respect to the conditions within a single Member State.

Best practices related to ensuring the universal service

- In general, prices for universal services provided by postal operators with significant market power should be regulated by the NRA using forward-looking procedures (ex

ante review, price caps) to ensure conformance with Article 12. Forward-looking procedures should normally be employed with respect to services provided by postal service providers where they benefit from designation or public procurement procedures. Where universal services are provided under conditions of effective competition, the NRA should normally rely upon the competitive market to ensure compliance with Article 12.

- Where cross border postal items are collected and forwarded as part of the universal service in a Member State, the NRA in the destination Member State should ensure that providers of postal services with significant market power comply with Article 13 and otherwise provide incoming postal items with similar services at similar prices compared to the services offered by that operator for similar domestic postal items.

- After transposition of the Third Postal Directive, Member States should ensure that methods of financing the net cost of universal service, if any, conform to the principles of proportionality and least market distortion and, in any case, create no greater market distortions than existed prior to transposition.

- Member States that must end the reserved area by the end of 2012 should phase out the reserved area in a manner calculated to provide an orderly transition to full market opening while preparing the public postal operator for competition.

Best practices related to ensuring full market opening for postal services

- In preparation for full market opening, the NRA and NCA should cooperatively develop a plan to monitor and control activities which are inconsistent with the competition rules.

- Where necessary to protect the interest of users or to promote effective competition, the NRA should ensure that, in accordance with Article 11a, transparent and non-discriminatory access is provided for all postal service providers to elements of the postal infrastructure.

- Where necessary to protect the interest of users or to promote effective competition, the NRA should ensure that, in accordance with Article 11a, transparent and non-discriminatory access is provided for all postal service providers to elements of the international postal infrastructure and services provided within the scope of the international universal service, including standardised operating documents and their electronic equivalents, standardised codes such as IMPC codes, and other elements of the international postal infrastructure.

- Member States should apply value-added tax to public and private postal services in a manner that creates the least market distortion while conforming to the requirements of Community law.
- Member States should apply customs laws as equally as possible to all postal service providers under comparable conditions consistent with the requirements of Community and international law.
- The NRA should review the issues posed by a multi-operator postal market and ensure that, compatible with full market opening, postal operators cooperate to ensure maintenance of universal service and protection of the rights of users.
- In order to facilitate full market opening, the NRA should systematically and transparently review all potential legal and operational barriers to entry and market distortions and take appropriate actions or recommend appropriate actions to government.

Best practices related to protecting the rights of users

- The NRA should ensure that information on prices, conditions of access, and the quality of universal services is published frequently and in a timely manner, consistent with appropriate protection of commercially sensitive information and promotion of full market opening.
- Member States should ensure that the NRA or other competent national authority is empowered to provide users appropriate redress where universal service is not provided, and the NRA or other competent national authority should actively ensure that the rights of users are effectively protected.

Cooperation Among NRAs

Analysis of postal regulatory practices in the Member States makes clear that closer cooperation national postal regulators would facilitate more efficient, effective, and uniform implementation of the Third Postal Directive.

The directive specifically calls for enhanced collaboration and mutual assistance among NRAs (Article 22(2)) and explains the goal of improved cooperation as follows: NRAs ‘should, where necessary, cooperate with other regulatory bodies of Member States and with the Commission in carrying out their tasks under Directive 97/67/EC. This would promote the development of the internal market for postal services and help to

ensure the consistent application, in all Member States, of the provisions laid down by the Directive' (Recital 50).

At present in the postal sector — unlike in other regulated industries such as electronic communications, energy, and railways sectors — there is no organisation dedicated to facilitating cooperation among Community postal regulators. Nevertheless, Community NRAs cooperate to a limited extent through two bodies with more general missions: (i) the Postal Directive Committee, and (ii) CERP, the European Committee for Postal Regulation. Neither body is composed of NRAs or specially focused on regulatory issues. Both are committees of Member States. NRAs occasionally represent their Member States at these bodies depending on the agenda agreed by Member States.

The key purpose of the Postal Directive Committee is to solicit the Member States' views on draft measures prepared by the Commission. The Postal Directive Committee does not facilitate – and does not aim at facilitating – extensive and effective cooperation of European NRAs. CERP is an inter-governmental organisation that allows government officials from inside and outside the European Union to exchange views and cooperate on postal policy matters. While CERP is a useful forum for its purposes, it is not dedicated to either the requirements of the European Union or to the tasks of postal regulators. We conclude that CERP is not an adequate organisation to facilitate the specific type of NRA cooperation that the Third Postal Directive requires.

Based on a thorough analysis of the need for NRA cooperation, and a discussion of possible benefits to be expected from cooperation, we recommend that postal NRAs should cooperate more closely with each other, and with the Commission. There are three important reasons why enhanced cooperation among NRAs would be beneficial: First, cooperation would allow NRAs to further develop regulatory practice and implement the Postal Directive more effectively through mutual assistance and by establishing best practices. This is needed most for complex technical questions such as control of accounting separation and emerging questions for regulating a multi-operators market. Second, cooperation would lead to more harmonised regulatory practice and thus promote the development of an internal market. Third, a body of NRAs could facilitate coordination of the regulation of cross border mail, and advice the Commission in this area.

Important areas where NRAs could coordinate include: separation of accounts, allocation of cost, price regulation, regulation of terminal dues and other aspects of cross-border mail, calculation of net costs of universal service, financing of universal service, access to postal infrastructure, interoperability, scope and methods for measuring quality of service, market statistics, and authorisation procedures. For most of these subjects, this study identifies clear opportunities for improving regulatory practice in many Member States, and areas of concern with regard to the current implementation of the Postal Directive. The results expected from the ERGP would

allow NRAs to take these opportunities (provided they have adequate staff and resources).

To facilitate cooperation among NRAs, we recommend that the Commission should establish an advisory group of independent regulators for the postal sector. This group could be called ERGP, European Regulators Group for Postal Services. It should begin to function before the end of 2010, the date of full liberalisation prescribed by the Postal Directive.

1 Introduction

1.1 Purpose and outline of study

The purpose of this study is to identify appropriate next steps for the regulators of postal services in the Member States of the European Union (EU) and European Economic Area (EEA)[1] in light of the evolution of postal markets, best regulatory practices, and the ongoing transposition of the 'Third Postal Directive'.

Postal services — public and private transportation networks which regularly collect, convey, and deliver all types of documents and parcels — have been an integral part of the social and commercial infrastructure of society since the first half of the nineteenth century. In the last two decades, however, advances in electronic communications, information processing, and transportation systems have precipitated fundamental changes in postal markets. Expansion of direct marketing and development of just-in-time supply chains have led to an enormous increase in the flow of direct mail, goods, and other parcels. At the same time, many forms of paper-based communications, including letters and other types of documents, are migrating to electronic communications. The relative role of private delivery services has expanded while the distinction between public and private operators has become blurred. Regional and global markets are increasingly important.

In the European Union and European Economic Area, fundamental shifts in postal markets have been overlain by a second set of changes, the legal and institutional developments accompanying creation of a single European market. Beginning with the Postal Directive adopted in 1997, Community legislation has sought to harmonise and improve postal services in the Member States with particular attention to improving the quality of cross border intra-Community postal services. The Postal Directive obliged Member States to ensure provision of a basic universal postal service of specified quality. Member States were also required to limit the scope of services reserved for the public postal operator as a first step in a 'gradual and controlled liberalisation of the market'. The Postal Directive further charged Member States with protecting the rights of users of postal services. Finally, Member States were required to establish independent national regulatory agencies, independent of any ministry or postal operator, to impartially and expertly implement these obligations.

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1 Member States of the European Economic Area (Iceland, Liechtenstein, and Norway) participate in the internal market of the European Union in return for their agreement to abide by certain Community legislation including, in particular, the Postal Directive. Agreement On The European Economic Area, OJ L1, 3 Jan 1994, p. 3, as amended, Annex XI, Article 5(d).

In this study, the term ‘regulators’ includes all agencies of government that adopt legal measures for the control of postal services. Typically, the lead agency is the national regulatory authority (NRA) established in response to the Postal Directive. At a minimum, a NRA applies the rules of law to specific factual situations. The legislator also controls the provision of postal services by establishing an overall regulatory framework and, perhaps, by determining certain elements of that framework, such as the scope of the reserved area or the scope of the universal service obligation. A minister or Council of Ministers may adopt ordinances or regulations which define specific rights or obligations for the postal sector. A national competition authority (NCA) may enforce the competition rules against certain practices of postal operators, if necessary. This study considers the functions of these different regulators and their relationships as well as the role of ‘regulators’ collectively.

The Postal Directive of 1997 has been amended twice, in 2002 and 2008. The ‘Second Postal Directive’ — i.e., the original Postal Directive as amended in 2002 — has been transposed into national law by all Member States of the EU and EEA. Transposition of the ‘Third Postal Directive’ — the Second Postal Directive as amended in 2008 — is required by 31 December 2010 at the latest (except for some Member States which may postpone implementation of the directive until 31 December 2012). The Third Postal Directive completes the program of liberalisation begun in the original Postal Directive by requiring Member States to end all postal monopolies and implement other changes consistent with ‘full market opening’.

This study thus comes at a transitional period in the regulation of European postal markets. Although all Member States have implemented the Second Postal Directive, their approaches vary significantly. At the same time, Member States must prepare for imminent implementation of the Third Postal Directive. In brief, this study seeks to assist the Commission and the Member States to establish a sound basis for implementing the Third Postal Directive by:

- reviewing the manner in which Member States are implementing the Second Postal Directive (chapter 3);
- summarizing the role of the competition authorities and general competition law in regulating European postal markets (chapter 4);
- describing preparations and studies undertaken or planned in preparation for implementation of the Third Postal Directive (chapter 5);
- identifying ‘best practices’ in the regulation of postal markets by postal and competition authorities, where ‘best’ reflects the objectives and requirements of the Third Postal Directive (chapter 6); and

- identifying potential gains and appropriate mechanisms for cooperation among national regulatory authorities in order to implement the Third Postal Directive most efficiently and effectively (chapter 7).

The main body of this study is bracketed by a beginning chapter and an ending chapter. The beginning chapter (chapter 2) clarifies the terms and concepts used in this study. The final chapter (chapter 8) offers a short statement of concluding observations that attempts to draw together the many threads of analysis presented and highlight the most important themes.

1.2 Acknowledgements

The authors are pleased to acknowledge that this study was materially improved by the substantial and constructive assistance provided by the Postal Markets and Related Logistics unit of DG Internal Market and Services, in particular Jörg Reinbothe, Kamil Kiljanski, Hughes de la Motte, who managed this project at the Commission services, and Denis Sparas.

We would also like to emphasise our appreciation for the extensive and generous contributions of all of the many respondents to the Internet survey, especially respondents from the postal ministries and national regulatory authorities who laboured long hours over extensive questionnaires and, often, responses to follow up emails and telephone calls. This study is their study as well as ours.

We are also grateful to the many individuals who provided valuable information for this study in personal interviews and to those who attended the public workshops and offered their comments either at the time or afterwards.

Any errors, of course, remain the responsibility of WIK-Consult.

1.3 Overall methodology

This study was prepared for the European Commission, Directorate General for Internal Market and Services, by WIK Consult GmbH ('WIK-Consult'), the consulting subsidiary of the Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste (Scientific Institute for Infrastructure and Communication Services), in Bad Honnef, Germany[2] and by James I. Campbell, Jr., an independent lawyer and consultant based in Washington, D.C., USA.[3] The project manager for this study was Alex Kalevi Dieke, head of the department of Postal Services and Logistics of WIK-Consult. In preparing this study, WIK-Consult also collaborated with Alexandre De Streel, Professor at CRID, and Robert Queck, Deputy Director of CRID, the Research Centre on IT and Law of the University of Namur, Belgium,[4] who contributed analysis of the implementation of competition law and restrictions on the use of state aids in the postal sector.

Research for this study was based on three primary sources of information:

- a survey of national regulatory authorities, national competition authorities, and universal service providers (see next section);
- interviews with selected officials from governments, national regulatory authorities, national competition authorities, universal service providers, private postal operators, the European Commission (Directorates General for Competition, Information Society and Media, Energy and Transport, and Taxation and Customs Union), the European Committee for Postal Regulation (CERP), the Federation Of European Direct And Interactive Marketing (FEDMA), PostEurop, the European Regulators Group (ERG), the European Regulators Group for Energy and Gas (ERGEG), and other associations;
- a review of legislation, literature, and other secondary materials.

WIK-Consult presented the objectives of the study, initial findings, and final conclusions in three public workshops hosted by the European Commission in Brussels on 23 January 2009, 4 June 2009, and 22 September 2009.

2 See http://www.wik.org.
3 See http://jwww.jcampbell.com.
4 See http://www.fundp.ac.be/en/dro/crid.

1.4 Survey of national regulatory authorities, national competition authorities, and universal service providers

This study is based in substantial part on a survey concerning regulatory practices addressed to ministry officials with postal responsibilities, national regulatory authorities (NRAs), national competition authorities (NRAs), and universal service providers (USPs) in the 27 Member States of the European Union and 3 Member States of the European Economic Area. The survey was conducted by means of three questionnaires that were posted on a password-protected site on the Internet managed by WIK-Consult. The questionnaires were developed by WIK-Consult and James I. Campbell Jr.

One questionnaire was addressed to each of three groups: (i) ministries/NRAs, (ii) national competition authorities, and (iii) USPs. Since allocation of responsibilities between ministries and NRAs varies among Member States, it was not possible to design a 'ministry only' or 'NRA only' questionnaire. In each Member State, ministries and NRAs divided the questions in the combined questionnaire among themselves. Respondents in one group were unable to view the questions addressed to another group. No respondent could view information provided by another respondent. Respondents were allowed to complete the questionnaires from the beginning of March to approximately the end of May 2009. In general, requests for current data were to be completed as of 1 March 2009.

The questionnaires covered a broad range of legal and policy questions relating to implementation of the current Postal Directive and the amendments introduced by Directive 2008/6/EC. The questionnaires were organised by topics into 'question modules'. Each question module was further divided into several 'submodules'. Question modules and submodules included explanatory introductions where appropriate. A standard vocabulary was included with the questionnaire to ensure uniformity in the interpretation of key terms. All monetary figures were expressed in Euros using a standard table of exchange rates, also included on the questionnaire website. The respondents, question modules, and number of questions in each module (excluding requests for contact information) are summarised in Table 1-1.

Table 1-1 Question modules for Internet survey

No.	Question Module	Number of Qs	Respondent
101	Laws	32	Ministry/NRA
102	Regulations And Secondary Legislation	49	Ministry/NRA
103	Regulatory Framework	45	Ministry/NRA
121	Economic Effects Of Postal Policy	26	Ministry/NRA
122	Reserved Area And Special Rights	37	Ministry/NRA
123	Ensuring Universal Service	46	Ministry/NRA
131	Future Studies And Legislation	46	Ministry/NRA
201	National Regulatory Authority	76	Ministry/NRA
211	Overview Of Regulated Services	84	Ministry/NRA
221	Definition Of Universal Service	33	Ministry/NRA
222	Quality Of Universal Service	17	Ministry/NRA
231	Postal Infrastructure, Interoperability, And Regulatory Symmetry	40	Ministry/NRA
241	Authorisation Of Postal Operators	88	Ministry/NRA
251	Price Regulation Generally	50	Ministry/NRA
252	Individual Agreements And Special Tariffs	49	Ministry/NRA
253	Regulation Of The Accounts Of USP(s)	81	Ministry/NRA
261	User Complaints And Redress	26	Ministry/NRA
271	Demand For Universal Postal Services	39	Ministry/NRA
301	Annual Statistics of The NRA	64	Ministry/NRA
302	Annual Estimates of Competition	31	Ministry/NRA
401	National Competition Authority	79	NCA
501	Overview of Regulation	68	USP
502	Access and Complaints Handling	27	USP
503	Postal Infrastructure And Interoperability	25	USP
505	Regulation Of The Accounts Of USP(s)	64	USP
506	Net Cost, if any, Of the Universal Service Obligation	15	USP
507	Demand Structure	33	USP
510	Annual Estimates of Competition	27	USP

In preparing the questionnaire, WIK-Consult tried diligently to make the questions simple, clear, and easy to answer. More than 60 percent of the questions required only a yes/no answer or selection from a drop down list. Only 20 percent of the questions required text answers. In many cases, respondents were able to skip inapplicable questions. Some questions (90 to NRAs and 26 to USPs) requested annual data or estimates for the years 2005, 2006, 2007, and 2008 (for example, information on the budget and staff of the NRA or number of authorisations granted postal operators). For each answer, the questionnaire permitted respondents to offer a short explanatory statement or qualification. In addition, an open-ended Additional Comments form could be used to amplify any response. In total, 959 questions were addressed to ministries/NRAs, 79 to NCAs, and 259 to USPs (excluding contact information, etc.).

Overall, the parties addressed by this questionnaire responded with diligence and generosity. The numbers of responses received from each respondent are shown in tables 1-2, 1-3, 1-4, and 1-5. Note that respondents could skip some questions based on answers to other questions so the total numbers of potential responses are not the same for all respondents in a given category.

Table 1-2 Response rates by ministries and NRAs by question module (part 1)

	101	102	103	121	122	123	131	201	211	221
AT	30	28	38	14	9	23	17	79	26	35
BE	32	49	48	23	34	39	41	73	68	35
BG	32	39	47	24	26	44	42	64	30	30
CY	32	46	46	20	36	35	37	78	11	22
CZ	32	50	44	20	29	33	28	76	29	36
DE	35	42	41	19	17	36	34	72	53	36
DK	32	50	47	22	33	36	37	75	74	34
EE	34	42	46	24	23	36	26	75	65	34
EL	33	48	45	20	28	31	28	76	54	36
ES	33	51	46	28	34	31	34	64	67	27
FI	32	38	42	21	11	32	34	73	72	32
FR	32	49	47	25	33	35	35	78	67	33
HU	32	46	48	25	35	37	42	79	73	36
IE	32	50	46	20	32	28	26	75	59	35
IT	35	48	48	23	26	37	34	67	59	33
LT	34	48	48	25	34	34	43	78	49	36
LU	33	38	47	24	34	30	34	77	61	28
LV	32	42	40	21	33	38	37	75	56	28
MT	32	50	44	22	28	32	29	75	50	35
NL	32	46	43		15	34	17	71	42	30
PL	32	42	47	23	30	34	38	76	47	32
PT	32	52	46	19	24	28	30	78	74	35
RO	33	48	48	22	32	39	37	77	38	28
SE	32	46	45	24	18	39	38	71	74	36
SI	32	44	47	20	30	30	46	78	72	33
SK	32	44	46	22	28	35	34	77	66	35
UK	32	36	45	22	17	30	28	71	51	33
IS	32	42	48	17	34	40	47	77	57	34
NO	32	44	47	23	31	33	37	79	78	36

No answers: LI

Table 1-3 Response rates by ministries and NRAs by question module (part 2)

	222	231	241	251	252	253	261	271	301	302
AT	8	21	73	36	34	83	10	28	214	92
BE	20	35	78	39	52	70	24	28	258	92
BG	18	28	68	31	35	43	27	31	222	111
CY	15	34	74	47	51	76	19	29	247	121
CZ	20	30	64	43	28	71	28	33	257	120
DE	16	34	82	46	45	63	25	38	240	121
DK	19	41	32	38	44	71	28	38	210	121
EE	19	40	83	39	27	75	28	38	256	115
EL	19	23	79	41	44	53	28	29	225	121
ES	20	36	79	37	38	77	24	28	227	120
FI	**19**	**32**	**72**	**32**	**30**		**29**			
FR	20	34	79	48	44	67	28	37	255	121
HU	20	35	81	35	42	77	28	38	259	121
IE	19	23	72	46	48	75	27	34	254	120
IT	19	34	83	42	31	61	28	31	258	
LT	17	38	72	39	37	78	28	35	259	113
LU	18	26	68	33	40	71	26	38	252	114
LV	20	34	44	48	36	72	29	38	211	117
MT	20	27	69	41	43	73	26	31	252	120
NL	20	35	37	34	38	57	15		206	
PL	19	22	41	38	48	75	27	30	241	121
PT	17	29	74	49	45	70	25	36	232	117
RO	18	12	76	39	36	67	25	31	228	105
SE	20	38	57	40	40	71	28	37	235	121
SI	20	33	77	40	34	72	28	35	241	115
SK	20	32	71	46	51	77	27	38	259	115
UK	18	34	67	44	44	71	28	28	244	92
IS	19	36	68	35	40	67	29	38	247	113
NO	20	32	31	45	40	70	28	30	195	

No answers: LI

Table 1-4 Number of responses by NCAs, question module 401

	401			**401**
AT	8		LT	71
BE	70		LU	70
BG	66		LV	74
CY	68		MT	66
CZ	68		NL	71
DE	63		PL	71
DK	65		RO	71
ES	69		SE	71
FI	70		SI	28
FR	64		SK	68
HU	71		UK	12
IE	71		IS	69
IT	72			

No answers: EE, EL, PT, LI, NO

Table 1-5 Number of responses by USPs, by question module

	501	502	503	505	506	507	510
BE	61	29	27	58	14	34	107
CY	64	25	21	53	10	35	108
CZ	62	29	23	60	11	35	107
DE	45	29	26	41	10	24	107
DK	16	22	9	38	10	24	108
EE	54	28	22	55	11	34	
EL	64	25	19	51	11	28	107
ES	51	20	25	57	12	32	107
FI	66	28	23	56	11	36	108
FR	47	27	26	59	15	25	79
HU	61	28	20	54	11	35	104
IE	56	28	25	59	15	31	108
IT	49	27	8	54	13	35	108
LT	61	28	22	60	11	29	107
LU	53	27	23	55	15	36	102
LV	55	29	22			31	107
MT	47	28	24	54	15	24	95
NL	70	29	27	53	15	35	108
PL	65	27	23	55	15	33	107
PT	66	20	26	55	11	34	108
SE	47	18	26	56	11	36	108
SI	56	27	26	58	11	32	108
SK	65	28	23	55	15	35	108
UK	42	28	27	54	14	35	79
NO	35	28	15	52	15	32	107

No answers: AT, BG, RO, LI, IS

2 Overview of the Regulation of Postal Services

This chapter introduces concepts and terminology that are used throughout this study. In particular, this chapter seeks to make clear:

- the legislative development of the Postal Directive and how the study will refer to various versions of the directive and amendatory directives;
- the different segments of the postal services market and how national markets are weighted in this study;
- the range of postal services ensured and regulated as universal service by the Member States;
- the role of postal NRAs in the regulation of non-universal postal services; and
- use of the term ‘universal service provider’ or ‘USP’ in this study.

2.1 Evolution of the EU Postal Directive

Postal regulation in the European Union has developed and evolved over the course of twenty years of study, public debate, and legislative deliberations. The starting point was a decision by the Commission in 1988 to initiate a fundamental review of postal markets in light of the drive towards a unified 'single market' for Community goods and services. After four years, the 'Postal Green Paper' was issued in June 1992.[5]

In 1997, after five years of public consultation, the European Parliament and Council adopted the Postal Directive.[6] The Postal Directive sought to raise and harmonise the quality of national postal services and to improve the then poor quality of cross border services. Member States were required to set universal service standards and monitor compliance with those standards by one or more 'universal service providers' designated by the Member State. An essential element of the modernisation strategy was 'gradual and controlled liberalisation of the market'.[7] The Postal Directive set price and weight limits on the scope of the reserved area and adopted the principle that the reserved area may be maintained only 'to the extent necessary to ensure the maintenance of universal service'.[8]

In Directive 2002/39/EC, adopted in 2002, the Community took the next step in postal reform and agreed to complete liberalisation as a fundamental long term policy objective.[9] Recital 14 declared,

> It is appropriate to provide at Community level a timetable for a gradual and controlled opening of the letters market to competition which allows all universal service providers sufficient time to put in place the further measures of modernisation and restructuring required to ensure their long-term viability under the new market conditions.

This directive set 1 January 2009 as the date for full liberalisation subject to further review and confirmation by the Commission. The directive also reduced the price and weight limits for the reservable area. Directive 2002/39/EC was an amendatory directive. In this study, where it is necessary or useful to distinguish between different

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5 *Green Paper on the Development of the Single Market for Postal Services*, COM/1991/0476 (11 Jun 1992) (hereafter, 'Postal Green Paper').

6 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L15, 21 Jan 1998, p. 14 (hereafter, 'Directive 97/67/EC').

7 Directive 97/67/EC, Recital 8.

8 Directive 97/67/EC, Articles 7(1) to 7(3). The Postal Directive also made clear that express services and document exchanges could not be included in the reserved area. Directive 97/67/EC, Recitals 17 and 18 and Article 7(4).

9 Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ L17, 5 Jul 2003, p. 21 (hereafter, 'Directive 2002/39/EC').

versions of the Postal Directive, the original Postal Directive as amended by Directive 2002/39/EC will be referred to as the '*Second Postal Directive*'.[10]

Directive 2008/6/EC, agreed in 2008, implemented the goal of full liberalisation but gave Member States additional time to prepare, two or four years depending on the Member State.[11] The effective date for Directive 2008/6/EC is 31 December 2010, except for 11 EU Member States for which the effective date is 31 December 2012.[12] Directive 2008/6/EC not only requires an end to the reserved area in each Member State but also modifies other provisions of the Postal Directive to render them more compatible with a liberalised, multi-operator market. In particular, user protection is extended to users of all postal services, not only universal services. Directive 2008/6/EC was likewise an amendatory directive. In this study, where necessary or useful to make the distinction, the Second Postal Directive as amended by Directive 2008/6/EC will be referred to as the '*Third Postal Directive*'.

At present (mid 2009) the Community is in a period of transition from the Second Postal Directive to the Third Postal Directive. Although Directive 2008/6/EC has been adopted, the deadline for transposition of its terms into national law is 31 December 2010 (or 2012 in the case of certain Member States). This study is therefore concerned with both current implementation of the Second Postal Directive and preparations for transposition of the Third Postal Directive.

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10 The term 'Second Postal Directive' will also be considered to include the revised version of Article 21 added by Regulation (EC) No. 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, OJ L284, 31 Oct 2003, p. 1.

11 Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, OJ L52, 27 Feb 2008, p. 3 (hereafter, 'Directive 2008/6/EC').

12 In principle, the deadline for transposition of the Third Postal Directive by the 3 Member States of the EEA (IS, LI, NO) is 31 December 2010. Any amendment, including a longer implementation period, would require a decision by the EEA Joint Committee. See Agreement on the European Economic Area, OJ L1, 3 Jan 1994, p. 3, as amended, Article 98 (providing for amendment to Annex XI).

2.2 Postal services and products in the EU/EEA market

In the evolution of the Postal Directive, definitions of key terms have been clarified or adjusted to conform to amending provisions. In this study, we shall use terms as explicitly or implicitly defined in the Third Postal Directive. For convenience, we shall also make use of common postal terms like 'letter' and 'letter post' that are not specifically defined in the Postal Directive.

In the Third Postal Directive, postal services are 'services involving the clearance, sorting, transport and delivery of postal items'.[13] A 'postal item' is defined as

> an item addressed in the final form in which it is to be carried by the postal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value.[14]

A 'postal service provider' is an 'undertaking that provides one or more postal services'. Thus, a postal service is a service for the collection (or 'clearance'), sorting, transportation, and delivery of addressed items.[15] We shall use the term 'postal operator' as synonymous with 'postal service provider'.

Modern postal service providers offer a variety of postal services. These might be represented in a simplified manner as shown in Figure 2-1. This figure is useful both for clarifying the use of certain terms used in this report and for explaining how we have analyzed the task of postal regulators.[16]

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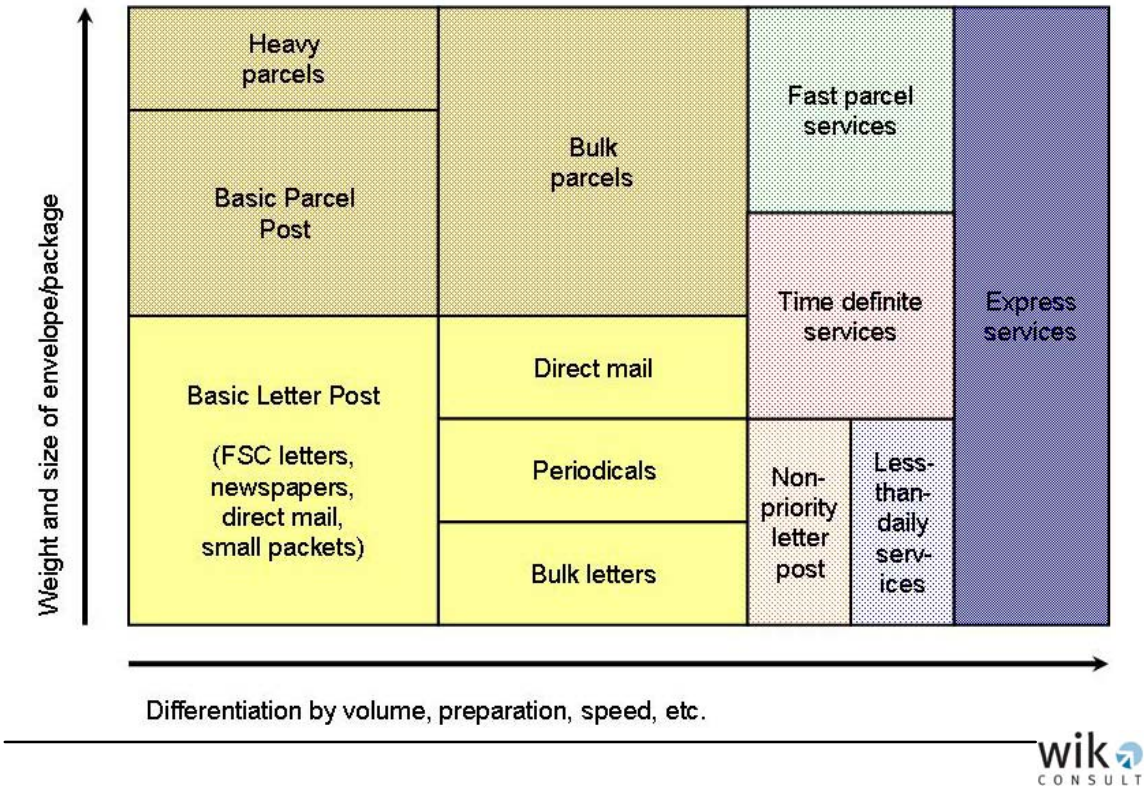
13 Third Postal Directive, Article 2(1).
14 Third Postal Directive, Article 2(6).
15 Third Postal Directive, Article 2(1a).
16 This figure is presented as a discussion aid. It is not intended to portray a comprehensive view of the postal services market or to represent perfectly the relationships between all segments of the market.

Figure 2-1 Postal services market



In this figure, the most basic service is the *basic letter post* located in the bottom left corner. Basic letter post service is a service that provides for the 'fastest standard category' (FSC) of conveyance for envelopes and other small items weighing up to 2 kilograms. In the Postal Directive, the term 'fastest standard category'[17] is equivalent to what most public postal operators and mailers refer to as 'first class' service. The basic letter post is designed for the regular exchange of letter communications. In this study, we use *letter* to refer to a written communication that is individualised for the addressee, such as an invoice, statement of account, or personal greeting. The term *letter* is equivalent to the term 'correspondence' in the Postal Directive.[18] In addition, the basic letter post conveys non-letter items, including newspapers, magazines, direct mail, catalogues, and small packets. The basic letter post may convey items tendered singly or in large quantities.

17 Third Postal Directive, Annex II.

18 Article 2(7) of the Third Postal Directive provides, '*item of correspondence*: a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence'.

Table 2-1 Weighting of Member States in EU/EEA postal market

Member state	LP % EU/EEA	LP per cap	Member state	LP % EU/EEA	LP per cap
AT	3.00%	301	LT	0.10%	30
BE	3.00%		LU	0.16%	322
BG	0.18%	23	LV	0.12%	54
CY	0.04%	57	MT	0.04%	105
CZ	0.98%	94	NL	6.00%	341
DE	20.00%	239	PL	2.00%	50
DK	2.00%	278	PT	1.00%	110
EE	0.12%	87	RO	0.64%	30
EL	0.63%	56	SE	3.00%	344
ES	6.00%	134	SI	0.41%	204
FI	2.00%	395	SK	0.30%	55
FR	18.00%	288	UK	22.00%	358
HU	0.98%	98	IS	0.06%	174
IE	0.67%	151	LI	0.01%	210
IT	6.00%	96	NO	2.00%	357

Note: 'LP' = letter post. Market shares do not sum to 100 percent because market shares in excess of 1 percent have been rounded to the nearest 1 percent to protect the confidentiality of WIK's estimate of the letter post volume in Belgium, which is derived in part from confidential data.

The second most basic service is the *basic parcel post*, represented as the box above the basic letter post. Basic parcel post is a service that provides for conveyance for packages tendered 'over the counter', either singly or in large quantities. For most public postal operators, the maximum weight per package for this service is 20 kilograms, but the weight limit varies among Member States. In addition, postal operators, including private postal operators, may offer collection and delivery services for packages of heavier weights.

Extending to the right of these basic services are additional services designed to meet the needs of particular mailers. The middle column represents a range of services for bulk shippers, i.e., substantial commercial mailers. These services tend to be specialised for different types of postal items and characterised by terms which require the mailer to subscribe to particular commitments relating to volume, price, preparation, or quality of service. Bulk services include *bulk letters* (such as statements of account), *periodicals* (items published periodically such as newspapers and magazines), and *direct mail* (advertisements, catalogues, announcements, etc.). The right hand columns represent services which offer distinctly different levels of service from the basic letter post and basic parcel post. This includes a *non-priority letter post* service for all types of letter post items; *less-than-daily services* (e.g., twice per week delivery of advertisements or statements of account); *time-definite delivery services* (e.g., for advertisements and catalogues), and *express services*. For heavier items, in addition to express services, there are a variety of time-definite and fast parcel services.

In this study, we shall summarise the prevalence of a specific regulatory policy among the Member States by summing up the sizes of the national postal markets affected. For example, if 7 Member States have liberalised postal services and 23 Member States have not we may also note that the 7 Member States account for 59 percent of the total EU/EEA postal market. For simplicity, and because of lack of data, we shall use the same weighting factors for the sizes of national postal markets for all such summary statements, even though in some cases it might be preferable to use parcel post figures instead of letter post figures or international letter post figures instead of domestic letter post figures.

The weighting factors used in this study are based on estimates of the volume of domestic letter post items conveyed in each national postal market. These estimates were developed by WIK-Consult and take into account, as well as possible, the operations of private postal service providers as well as the national universal service provider. These figures reflect an estimated overall letter post volume for the EU and EEA combined of approximately 95 billion letter post items in 2007. The relative weights of the 30 Member States used in this study are shown in Table 2-1.

This study uses terms as defined in the Third Postal Directive. The term *postal services* includes all public and private 'services involving the clearance, sorting, transport and delivery of postal items'. There are many submarkets in the total postal services market. The traditional services provided by public postal operators are described in this study as: *basic letter post*, *bulk letters*, *periodicals* (newspapers, magazines, etc.), *direct mail* (identical printed advertisements), *non-priority letter post* (not offered in all Member States), *basic parcel post*, and *bulk parcels*.

This study summarises the prevalence of specific regulatory policies among the Member States by summing up the sizes of the national postal markets affected. For this purpose, national postal markets are weighted according to WIK-Consult's estimates of the volume of domestic letter post items conveyed by public and private operators in 2007.

2.3 Postal services ensured as universal services

Under the Postal Directive, a *universal service* is a postal service that is *ensured* and *regulated* by the Member State and thus complies with minimum requirements laid down by the Postal Directive. According to Article 3, Member States must ensure that 'users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users'. A 'universal service' is not merely a service that is available at all points in the national territory but one that government guarantees will be provided on a permanent basis. Moreover, under the Postal Directive, Member States must regulate certain aspects of a universal service. For example, delivery must be made at least five days per week to every home or business address.[19] Prices must be 'affordable', 'cost-oriented', 'transparent and non-discriminatory'.[20] Quality of service standards must be adopted and monitored by government.

Not all postal services are universal services. The Postal Directive places two specific boundaries on the concept of universal service. First, the directive makes clear that express services cannot be considered universal services. Although not explicitly defined in the directive, the term 'express service' refers to a value-added service, where the extra value may take different forms and is reflected in a higher price than charged for basic letter post service.[21] As the Commission has noted, express services are usually characterised by greater speed and reliability.[22] A second boundary on the range of universal services is established by weight. According to the directive, universal service includes only parcels weighing up to 10 kilograms, although Member States may increase this limit up to 20 kilograms (most but not all Member States have done so).

Within these bounds, the universal service must include a minimum range of services. Article 3(3) declares that Member States must ensure a universal service that provides, at a minimum, for the collection, sorting, transport, and distribution of (i) postal items weighing up to two kilograms and (ii) postal packages up to 10 kilograms, as well as services for registered items and insured items in both categories. As noted above, services for these items must be regulated so that they meet minimum criteria of frequency, availability, price, and quality. In combination, these several requirements imply that the Member States must, at a minimum, ensure and regulate basic letter post service and basic parcel post service as universal services.

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19 Third Postal Directive, Article 3(3).
20 Third Postal Directive, Article 12.
21 Directive 97/67/EC, Recital 18.
22 See European Commission, *Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services*, OJ C29, 6 Feb 1998, p. 2, 6 (definition of 'express mail service).

The Postal Directive does not require Member States to regulate every postal operator that provides a basic letter post service or basic parcel post service. For example, no Member States requires every parcel delivery service to make deliveries to every address five days per week. The unanimous view among Member States is that it is sufficient to ensure that at least one postal operator provides universal service and is regulated so that it complies with the requirements of the directive. For the most part, Member States have focused regulation on the universal services provided by a designated 'universal service provider' (designated USP), invariably the public postal operator or its successor.

In addition to the two basic postal services, several other postal services could be considered universal services because they involve the transportation of the same types of items as basic letter post and parcel post and are not specifically exempted by the Postal Directive. All of the bulk postal services mentioned above — bulk letters, periodicals, direct mail, and bulk parcels — as well as non-priority letter post fall into this category. Does the Postal Directive require Member States to ensure provision of these additional services and to regulate them as universal services? To clarify the range of postal services required to be ensured by the Member States, this survey asked national regulatory authorities (NRAs) whether they interpreted the Postal Directive to require them to ensure and regulate each of these additional services as 'universal services'. The results are summarised in Table 2-2. The survey allowed NRAs to choose from among five answers: 'definitely yes', 'probably yes', 'proper interpretation unclear', 'probably no', and 'definitely no'. The entries in the table indicate the number of Member States and their collective percentage of the EU/EEA letter post market.

Table 2-2 Overview: services required by Postal Directive (as interpreted by NRAs)

	Definitely yes	Probably yes	Unclear or no answer	Probably no	Definitely no
Basic letter post service	22 (69%)	1 (0%)	6 (31%)	0 (0%)	0 (0%)
Bulk letters	9 (27%)	5 (12%)	11 (32%)	3 (28%)	1 (1%)
Direct mail	7 (26%)	3 (9%)	13 (34%)	3 (30%)	3 (1%)
Periodicals	5 (23%)	3 (6%)	13 (54%)	4 (11%)	4 (6%)
Non-priority letter post	8 (30%)	1 (1%)	16 (62%)	3 (6%)	1 (0%)
Basic parcel post	19 (48%)	1 (0%)	8 (50%)	1 (2%)	0 (0%)
Bulk parcels	3 (3%)	2 (6%)	16 (40%)	3 (28%)	5 (23%)

Note: Entries in the table indicate the number of NRAs and their Member States' collective percentage of the EU/EEA letter post market.

The answers suggest that NRAs have different views and some uncertainly about the range of services that must be ensured as universal services as a matter of Community law. For example, with respect to bulk letter services, 4 NRAs (EE, ES, PL, UK) believe that the Postal Directive does not require these services to be ensured as universal

services, 3 NRAs believe the Postal Directive is unclear, and 8 NRAs did not answer the question.

We also asked NRAs whether their national law does in fact ensure provision of these services as universal services and provide for regulation accordingly. The answers to these questions are summarised in Table 2-3.

Table 2-3 Overview: services ensured as universal services

	Basic letter post	Bulk letters	Direct mail	Periodicals	Non-priority letter post	Basic parcel post	Bulk parcels
AT	Yes					Yes	
BE	Yes	Yes	Yes	Yes	Yes	Yes	Yes
BG	Yes			Yes	Yes	Yes	
CY	Yes	Yes	No	Yes	No	Yes	No
CZ	Yes			No	No	Yes	
DE	Yes			Yes	No	Yes	
DK	Yes	Yes	No	No	Yes	Yes	Yes
EE	Yes	No	No	Yes	No	Yes	No
EL	Yes	Yes			Yes	Yes	
ES	Yes	Yes	No	No	No	Yes	No
FI	Yes	No	No	No	Yes	Yes	No
FR	Yes	Yes	Yes	Yes	Yes	Yes	No
HU	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IE	Yes	Yes	Yes	No	No	Yes	No
IT	Yes	Yes	Yes	Yes	No	Yes	No
LT	Yes	Yes	??	Yes	Yes	Yes	
LU	Yes	No	No	No		Yes	No
LV	Yes	Yes	No	No	Yes	Yes	No
MT	Yes	No	Yes	Yes	No	Yes	No
NL	Yes	No	No	No	No	Yes	No
PL	Yes	No	No	No	Yes	Yes	No
PT	Yes	Yes	Yes	Yes	Yes	Yes	Yes
RO	Yes	No	No	No	Yes	Yes	No
SE	Yes	No	No	No	Yes	Yes	No
SI	Yes	Yes	No	Yes	No	Yes	No
SK	Yes	Yes	Yes	No	Yes	Yes	No
UK	Yes	Yes	Yes	No	Yes	Yes	Yes
IS	Yes	Yes	Yes	Yes	No	Yes	No
NO	Yes	No	No	No	Yes	Yes	No

Key to shading: light gray (red) = ensured as a universal service; medium gray (light green) = not confirmed as an ensured universal service by NRA; dark gray (dark green) = not ensured as a universal service.

This table summarises the apparent scope of the universal service obligation as implemented in the EU/EEA postal market. In this table, the lightly shaded cells (red) indicate services which the NRA specifically indicated are ensured and regulated as universal services. Darkly shaded (green) cells indicate services which the NRA has

specifically indicated are not ensured and regulated as universal services. Medium shading (light green) indicates that NRA has not provided an answer. Presumably, if there existed a positive universal service obligation for such services, the NRA would have so indicated.

From this table, it appears that every Member State ensures and regulates two services as universal services: basic letter post service and basic parcel post service. At the other extreme, only four Member States (BE, DK, PT, UK) treat bulk parcel services as a universal service. One third to one half of the Member States treat services for bulk letters and direct mail as a universal service. Only two Member States, Belgium and Portugal, ensure and regulate all services as 'universal services'.

In some cases, notably in Sweden and Norway, NRAs clarified their responses by indicating that the law does not require the USP to provide certain bulk postal services, but if the USP chooses to provide such services, then they are regulated as universal services. For example, in Sweden, while the USP is not required to provide a discounted postal service tailored to the needs of bulk mailers, if Sweden Post does provide such a service, then the Swedish NRA requires Sweden Post to offer the service throughout the national territory under the same regulatory supervision as other universal services. [23] In this study, we do not consider such a postal service to be a 'universal service' within the universal service obligation since provision of the postal service is not obligatory, i.e., the service is not required by the Member State nor does the Member State ensure the permanent provision of the service as mandated by Article 3 of the Postal Directive. On other hand, as explained in the next section, we believe that, under the Third Postal Directive, regulation of such services may be appropriate, or even mandatory, even though they are not 'universal services'.

Finally, in this survey universal service providers were also asked to identify which services were ensured as universal services. Answers of the USPs are summarised in Table 2-4. In this table, shading indicates instances in which both the NRA and the USP provided answers and the answers were not the same. As this table indicates, in several cases, USPs and the NRAs appear to have different understandings of the scope of the universal service obligation.

23 The position of the Portuguese NRA appears to be similar.

Table 2-4 Overview: services ensured as universal services (USPs)

	Basic letter post	Bulk letters	Direct mail	Periodicals	Non-priority letter post	Basic parcel post	Bulk parcels
AT							
BE	Yes	Yes	No	Yes		Yes	No
BG							
CY	Yes	Yes	Yes	Yes	Yes	Yes	Yes
CZ	Yes	No	No	No	No	Yes	No
DE	Yes	Yes	Yes	No	No	Yes	Yes
DK	Yes				Yes	Yes	
EE	Yes	No	No	Yes	No	Yes	No
EL	Yes	Yes	Yes	Yes	Yes	Yes	No
ES	Yes	Yes	Yes	Yes	No	Yes	
FI	Yes	No	No	No	No	Yes	No
FR	Yes	Yes	Yes	Yes	Yes	Yes	No
HU	Yes	Yes	Yes	Yes	Yes	Yes	No
IE	Yes	Yes	No	Yes	No	Yes	No
IT	Yes	Yes	Yes	Yes	No	Yes	No
LT	Yes	Yes	No	No	Yes	Yes	No
LU	Yes	Yes	Yes	Yes	??	Yes	Yes
LV	Yes	Yes	No	No	Yes	Yes	Yes
MT	Yes	No	No	Yes	No	Yes	No
NL	Yes	No	No	No	No	Yes	No
PL	Yes	Yes	Yes	Yes	Yes	Yes	Yes
PT	Yes	Yes	No	Yes	Yes	Yes	No
RO							
SE	Yes	No			No	Yes	No
SI	Yes	Yes	No	No		Yes	No
SK	Yes	Yes	No	No	Yes	Yes	Yes
UK	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IS							
NO	Yes	No	No	No	Yes	Yes	No

Note: Service ensured as universal service? Stripes (red) up and to the right indicate USP states "yes" but NRA states "no"; stripes (green) down and to the right indicate USP states 'no" but NRA states 'yes'.

Not all postal services are ‘universal services’. Under Article 3 of the Postal Directive, a *universal service* is a postal service that is *ensured* and *regulated* by the Member State and complies with minimum requirements laid down by the Postal Directive. The directive makes clear that express services and services for heavy weight parcels are not universal services. With respect to the seven postal services traditionally offered by public postal operators, the situation is less clear. Every Member State ensures and regulates provision of two services as universal services: basic letter post and basic parcel post. Few Member States treat bulk parcels as a universal service. One third to one half of the Member States treat services for bulk letters, periodicals, and direct mail as a universal service. Only two Member States, Belgium and Portugal, regulates all services as ‘universal services’. In several Member States USPs and the NRAs have different understandings of the scope of the universal service obligation.

Case history 2-1: Universal service in the Netherlands

In the Netherlands, universal services are specifically limited to single piece items and all bulk mail products are not considered as universal services. The Dutch postal act of 2009 defined universal services in similar fashion as other European postal laws and set out standard weight limits for universal services (two kilograms for letters, ten kilograms for parcels) and requires, for example, that universal services include be collected and delivered at least six days a week. A ministerial decree, however, limits the universal service to items posted at a single piece tariff (Postbesluit of 2009, Article 3.1). Consequently, all services that are posted at discounted rates, i.e. all bulk services, are not regulated as universal service in the Netherlands.

2.4 Regulation of non-universal services

The Postal Directive also provides for the regulation of non-universal postal services in certain circumstances. Regulation of non-universal services is grounded in two perspectives. In some situations, the NRA is cast as a regulator of 'universal service providers', and this responsibility is not limited to universal services. In other situations, the NRA is established as a regulator of postal services generally.

The Postal Directive specifically provides for regulation of *universal service providers* in several instances in terms not limited to the provision of universal services. Article 12 (in the Second Postal Directive and later) requires Member States to ensure that special tariffs offered by universal service providers meet certain conditions. Article 13 requires Member States to encourage their universal service providers to adhere to certain standards with respect to the charging of terminal dues. Article 14 requires Member States to ensure that the accounts of universal service providers meet certain requirements. Article 15 requires Member States to see that universal service providers prepare audited financial accounts in accordance with certain criteria.

In other instances, the Postal Directive provides for regulation of postal services generally. For example, Article 11a (added by Directive 2008/6/EC) requires Member States to ensure transparent access to the postal infrastructure. Article 19 (after Directive 2002/39/EC) requires Member States to ensure that all postal operators, not only universal service providers, maintain certain measures to protect the rights of users. Article 22a (added by Directive 2008/6/EC) requires all postal service providers to provide certain information to the NRA. More generally, Article 22 declares that NRAs ‘shall have as a particular task ensuring compliance with the obligations arising from this Directive’, and it is clear that these obligations are designed to accomplish full market opening and protection of users of postal services as well as the assurance of universal service

Regulation of non-universal postal services features more prominently in the Third Postal Directive than it does in the Second Postal Directive. This is partly because the definition of ‘universal service provider’ is implicitly broadened in the Third Postal Directive (see next section) and partly because the Third Postal Directive includes several new provisions that address regulation of the postal services market as a whole. Most importantly, as the liberalisation required by the Third Postal Directive becomes effective, USPs will be strongly motivated to seek an increase in commercial flexibility by narrowing the definition of the USO so that bulk mail services are deemed non-universal services. Where the USP enjoys significant market power in the supply of bulk mail services, a narrow definition of the USO may allow the USP to abuse its market power and undercut full market opening unless the NRA has authority to address non-universal as well as universal services.

In sum, regulation of non-universal postal services features more prominently in the Third Postal Directive than it does the Second Postal Directive, partly due to changes in terms and provisions and due to the implications of full market opening. The Third Postal Directive provides for regulation of universal service providers in instances that are not limited to the provision of universal services (special tariffs, terminal dues, accounting). In addition, the directive provides for regulation of some elements of postal services generally (user protection, access to postal infrastructure, statistics, etc.).

2.5 USPs, national USPs, and PPOs

In light of changes introduced in the Third Postal Directive, it is necessary to take special care in use of the term 'universal service provider' or 'USP'.

In the original Postal Directive, the definition of 'universal service provider' was:

> the public or private entity providing a universal postal service or parts thereof within a Member State, *the identity of which has been notified to the Commission in accordance with Article 4*.[24]

In turn, Article 4 of original Postal Directive provided:

> Each Member State shall ensure that the provision of the universal service is guaranteed and *shall notify the Commission of the steps it has taken to fulfil this obligation and, in particular, the identity of its universal service provider(s).* Each Member State shall determine in accordance with Community law the obligations and rights assigned to the universal service provider(s) and shall publish them. [emphasis added]

In the original Postal Directive, therefore, the term 'universal service provider' referred only to the postal operator identified or 'designated'[25] as the universal service provider in the notice to the Commission. Although Article 4 allowed for the possibility that Member States could designate more than one USP under Article 4, in fact, each Member State designated only one, the national postal administration or its corporatised successor. Hence, the term 'universal service provider' was apparently limited to postal operators designated under Article 4.

In the Third Postal Directive, the definition of 'universal service provider' is changed slightly by replacing 'entity' with 'postal service provider':

> the public or private *postal service provider* providing a universal postal service or parts thereof within a Member State, *the identity of which has been notified to the Commission in accordance with Article 4*.[26]

This seems an insignificant change since it is self-evident that an entity 'providing a universal postal service' is also a 'postal service provider'. At the same time, however,

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24 Directive 97/67/EC, Article 2(13) (emphasis added).

25 In the original Postal Directive, Article 4 does not use the word 'designate'. However, the procedure by which Member States select a 'universal service provider' — no term is given in the original directive for this procedure — came to be known as 'designation'. Thus, in describing this procedure in retrospect, Recital 23 of Directive 2008/6/EC states, 'Directive 97/67/EC established a preference for the provision of the universal service *through the designation of universal service providers*'.

26 Third Postal Directive, Article 2(13) (emphasis added).

Article 4 is revised more significantly, casting doubt on the meaning of the term 'universal service provider'. In the Third Postal Directive, Article 4 provides for *two* notifications to the Commission, as follows:

> 1. Each Member State shall ensure that the provision of the universal service is guaranteed *and shall notify the Commission of the steps it has taken to fulfil this obligation*. . . .
>
> 2. Member States *may designate one or more undertakings as universal service providers* in order that the whole of the national territory can be covered. Member States may designate different undertakings to provide different elements of universal service and/or to cover different parts of the national territory. . . .
>
> *Member States shall notify the Commission of the identity of the universal service provider(s) they designate*. The designation of a universal service provider shall be subject to a periodic review and be examined against the conditions and principles set out in this Article. [emphasis added]

This leaves unclear whether the term 'universal service provider' refers to postal service providers whose identity is provided in the notification under Article 4(1) or in the notification under Article 4(2). Article 4(2) notice plainly refers only to designated USPs. The Article 4(1) notice could refer to other postal service providers. Recital 23 of Directive 2008/6/EC makes clear that, under the Third Postal Directive, designation under Article 4(2) is only one of three methods by which Member States may ensure universal service:

> Member States may apply one or a combination of the following: the provision of the universal service by market forces, the designation of one or several undertakings to provide different elements of the universal service or to cover different parts of the territory and public procurement of services.

Hence, the Article 4(1) notice must identify in some manner all postal service providers which the Member State relies upon to ensure universal service, whether by market forces, designation, or public procurement, whereas the Article 4(2) notice will be limited to the postal service providers who are designated under Article 4(2).

In a nutshell, it appears that the term 'universal service provider' in the Third Postal Directive could arguably refer to either—

- a postal service provider that provides all or part of the universal service through the operation of market forces, designation, or public procurement pursuant to a notice provided under Article 4(1) or

- a postal service provider that has been designated as a universal service provider under Article 14(2) to provide all or part of the universal service.

In this study, we shall use the term 'universal service provider' in the first sense rather than the second when referring to regulation under the Third Postal Directive. The first interpretation seems to us more in keeping with the overall approach of the Third Postal Directive. For example, in the Third Postal Directive, Article 6 requires each Member State to ensure that *universal service providers* give users up-to-date information about universal services. It seems probable that Parliament and the Council expect each Member State to ensure the availability of this information regardless of whether it relies upon market forces, designation, or public procurement to ensure universal service. Likewise, Article 14 requires *universal service providers* to maintain accounts according to criteria that allow the NRA to ensure that prices of universal services conform to the criteria of Article 12. If Article 14 refers only to universal service providers designated under Article 4(2), then NRAs might lack adequate accounts to regulate prices of universal services in cases where Member States rely upon market forces or public procurement to ensure universal service. It seems unlikely, however, the Council and the Parliament intended for Member States to escape the obligation to control the prices of universal services in such cases.[27]

Thus, in this study, the term *'universal service provider' or 'USP' will refer to any postal service provider that a Member State relies upon to provide universal service*. If the discussion relates to regulation under the Second Postal Directive (now in effect), then the term 'universal service provider' will refer to the postal service provider designated under Article 4. However, if the discussion refers to regulation under the Third Postal Directive, then the term 'universal service provider' will refer generally to any postal service provider that is or may be relied upon to provide universal service by market forces, designation, or public procurement. Where there is ambiguity or need for emphasis, we will use the term 'designated universal service provider' or 'designated USP' to refer a postal service provider that has been designated as a universal service provider under Article 4 of the Second Postal Directive or Article 4(2) of the Third Postal Directive.

For clarity, it also appears useful to define two closely related terms at the same time. We will use the term '*national universal service provider*' or '*national USP*' to refer to single postal operator that is legally obliged — normally by designation under Article 4 — to provide all universal postal services to all points in the national territory. Nothing in

27 More generally, as noted in section 2.4, above, the Third Postal Directive appears to subject universal service providers to several obligations where they are providing non-universal postal services. If the term 'universal service provider' is limited to postal service providers designated under Article 4(2), the scope of such regulation is likewise limited, a seemingly unreasonable result.

the Postal Directive requires a Member State to establish a national USP, as opposed to multiple USPs, but all Member States except Germany have done so far.

The second term is '*public postal operator'* or *PPO*. We shall use the term public postal operator to refer to a postal service provider that is owned wholly or partly by government. Technically, it is not necessary for a public postal operator to be a USP. It is certainly not necessary for a USP to be a public postal operator. Two Member States (MT, NL), have sold all of the ownership in their former public postal operators so these Member States have USPs — indeed national USPs — but no public postal operators.

In light of changes introduced in the Third Postal Directive, it is necessary to take special care in use of the term 'universal service provider' or 'USP'. In the Second Postal Directive, the term 'USP' referred to a postal operator designated as a universal service provider under Article 4. In the Third Postal Directive, the term 'USP' appears to refer to any postal service provider that provides all or part of the universal service through the operation of market forces, designation, or public procurement pursuant to a notice provided under Article 4(1).

3 Implementation of the Second Postal Directive

This chapter describes how Member States of the EU and EEA have implemented the Second Postal Directive. It also considers compliance with provisions of the Third Postal Directive to the extent that the Third Postal Directive merely clarifies provisions of the Second. This chapter addresses, in particular, strengths and weaknesses of different regulatory approaches with respect to the following key components of the Second Postal Directive:

- the regulatory framework and allocation of responsibility for implementing the Postal Directive among national agencies;
- development and tasks of the national regulatory authority;
- definition of the universal service obligation;
- quality of service monitoring;
- exclusive and special rights;
- licensing/authorisation procedures;
- use of compensation funds to support universal service;
- regulation of prices for universal service;
- regulation of the accounts of USP(s); and
- protection of users' rights.

This chapter, like chapter 4 (implementation of the competition rules) and chapter 5 (preparations for implementing the Third Postal Directive), is primarily descriptive. In chapter 6, practices described in chapters 3 to 5 are evaluated by reference to what we consider to be the 'best practices' in postal regulation.

3.1 Regulatory framework

In this study, the term *regulatory framework* refers to the system of the laws and governmental institutions that have been established to govern, regulate, or provide postal services. The laws include 'primary legislation' (legislation adopted by the parliament or highest legislative authority) and 'secondary legislation' (rules and regulation adopted by other authorities). Judicial decisions are also part of the regulatory framework.

3.1.1 Postal laws and regulations

Primary postal legislation has been undergoing substantial revision since adoption of the Postal Directive in 1997. In that year, the average age of primary postal legislation was about 15 years. At the end of 2005, it was about 5 years (EU members only). Since 2005, many Member States, especially those who joined the European Union since 2004, have adopted significant amendments to their postal laws. The current state of primary postal legislation is shown in Table 3-1. The third column indicates whether the Member States consider their current postal laws to be complete transpositions of the Third Postal Directive.

Table 3-1 Primary postal legislation

	Law enacted	Major amendments since 2005	Transpose 2008/6?	English version available	Judicial cases since 2005
AT					
BE	1992	2	No	No	0
BG	2000	8	No	Yes	0
CY	2006	0	No	Yes	0
CZ	2001	1	No	Yes	0
DE	1998	1	Yes*	No	
DK	2004	1	No	Yes	0
EE	2009	1	Yes	No	2
EL	1999	0	No	Yes	
ES	1999	1	No	No	3
FI			No	Yes	0
FR	2006	0	No	Yes	0
HU	2005	1	No	Yes	0
IE	1908	0	No	Yes	0
IT	2000		No	No	
LT	2000		No	Yes	2
LU	2001	0	No	No	1
LV	1995	0	No	Yes	0
MT	1975	1	No	Yes	0
NL	2009	1	Yes	Yes	
PL	2003	5	No	Yes	0
PT	2001	0	No	Yes	0
RO	2002	1	No	Yes	1
SE	1994	0	No	Yes	0
SI	2004	0	No	No	0
SK	2001	1	No	Yes	0
UK			??	Yes	
IS	2003	1	No	Yes	0
NO	1998	0	No	Yes	0

* Germany noted that 'slight amendments are necessary' to transpose Directive 2008/6.
?? Unknown. No information about law or practice

Secondary postal legislation is more difficult to summarise. Secondary legislation may be adopted by a variety of legal measures including ordinances or regulations issued by the Council of Ministers or an individual ministry, ordinances or regulations issued by the NRA, legal obligations included in a license issued by the NRA, a contract between government and a postal operator defining conditions of service, and similar legal instruments. Table 3-2 shows the dates of secondary legislation dealing with key postal topics.

Table 3-2 Secondary postal legislation: dates of major measures

	Scope of US0	USO Quality	USO Rates	USP accounts	Reserved area	Authorisation procedures	Univ. Serv. fund	User protection
AT								
BE	2006	2006	2006	2006		2006	2006	
BG		2006	2004					
CY								
CZ	2008	2008		2008	2005	2009		2008
DE		2000	2000	2000				2002
DK	2005	2005	2005	2006	2005	2005		2005
EE			2009	2009		2009		
EL		2006	2005	2005	2007	2010		2005
ES		1999	2001	2001		2000	2001	1999
FI								
FR	2007	2009	2009	2008		2006		2007
HU		2005	2007	2006		2005		2005
IE	2006	2004	2002		2003	2003		2008
IT	2009	2008	2006		2007	2000	2001	
LT	2007	2004	2007	2005		2004		2006
LU		2001						
LV		2006	2007			2007		
MT								
NL	2009	2009	2009	2009				
PL		2004		2004				2004
PT	1999	2008	2008	2001	1999	2001		
RO	2007			2005		2007		
SE	1994	1994	1994	2001				2001
SI		2004	2005	2005		2003		
SK	2004	2004	2008					2004
UK								2008
IS	2009	2009		2005				
NO	1997	2007		2007				2007

This table suggests that most Member States have been actively revising their postal legislation since 2005 even though they have not yet transposed the Third Postal Directive. The average age of secondary postal legislation is now about four and a half years. It should be noted that an absence of secondary legislation does not necessarily demonstrate a gap in the legal framework since some topics may be completely specified in primary legislation.

Since 2005, the pace of new primary postal legislation has slowed. Nonetheless, Member States have continued to modernise their postal legislation by revising secondary postal legislation. The average age of secondary postal legislation is now about four and a half years.

3.1.2 Postal authorities: Postal Ministries, USPs, NRAs, NCAs

Traditionally, responsibility for the national postal service was vested in a single ministry which operated the national post office and formulated public policy towards the postal service, telecommunications services, and perhaps other types of infrastructure services. For almost all of the twentieth century, these ministries could be referred to generically as 'PTTs', i.e., as ministries for post, telephone, and telegraph.

After two decades of intense public debate, unified exercise of governmental and operational authority over the postal system is no longer considered desirable or acceptable. In the wake of new technologies and changing business practices, differences between public postal services and other communications services have become more marked while differences between public postal services and other types of delivery services — private distributors of unaddressed advertisements, newspapers, parcels, and express services — have diminished. As personal communications have migrated to the telephone and email, public postal services have become more commercial in nature. In response, governments have given their post offices more flexibility in matters of commerce and governance. At the same time, increased concerns for efficiency and competitive fairness have motivated separation of the government's regulatory responsibilities from the commercial activities of the post. The ideal of a 'level playing field' for all types of postal operators has prompted extensive re-examination of the postal monopoly and other special rights traditionally accorded the public postal service.

In place of the former PTT, there are now several government agencies which have a significant role in the regulation and provision of universal postal services. Although there are variations among Member States, government institutions that participate in governance of the postal sector typically include (i) a ministry responsible for postal policy (the 'postal ministry'), (ii) a 'public postal operator' owned wholly or partly by government or a 'universal service provider' designated by government, (iii) a national regulatory authority with jurisdiction over the postal sector ('NRA'), and (iv) a national competition authority ('NCA').

In all Member States there is a ministry of government whose portfolio includes responsibility for development of public policy towards postal services.[28] While the title and functions of this ministry varies among Member States, in this study we shall use the generic term 'postal ministry' to refer to this ministry. A list of postal ministries is presented in Table 3-3.

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28 In Belgium there is a minister responsible for postal services but no 'ministry'. This minister is merely supported by a cabinet office.

Table 3-3 Ministry with primary responsibility for postal services

	Postal ministry
AT	Federal Ministry for Transport, Innovation and Technology
BE	Minister for Enterprises and Simplification
BG	State Agency for Information Technology and Communications
CY	Ministry of Communication and Works
CZ	Ministry of Industry and Trade (MIT)
DE	Federal Ministry of Economics and Technology
DK	Ministry of Transport
EE	Ministry of Economic Affairs and Communications
EL	Ministry of Transport and Communications
ES	Ministry of Public Works and Transportation
FI	Ministry of Transport and Communications
FR	Ministry of Economy, Industry and Employment
HU	Ministry of Transport, Telecommunication and Energy
IE	Department of Communications, Marine and Natural Resources
IT	Ministry of Economic Development
LT	Ministry of Transport and Communications
LU	Ministry of Communications
LV	Ministry of Transport
MT	Ministry for Infrastructure, Transport and Communications
NL	Ministry of Economic Affairs
PL	Ministry of Infrastructure.
PT	Ministry of Public Works, Transport and Communications
RO	Ministry of Communications and Information Society
SE	Ministry of Industry, Employment and Communications
SI	Ministry of the Economy
SK	Ministry of Transport, Posts and Telecommunications
UK	Department for Business, Enterprise and Regulatory Reform
IS	Ministry of Communications
NO	Ministry of Transport and Communications

In most Member States, the second government institution is a public postal operator that has been designated under Article 4 of the Second Postal Directive as the national universal service provider, or national USP, for the entire national territory. While the Second Postal Directive allows Member States to designate more than one USP, none have done so. In all but two cases, the national USP is also a public postal operator. Table 3-4 lists the current roster of national USPs and the extent of State ownership.

Table 3-4 National universal service provider

	National universal service provider	Legal status	State ownership (%)
AT	Austria Post	PLC	53
BE	La Poste/DePost	PLC	
BG	Bulgarian Posts	PLC	100
CY	Cyprus Post	Govt	100
CZ	Czech Post, S. E.	SOE	100
DE	[No USP designated]		
DK	Post Denmark A/S	PLC	75
EE	Estonian Post Ltd	SOE	100
EL	Hellenic Post (ELTA)	SOE	100
ES	Sociedad Estatal Correos y Telégrafos, S.A.	PLC	100
FI	Itella	PLC	100
FR	La Poste	Other	100
HU	Hungarian Post Company Limited	Other	100
IE	An Post	PLC	100
IT	Poste Italiane S.p.A.	PLC	65
LT	Lithuanian Post	PLC	100
LU	Entreprise des Postes et Télécommunications Luxembourg (EPT)	Other	100
LV	Latvijas Pasts	Other	100
MT	Maltapost p.l.c.	PLC	0
NL	TNT Post BV	PLC	0
PL	Polish Post	SOE	100
PT	Correios de Portugal, S.A. (CTT)	PLC	100
RO	Romanian Post S.A.	SOE	100
SE	Posten AB	PLC	100
SI	Pošta Slovenije d.o.o.	PLC	100
SK	Slovenská pošta, a. s.	PLC	100
UK	Royal Mail Group Ltd.	Other	100
IS	Iceland Post	SOE	100
NO	Norway Post	PLC	100

Legal status: Govt = Government department; SOE = State enterprise; PLC = Public limited company; Other = Other

The third agency with responsibility for postal matters is the ‘national regulatory authority’ or NRA. In most Member States, establishment of the postal NRA was prompted by adoption of the original Postal Directive in 1997. Article 22 of that directive required each Member State to ‘designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators'. The capacity and competence of the NRAs are addressed in the next section and in section 3.2, below.

A fourth agency that exercises regulatory authority over the postal sector is the national competition authority (NCA). In the last two decades, public postal operators have been subject to a substantial number of complaints under the competition rules. These cases have been one influence shaping postal reform. The role of the NCA at national level

varies from Member State to Member State. Table 3-5 lists the national competition authority in each Member State. All of the NRAs who answered the survey declared their authority to enforce the competition rules in the postal sector.

Table 3-5 National competition authority and its role in postal sector

	Name of NCA
AT	Federal Competition Authority
BE	Belgian Competition Authority
BG	Commission on Protection of Competition
CY	Commission for the Protection of Competition
CZ	Office for the Protection of Competition
DE	Federal Cartel Office
DK	Danish Competition Authority
EE	Estonian Competition Authority [same as NRA]
EL	Hellenic Competition Commission
ES	National Competition Commission
FI	Finnish Competition Authority
FR	French Competition Authority
HU	Hungarian Competition Authority
IE	The Competition Authority.
IT	Italian Competition Authority
LT	Competition Council of the Republic of Lithuania
LU	Competition Council
LV	Competition Council
MT	Office for Fair Competition- antitrust and mergers State Aid Monitoring Board- State Aid
NL	Netherlands Competition Authority
PL	Polish Office of Competition and Consumer Protection (OCCP)
PT	Portuguese Competition Authority
RO	Romanian Competition Council
SE	Swedish Competition Authority
SI	Competition Protection Office (UVK)
SK	Antimonopoly office of the Slovak Republic
UK	The Office of Fair Trading
IS	The Competition Authority
NO	The Norwegian Competition Authority

In place of the former 'PTT' ministry (ministry of posts, telegraphs, and telecommunications), there are now several government agencies which have a significant role in the regulation and provision of universal postal services in most Member States. Although there are variations among Member States, government institutions that are participate in governance of the postal sector typically include a 'postal ministry' (ministry responsible for postal policy as part of a larger portfolio), a national universal service provider (national USP, usually a public postal operator owned wholly or partly by government), a national regulatory authority (NRA) with jurisdiction over the postal sector, and a national competition authority (NCA).

3.1.3 Allocation of regulatory authority

In general, government may fulfil the obligations imposed by the Postal Directive by one of three decision making procedures:

- measures are adopted by the parliament or by the government as a whole (e.g., by a council of ministers);
- measures are adopted by a single minister (ministerial regulation); and
- measures are adopted by an independent regulatory body (e.g., a NRA regulation or decision).

The manner in which authority over the postal sector is allocated among these three decision making procedures is significant. Different procedures reflect different bases for decision. Legislation is the most cumbersome decision making process and is usually reserved for the most politically sensitive issues, that is, for issues which require the input of all significant interest groups before a decision can be made. The council of ministers likewise provides a broadly based and relatively inflexible forum, suited to decisions of a fundamentally political nature. Decisions by a single minister may be both political and flexible. Authorising an expert independent regulator to decide an issue, while not wholly free from political considerations, normally provides the most economically objective means of decision making. To some extent, allocation of authority reflects the extent to which postal policy is to be determined by political criteria or economic criteria.

Article 22 of the Postal Directive provides that ‘the national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive'. This implies that a minimum range of regulatory functions must be committed to an independent regulator and not resolved by more political processes. The Postal Directive does not state which functions must be committed to the NRA. In principle, however, the allocation of regulatory authority over postal affairs should serve the overall objectives of the directive.

In this study, we asked Member States to indicate which types of governmental procedures are used to determine certain key policy issues. In particular, which measures—

- specify the frequency of delivery for universal services?
- determine the maximum weight of parcels within the universal service?
- specify the scope of the reserved area?
- establish the requirements and conditions for general authorisations or licences?

- establish the procedures or requirements for a fund that shares the net cost of universal service obligations among providers of services and/or users?
- require the USP to maintain prices for some or all universal services that are uniform throughout the national territory? and
- define the quality of service standards which the USP must attain in the provision of universal service (e.g. routing time targets, minimum criteria for access points etc.)?

Table 3-6 summarises how Member States discharge these key policymaking functions. As this table indicates, key issues of postal policy are most often resolved by primary legislation (A) or by regulations adopted by the government as a whole (B). That is, they are decided on political rather than technical grounds. What is notable are cases in which Member States have given independent regulators substantial discretion to determine the specifics of policy within a framework of legislative guidelines (D). These include Cyprus, Denmark, Romania, Sweden, and the United Kingdom. On the other hand, delegating substantial policy authority to the council of ministers (B) (e.g., DE, ES, HU, LV) or to a single minister (C) (e.g., EL, ES, FR, IT, NO) may suggest the possibility of substantial political influence on postal policy.

One policy issue deserves particular comment, the scope of the reserved area. Under the Second Postal Directive, the scope of the reserved area is a technical rather than a political issue. Article 7(1) requires that the scope of the reserved area must be no larger than necessary to ensure universal service. In almost all Member States, however, the scope of the reserved area is determined by the legislator rather than by the regulator. A notable positive exception is the UK. In 2000, UK postal law delegated to the NRA, Postcomm, the authority to determine the extent to which competition with the public postal operator is consistent with ensuring the universal service. After a searching inquiry, Postcomm concluded in 2002 that full liberalisation should be permitted.[29]

29 UK, Postcomm, *Promoting Effective Competition in UK Postal Services: A Decision Document* (May 2002).

Table 3-6 Authority determining policy decisions required by Postal Directive

	Frequency of US	Weight limit US parcels	Scope of reserved area	Authorisation procedures	USO fund	Uniform tariff rules	USO quality standards
AT	A	A	A	A	F	A	AB
BE	A	A	A	AB	AB	A	AB
BG	D	A	A	A	F	AD	D
CY	AD	A	A	AD	AD	AD	AD
CZ	D	D	AB	G		F	D
DE	B	B	BF	A	A	B	B
DK	D	D	D	D	F	D	D
EE	A	A	A	A	AC	AC	AC
EL	AC	AC	AC	ACD	AC	A	AC
ES	AB	AB	A	AB	AB	AB	B
FI	A	A	F	A	F	A	AE
FR	AC	AC	A	AC	AC	AC	AC
HU	A	AB	A	AB	F	F	B
IE	A	A	A	A	F	F	D
IT	A	AC	AC	C	C	C	C
LT	A	A	A	AD	F	A	C
LU	A	A	A	A	F	A	C
LV	B	A	A	ABD	F	A	B
MT	A	AC	AC	AC		AD	AD
NL	A	A	F	A	A	A	A
PL	A	A	A	A	F	A	C
PT	A	A	A	A	A	AG	G
RO	ACD	AD	AD	AD	G	D	AD
SE	A	A	F	AD	F	AD	AD
SI	A	A	A	A	A	A	C
SK	A	A	A	A	F	DE	D
UK	AD	AD	AD	AD	F	AD	D
IS	AD	A	A	A	AC	AC	AB
NO	AC	AC	A	AC	A	AC	C

Key: (A) Postal law includes specific criteria; (B) Regulation, decree, or ordinance of Prime Minister or Council; (C) Regulation, decree, or ordinance of the postal ministry; (D) NRA regulation or authorisation requirement; (E) Discretionary decision of USP; (F) Not applicable; (G) Other

Assignment of administrative tasks required to implement the directive can be evaluated in the same way. In this study, we asked Member States to identify which government agency:

- has primary responsibility for ensuring that the USP(s) gives users up to date information about universal service?
- administers the system, if any, for granting authorisations by means of general authorisations or individual licences?

- has primary responsibility for collecting money for and making required payments from a fund, if any, that shares the net cost of universal service obligations among providers of services and/or users?
- has primary responsibility for reviewing the prices of universal services and ensuring that they are affordable and geared to costs?
- has primary responsibility for reviewing special tariffs of the USP, if any, and ensuring that they are transparent, non-discriminatory, and take into account avoided costs?
- has primary responsibility for reviewing the accounts of USP(s) and ensuring that they comply with the requirements of the Postal Directive?
- has primary responsibility for ensuring that independent performance monitoring of quality of service is provided?
- has primary responsibility for ensuring that transparent, simple, and inexpensive procedures are drawn up by postal operators for dealing with the complaints of users of universal services?
- has primary responsibility for ensuring that revenues from the reserved sector, if any, are not used to cross subsidise non-reserved services within the universal service except when strictly necessary?
- has primary responsibility for ensuring that revenues from the reserved sector, if any, are not used to cross subsidise services outside the universal service?

Answers are summarised in Table 3-7.

Table 3-7 Responsibility for administrative decisions required by Directive

	Authori-sation	Admin USO fund	US rates	Special tariffs	USP accts	Quality of US	User complaints	Cross subsidy in US	Cross subsidy non-US
AT	NRA		NRA	NRA	NRA		Min Post	NRA	NRA
BE	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
BG	NCA		NRA	NRA	NRA	NRA	NRA	NRA	NRA
CY	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
CZ	Other		NRA	NRA	NRA	NRA	NRA	NRA	NRA
DE	NRA	NRA	NRA	NRA	NRA	NRA	NRA		
DK		Min Post	NRA	NCA	Council	NRA	NRA	Min Post	NCA
EE	NCA	NCA	NCA	NCA	NCA	NCA	NCA	NCA	NCA
EL	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
ES	Min Post	Min Post	Min Post	Min Post	Min Post	Min Post	Min Post	Min Post	Min Post
FI	Council		NRA	NRA	NRA	NRA	NRA		
FR	NRA		NRA	NRA	NRA	NRA	NRA	NRA	NRA
HU	NRA	Other	Min Post	Min Post	NRA	NRA	NRA	NRA	NRA
IE	NRA	Other	NRA	NRA	NRA	NRA	NRA	NRA	NRA
IT	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
LT	NRA	Other	NRA	NRA	NRA	NRA	NRA	NRA	NRA
LU	NRA		NRA	NRA	NRA	NRA	Other	NRA	NRA
LV	NRA		NRA	NRA	NRA				
MT	NRA		NRA	NRA	NRA	NRA	NRA	NRA	NRA
NL	NRA	NRA	NRA	NRA	NRA	NRA	NRA		
PL	NRA		NRA	NRA	NRA	NRA	NRA	NRA	NRA
PT	NRA	Other	NRA	NRA	NRA	NRA	NRA	NRA	NRA
RO	NRA	Other	NRA	NRA	NRA	NRA	NRA	NRA	NRA
SE	NRA		NRA	NRA	NRA	NRA	NRA		
SI	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
SK	NRA		NRA	NRA	NRA	NRA	NRA	NRA	NRA
UK	NRA		NRA	NRA	NRA	NRA	NRA		
IS	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA	NRA
NO	Min Post		NRA	NRA	NRA	NRA	NRA	NRA	NRA

Key: NRA = National regulatory authority (NRA) or staff; NCA = National competition authority (NCA); Min Post = Postal Minister or ministry staff; Min Other = Ministry other than the postal ministry; Court = Court of law; Council = Council of Ministers. .

Almost all Member States commit almost all administrative functions to the NRA, and it is the exceptions that stand out. For example, in Denmark it appears that the postal ministry and the council have important roles in the competitively sensitive areas of USP account regulation, control of cross subsidy, and the compensation fund. In Hungary, the postal ministry regulates postal rates.

In some Member States, the freedom of NRAs to take administrative decisions can be limited substantially by overly specific rules set out in legislation. One example relates to regulation of tariffs and accounting separation in the Netherlands. As the table above states, the Dutch postal regulator, OPTA, is responsible for regulating tariffs and

controlling separation of accounts. However, OPTA's role in controlling accounts is very limited. The NRA cannot specify detailed rules for the USP's accounts because the postal law delegates such authority to the postal minister ('specific rules shall be set by ministerial regulation with respect to the structure of the said accounts and the cost allocation method').[30] Similarly, specific rules for price regulation, including specification of a 'reasonable return', are determined by ministerial regulation.[31]

Allocation of regulatory authority among national institutional reflects the extent to which postal policy is to be determined by political criteria or economic criteria. The Postal Directive provides that a minimum range of regulatory functions should be committed to an independent regulator and not resolved by more political agencies. Most Member States have determined most major policy issues by primary legislation or ministerial regulation and committed most administrative tasks to the NRA. It is the exceptions to this pattern that are most notable. On the positive side, the UK has delegated to the NRA the authority to determine the appropriate scope of the reserved area by impartial administrative inquiry — an approach that conforms well with the requirements of the Postal Directive. Less positive examples are provided by Member States (notably, Denmark, the Netherlands) where a ministry or the Council of Ministers has a significant role in technical or competitively sensitive areas such as regulation of prices, accounting, cross subsidy, or the compensation fund.

30 Netherlands Postal Act 2009, Article 22.

31 See Netherlands Postal Act 2009, Article 25. Although the 2009 act provides that the postal minister must consult with OPTA prior to issuing a regulation on price control, with respect to the fundamental question of the 'reasonable return', the minister has already adopted a regulation declaring that the 'reasonable return' is the return reported by the USP in 2008. See Netherlands Postal Regulation 2009 (*Postregeling 2009*), Article 14.

3.1.4 Rights of ownership

In the Third Postal Directive, Article 22 is amended to clarify the high degree of separation required between governmental decisions and commercial decisions. The amended Article 22 requires separation between regulatory functions and the rights of ownership: *'Member States that retain ownership or control of postal service providers shall ensure effective structural separation of the regulatory functions from activities associated with ownership or control*'. This survey therefore inquired how governments today exercise ownership authority over their public operators. Table 3-8 summarises the results.

Table 3-8 Government control of the public postal operator

	Who appoints CEO?	Number of directors on board	Directors appointed by Gov't	Who appoints Directors?	Term of Directors	Directors: cause for dismissal
AT						
BE	Council	10	5	Council	6 yr	Other
BG	USP board	5	5	Min Other	3 yr	Discretion
CY	Other	0				Other
CZ	Min Other					
DE			0			
DK	USP board	12	6	Council	2 yr	Other
EE	Other	3	0	Other		
EL	Min Other	11				
ES	USP board	19	19	Council		
FI	USP board					
FR	Council	21	7	Other	5 yr	Discretion
HU	Other	7	7	Min Other	3 yr	Other
IE	USP board			Min Post		
IT	USP board	5	5	Min Other	3 yr	Misconduct
LT	Min Post	1	1	Min Post	4 yr	Discretion
LU	USP board	5	5	Council	5 yr	Misconduct
LV	Min Post	4	0			
MT	USP board	5	0			
NL	USP board		0			
PL	Min Post	4	4	Min Post	None	Discretion
PT	USP board	7			3 yr	
RO	USP board	7	7	Min Post	2 yr	Discretion
SE	USP board	10	7	Min Post	1 yr	Misconduct
SI	Other	3	0		4 yr	Other
SK	Min Post	5	5	Min Post		Misconduct
UK	USP board	11	11	Min Post	3 yr	Misconduct
IS	USP board	7	7	Min Post	None	Misconduct
NO	USP board	10	6	Min Post	2 yr	Discretion

The key feature of proprietary control is the power to appoint the top management authority, that is, either the board of directors or, if there is no board, the chief executive officer (CEO). In at least nine Member States (IE, LT, PL, RO, SE, SK, UK, IS, NO), it appears that the board of directors is appointed by the postal minister.[32] In some Member States (LT, LV, PL, SK), the postal minister also appoints the CEO directly (or in lieu of a board in the case of Latvia). In several cases, the directors serve at the discretion of the postal minister or for terms of three years or less. Since the postal minister exercises policy making authority over the postal sector, it appears questionable whether these arrangements satisfy the structural separation requirement of the Third Postal Directive.

In other Member States, control over the public postal operator appears to be less conjoined with the authority of the postal minister. An especially clean separation of regulatory authority and ownership authority is provided in Hungary. The Hungarian State Holding Company exercises ownership authority over the public postal operator and other entrepreneurial assets of the Hungarian State. The holding company was established to provide market-based management of state assets.[33] An alternative approach is provided by France, where the board of the public postal operator is composed of representatives of several ministries. Outside the Community, New Zealand offers a well-developed model for exercising ownership rights in multiple 'state owned enterprises' such as New Zealand Post, which substantially separates ownership rights from policy making (see case history 3-1, below). Finally, the Netherlands and Malta have completely separated ownership from governmental authority by selling ownership of the public postal operator to private parties.

In many Member States, the postal minister appoints all or most of the board of directors and/or the chief executive officer of the public postal operator. It appears questionable whether these arrangements provide sufficient separation between regulatory and policy making authority, on the one hand, and ownership and control of the public postal operator, on the other. An example of a distinct separation of regulatory authority and ownership authority is provided by Hungary, where ownership of state entrepreneurial companies is vested in a separate holding company.

32 In Sweden, the Postal Minister appoints 7 of 10 directors.
33 See Hungarian State Holding Company (MNV Zrt.). http://www.mnvzrt.hu/en.

Case history 3-1: Safeguarding proprietary rights and supervision of NZ Post Group (New Zealand)

As a State-Owned Enterprise (SOE), NZ Post Group is subject to the legal provisions of the State-Owned Enterprises Act of 1986, which defines the nature of the government's ownership of companies, the responsibilities of shareholders, the objectives governing operation of SOEs, and corporate accountability (role of directors, reporting requirements). Activities of NZ Post are also regulated by sector-specific laws.

NZ Post has two shareholding ministers: the Minister of Finance and the Minister for State-Enterprises. In the exercise of their duties, the ministers are assisted by the Crown Company Monitoring and Advisory Unit (CCMAU), a government agency administratively attached to the Treasury. CCMAU advises on strategic issues, investment and diversification opportunities, and impact of government policies. CCMAU also monitors sector trends as well as business plans and performance of SOEs; promotes corporate governance best practice; and assists with the appointment of directors to boards.

The Ministers may authorise SOEs to act on behalf of the government in providing goods and services, to transfer assets and liabilities of the government to SOEs, to vest in SOEs any rights applying to land transferred to SOEs, and to grant leases, licences, easements, permits or rights of any kind. On the other hand, the government is obliged to fund any non-commercial activities that it wants NZ Post to carry out. The Ministers appoint the nine Directors of the Board of NZ Post, considering the balance of competencies and experiences, and after having consulted the chairman. They may also determine the amount of dividend.

Pursuant to the State-Owned Enterprises Act, NZ Post has to follow basic principles: to be profitable and efficient as comparable business; to act as a good employer (good and safe working conditions, equal opportunities employment programme, impartial selection of persons for appointment, opportunities for enhancement of abilities of employees); and to exhibit a sense of social responsibility. In following these guidelines, the board is accountable to the Ministers for directing and monitoring management and affairs of NZ Post.

The Act also commits a SOE to deliver to the Ministers a 'statement of corporate intent', covering the next three financial years. This statement specifies objectives, nature and scope of activities, ratio of shareholders' funds to total assets, accounting policies, performance targets, principles in determining the dividend, information to be reported to Ministers, procedures for acquisition of shares, and activities to be compensated by government. The SOE is required to follow its statement of corporate intent. The SOE must also provide shareholding Ministers with an annual report of operations, audited financial statements (as well as with half-yearly reports), and any other information on its affairs. In addition, NZ Post has voluntarily agreed to refer to the Ministers its annual business plan, quarterly reports on the performance, and reports on other significant developments.

In 1989, NZ Post and the government signed a Deed of Understanding. This document sets out the obligations of NZ Post with respect to social services, prices, and quality of service. These requirements are supplemented by other company-specific measures, such as director education and induction programmes, and compliance with integrity standards. The Deed was updated in 1998.

Case history 3-2: Separation of state ownership and policy making: The Hungarian State Holding Company (MNV Zrt.)

During the 1990s and the beginning of the current decade, the Hungarian government pursued different sector-specific strategies with respect to the management of public assets and state-owned enterprises. Numerous institutions were established to administer companies of national or strategic importance, as well as companies which serve defence and law enforcement purposes, manage state monopolies, or preserve national culture and traditions. In 2007, a new legal framework was enacted to meet several objectives: (i) to create a single approach to the management of national assets; (ii) to unify principles, organisation, tasks, and requirements, (iii) to implement effective, cost-efficient, transparent, and flexible decision-making processes and management procedures; and (iv) to preserve and increase the value of assets. The relevant provision is Act CVI of 2007 on state-owned assets (State-owned Assets Act).

Pursuant to the State-owned Assets Act, the Hungarian State Holding Company (MNV Zrt.) was set up on 1 January 2008 as the legal successor of three organisations, the Hungarian Privatisation and State Holding Company, the Treasury Property Directorate, and the National Land Fund. MNV is an independent single-shareholder joint stock company, which may not be sold, transformed, divided, or merged. It is fully owned by the Hungarian state with shareholder's rights exercised by the Minister of Finance.

MNV is fully responsible for the management of the Hungarian state assets. Revenues and expenses incurred with respect to MNV's own assets are unbundled from the accounts related to the management of state assets. Besides managing state assets by itself, MNV also concludes contracts with others to undertake the task.

The organisational structure of MNV comprises the National State Holding Board, a Supervisory Board and an Audit Directorate, and the Chief Executive Officer and the management departments. The Minister of Finance adopts the decisions falling into the competence of the General Meeting.

The National State Holding Board is the executive body. It is composed of seven members headed by a Chairman. Members are appointed by the President on proposal of the Prime Minister, with all candidates being nominated by three Ministers. The Board directs MNV, and exercises the rights and performs the obligations arising from the ownership of state assets. Decisions are based on internal proposals and reports. Moreover, MNV adopts an annual report and reports to the Parliament.

Under the direction and management of the Supervisory Board, there is an Audit Directorate consisting of 11 members. It controls the operation of MNV and the National State Holding Board, in particular, and of the management of assets.

Business management and operation are guided by the Chief Executive Officer. He serves as the legal representative of MNV, and is appointed and released by the Minister of Finance. Work is carried out by three sector-specific departments (agriculture portfolio, real property, corporate portfolio) plus three departments with cross-sectional tasks (legal affairs, finances, human resources).

3.2 National regulatory authorities

National regulatory authorities are central to the transformation of the postal sector. As noted, Article 22 of the Postal Directive requires that Member States 'designate one or more national regulatory authorities for the postal sector' and that NRAs 'shall have as a particular task ensuring compliance with the obligations arising from this Directive and shall, where appropriate, establish controls and specific procedures to ensure that the reserved services are respected'.

3.2.1 Establishment of NRAs

Although the Postal Directive permits Member States to establish more than one national regulatory authority for postal affairs, all Member States state that they have entrusted to a single national regulatory authority the responsibility for ensuring compliance with 'all or most of the regulatory functions falling within the scope of the Postal Directive'.[34] It is, therefore, possible to refer to *the* NRA in each Member State without ambiguity. Where it is necessary to distinguish between the agency with primary responsibility for regulation of postal services and other agencies with secondary regulatory responsibilities, the former will be called the 'primary NRA'.

In all but two Member States, the agency responsible for regulation of the postal sector is also responsible for regulating other sectors. Most Member States (24) have combined postal and electronic communications regulation in the same agency. In some Member States, the postal NRA also regulates other network industries such as electricity (DE, EE, LU, LV), gas (LU), rail (DE, EE, LV), or road safety (DK). The only Member States which limit the NRA to the postal sector are Slovakia and the United Kingdom, and the U.K. is reconsidering this arrangement.[35]

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34 Questionnaire 103-12.

35 The British Parliament is presently considering a bill that would abolish its dedicated postal NRA (Postcomm) and extend the jurisdiction of the telecommunications NRA to include the postal sector. See HL 41.

Table 3-9 Primary national regulatory authority for postal services

	National regulatory authority	NRA short name	Other sectors regulated
AT	Austrian Regulatory Authority for Broadcasting and Telecommunications	RTR	B
BE	Belgian Institute for Postal Services and Telecommunications	BIPT	B
BG	Communications Regulation Commission		B
CY	Office of the Commissioner of Electronic Comm. and Postal Regulation	OCECPR	B
CZ	Czech Telecommunication Office	CTU	B
DE	Federal Network Agency for Electricity, Gas, Telecomm., Post and Railway	BNetzA	BCEF
DK	Road Safety and Transport Agency, Postal Supervisory Department	-	A
EE	Estonian Competition Authority	-	BCEF
EL	Hellenic Telecommunications And Post Commission	EETT	BG
ES	Ministry of Public Works and Transportation		A
FI	Finnish Communications Regulatory Authority	Ficora	BG
FR	Regulation Authority for Electronic Communications and Posts	ARCEP	B
HU	National Communications Authority	NHH	BG
IE	Commission for Communications Regulation	ComReg	BG
IT	General Direction of Postal Services Regulation (Min. Eco. Dev.)	DGRSP	
LT	Communications Regulatory Authority	RRT	B
LU	Luxembourg Institute for Regulation	ILR	BCEG
LV	Public Utilities Commission		BCF
MT	Malta Communications Authority	MCA	BG
NL	Independent Post and Telecommunications Authority	OPTA	B
PL	The President of the Office of Electronic Communications.	UKE	B
PT	National Communications Authority	ANACOM	B
RO	National Authority for Management and Regulation of Communications	ANCOM	B
SE	National Post and Telecom Agency	PTS	B
SI	Post and Electronic Communications Agency of the Republic of Slovenia	APEK	BG
SK	Postal Regulatory Office		A
UK	Postal Services Commission	Postcomm	A
IS	Post And Telecom Administration	PTA	B
NO	Norwegian Post and Telecommunications Authority	NPT	B

Other sectors regulated: (A) None; (B) Telecommunications; (C) Energy; (D) Water; (E) Gas; (F) Railway; (G) Other.

Case history 3-3: Plans for creating an independent postal regulator in Spain

In October 2007, the Spanish legislator adopted a law on the establishment of an independent national regulatory authority for the postal sector to be called CNSP (Comisión Nacional del Sector Postal).[36] As of mid-2009, the authority has not been established in practice.

CNSP is to take over some functions from the Ministry of Public Works and Transportation (Ministerio de Fomento) that currently performs the tasks of the postal NRA in Spain. According to the law, the CNSP's will, inter alia, resolve user complaints and conflicts between postal operators, issue and manage authorisations, determine conditions for downstream network access, monitor market development, advise the government of postal policy, determine annually the net cost of the universal service, and administer a compensation fund for the universal service (if needed). Responsibility for regulating postal tariffs, a key regulatory competence, will remain with the ministry. Responsibility for policy-making in the postal sector, including adoption of measures to guarantee the provision of the universal service will likewise remain in the ministry.

The NRA will be headed by a commission of five persons serving fixed terms of six years. The authority will be financed from fees paid by postal operators. Contributions are planned to amount to 0.1881 percent of gross revenues of each postal operator, in addition to registration fees. For the first year of operation, the law allows for financing of CNSP from the state budget. The staff of the CNSP will in part be recruited from the current staff of the Ministry of Public Works and Transportation.

In order to be established in practice, the government will need to appoint the commissioners by an ordinance to be adopted by the council of ministers, at the recommendation of the Minister of Public Works and Transportation. Judging from interviews with stakeholders, it appears to WIK-Consult that the government's efforts to recruit adequate persons to serve as commissioners have so far been unsuccessful, and that this is the key obstacle to the establishment of the Spanish postal regulator. At present, there is no independent NRA outside a ministry in Spain, and therefore the requirement to establish an independent NRA — a key element of the Postal Directive — appears not to have been implemented in Spain.

36 Ley 23/2007, de 8 de octubre, de creación de la Comisión Nacional del Sector Postal.

3.2.2 Mission and resources of NRAs

Table 3-10 Resources of NRAs (2008)

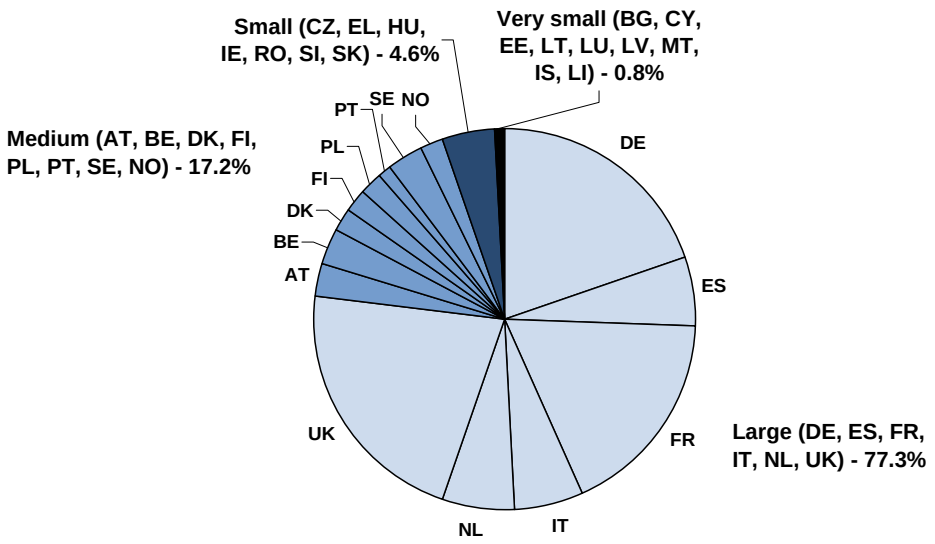
	Size Group	Budget (€000)	Total staff	Professional staff	Economists	Lawyers	Consultants (%budget)	Average budget per staff (€000)
DE	1	-	48	30	-	-	-	-
ES	1	-	38	12	2	6	-	-
FR	1	1,908	14	14	-	-	6	124.9
IT	1	2,539	47	7	-	-	1	53.5
NL	1	499	-	-	-	-	2	-
UK	1	11,512	66	-	-	-	28	126.5
AT	2	-	-	-	-	-	-	-
BE	2	-	10	-	2	4	-	-
DK	2	227	5	3	-	2	-	45.3
FI	2	-	-	-	-	-	-	-
PL	2	146	11	9	4	4	18	10.9
PT	2	1,728	19	10	6	2	11	81.1
SE	2	734	9	9	5	2	1	80.8
NO	2	567	3	-	-	-	-	189.0
CZ	3	150	6	6	-	1	-	25.0
EL	3	780	11	11	5	2	-	70.9
HU	3	2,681	15	14	2	2	3	173.4
IE	3	1,499	7	5	1	1	29	152.7
RO	3	-	-	-	-	-	-	-
SI	3	286	4	4	4	-	6	67.3
SK	3	396	17	14	3	1	1	23.1
BG	4	491	10	10	5	2	-	49.1
CY	4	-	3	3	2	1	-	-
EE	4	51	2	2	1	-	3	25.0
LT	4	-	8	2	2	-	-	-
LU	4	427	2	1	0	0	0	203.3
LV	4	-	6	4	2	2	-	-
MT	4	177	3	2	-	1	19	47.8
IS	4	80	2	2	1	1	-	40.0
LI	4	0	0	0	0	0	0	-

Since, under Article 22 of the Postal Directive, NRAs are required to ensure compliance with the obligations arising from the directive, Member States must equip NRAs with sufficient resources to do the job. Recital 47 of Directive 2008/6 emphasises this implied obligation: 'National regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks'. A summary of resource data reported by the NRAs for 2008 is presented in Table 3-10. Note that throughout this chapter, 'NRA budget' and 'NRA staff' refer to the

resources allocated to postal regulation, not the total staff or budget of the authorities (which in most cases regulate other sectors as well).

In practice, the financial and personnel resources available to NRAs vary substantially among Member States. Part of this variation is due to differences in the sizes of postal markets. To provide a reasonable basis for comparison, we have divided the Member States into four groups: large postal markets (more than 5 percent of the combined EU/EEA domestic letter post market); medium-sized markets (1 to 5 percent); small markets (0.2 to 1 percent); and very small markets (0.2 percent or less). Figure 3-1 illustrates this grouping of the Member States by size of postal market and the relative weight of each group in the total EU/EEA market. The relative weights for the each Member State are those set out in table 2—1.

Figure 3-1 Division of Member States by size postal markets



Since it is easier to compare Member States graphically, Figure 3-2 to Figure 3-5 present the total budget and total staff data from Table 3-11 by Member State group. Note that the ratio between the scale for the budget (left axis) and the scale for the total number of staff (right) is fixed so that the two bars are equal when the average budget per employee is €100,000. The scales for the last three figures are the same so that the resources available to medium, small, and very small Member State postal markets may be compared directly.

Figure 3-2 NRA resources in large MS postal markets, 2008

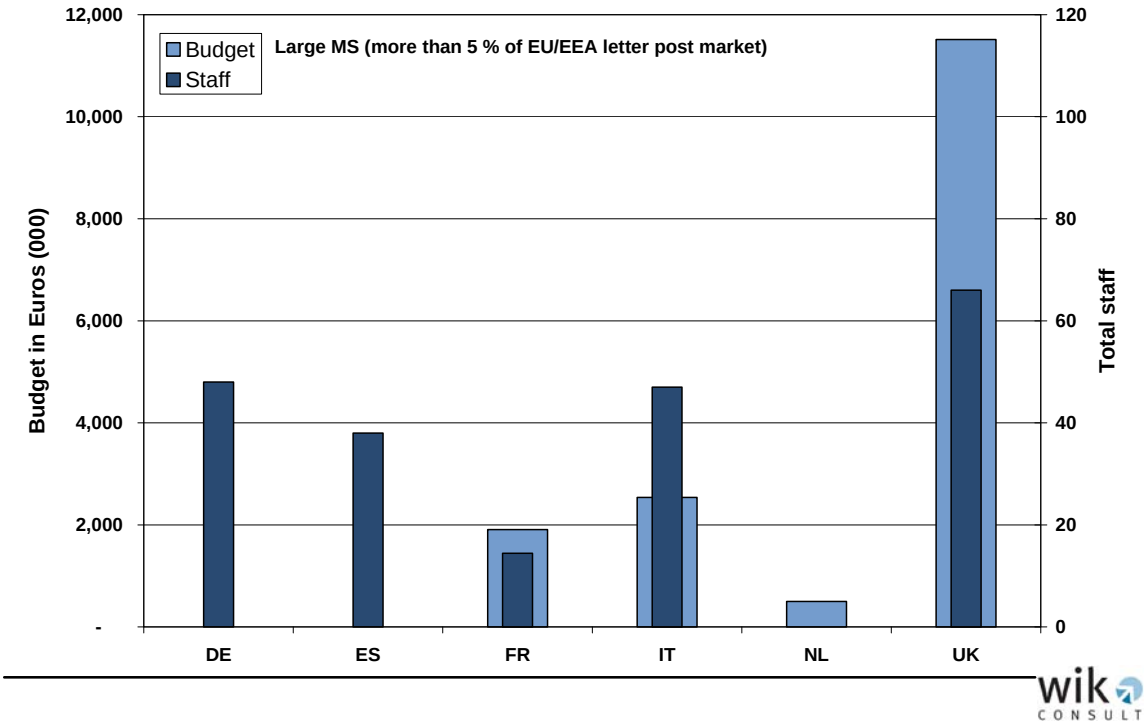


Figure 3-3 NRA resources in medium MS postal markets, 2008

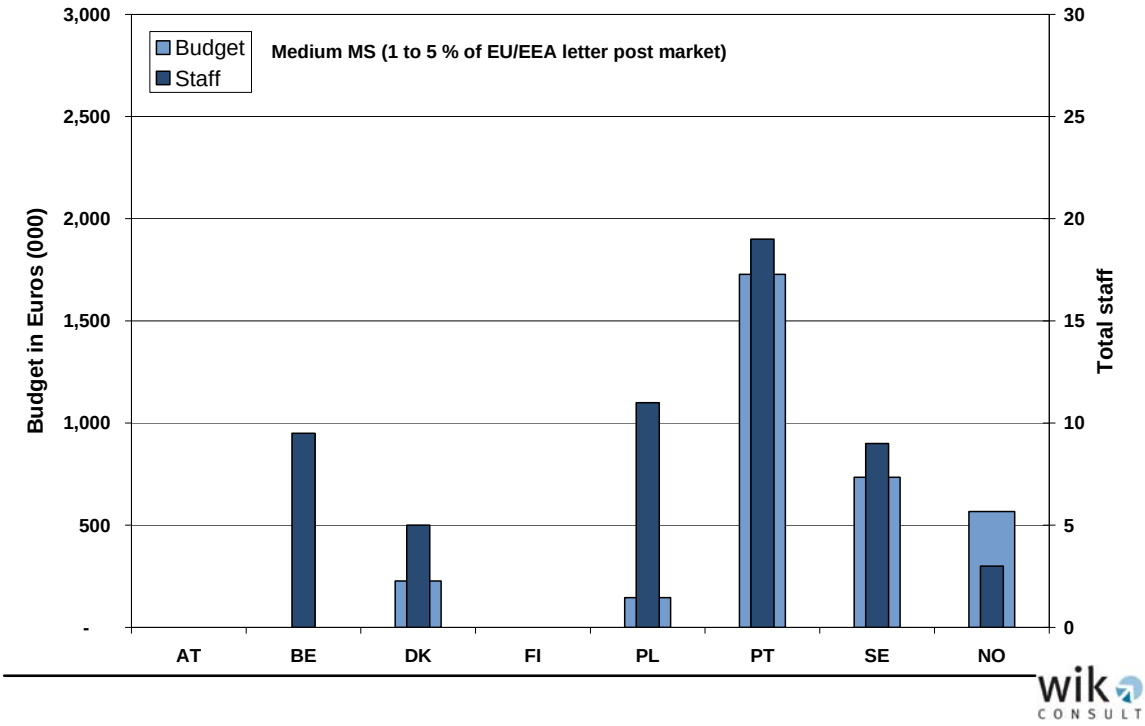


Figure 3-4 NRA resources in small MS postal markets, 2008

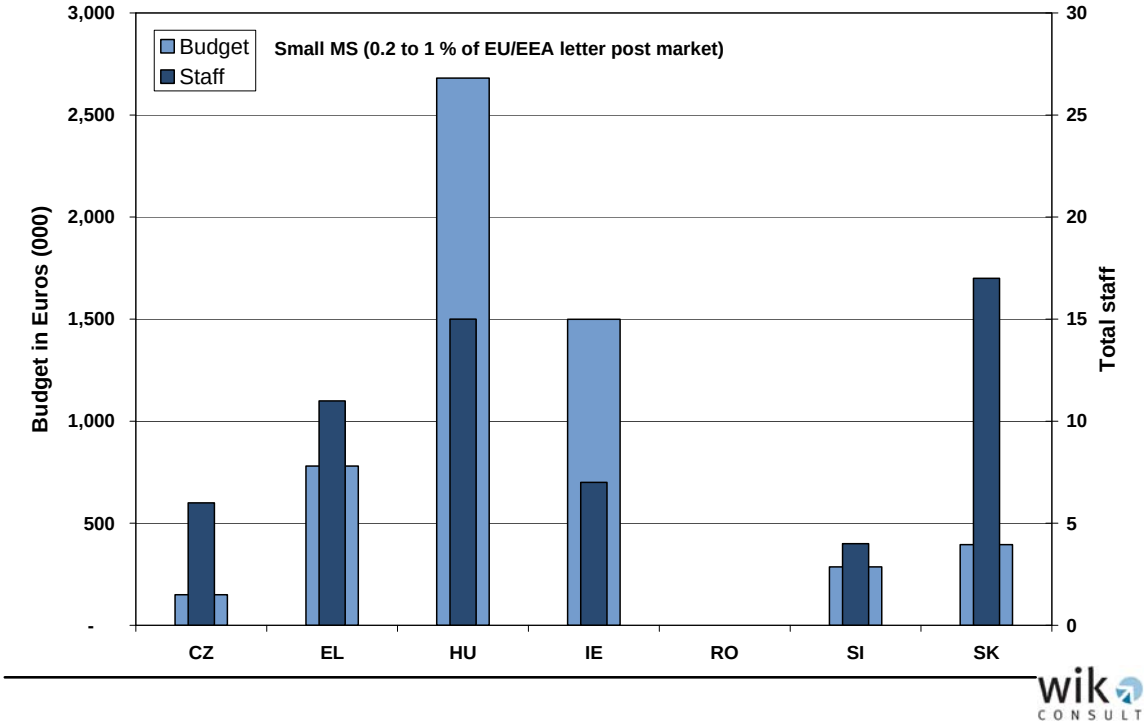
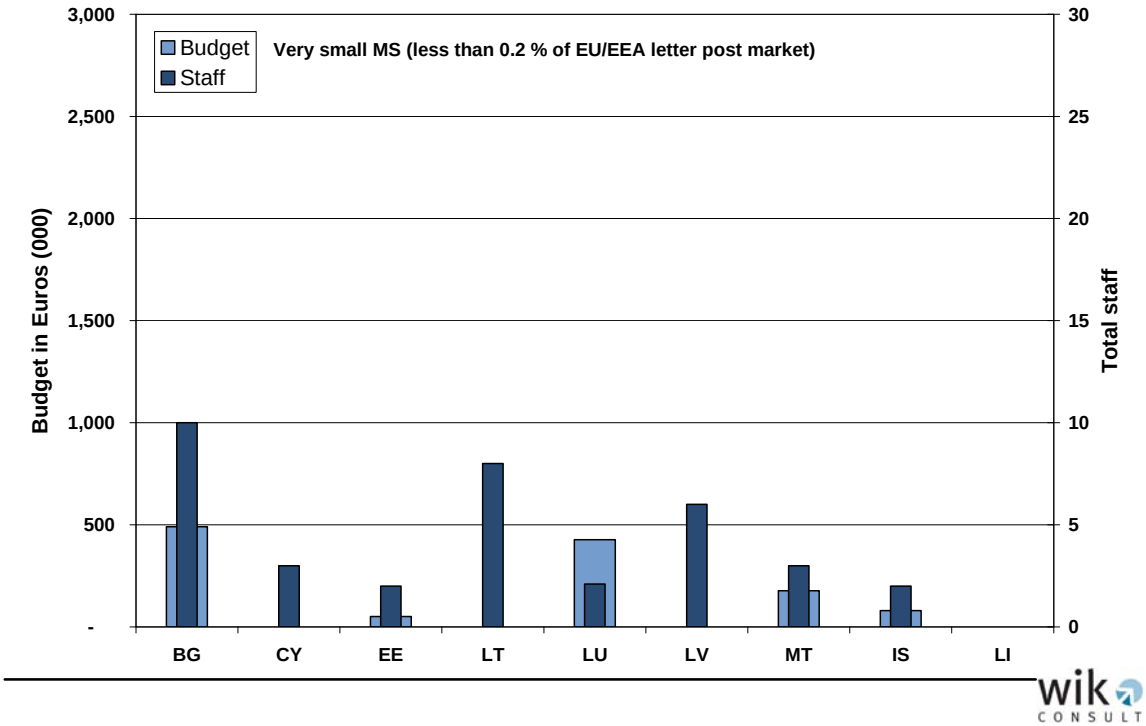


Figure 3-5 NRA resources in very small MS postal markets, 2008



Overall, 20 of 30 NRAs have provided annual budgets for 2008 or 2007 (if 2008 data was unavailable). Six NRAs (BE, CY, DE, ES, LT, LV) reported personnel figures but indicated that separate budget figures were unavailable; one (NL) provided a budget but not personnel total. This incomplete response may imply a lack of formality in the regulatory apparatus of some Member States. Regulation of the postal sector does not appear to be the subject of a regular and explicit decision on resource allocation.

Table 3-11 shows the average budgets and personnel figures for each group of NRAs based upon available data. These figures must be interpreted with caution since there are wide variations in NRA resources within each group. If one adopts the plausible assumption that the best-equipped NRAs in each size group are likely to have an adequate but not extravagant level of resources for postal regulation, then the average level of resources might be interpreted as the minimum level of resources towards which Member States should aim in each size group. Calculation of the average resources available to NRAs in each size group also makes possible a rough but plausible calculation of the total regulatory resources available in the EU/EEA region, using the assumption that each NRA which has not reported budget or staffing data has approximately the average budget and staff reported by other NRAs in its group,

Table 3-11 Average resources of NRAs by MS group (available data only)

Group	Budget (Euros)	Total staff	Professional staff	Economists	Lawyers	Consultants (% budget)	Average exp per person
1	4,114	43	16	2	6	9	102
2	680	9	8	6	3	15	81
3	965	10	9	3	1	8	85
4	245	5	3	2	1	7	73

In the first group there are six Member States with large postal markets (DE, ES, FR, IT, NL, UK).[37] These Member States collectively account for more than 77 percent of the combined domestic letter post volume of the EU and EEA. Three of the NRAs have provided incomplete information on staffing and budgets so it is difficult to draw conclusions about this group as a whole. Clearly, the United Kingdom spends substantially more than any other Member State on postal regulation. Equally clearly, the budget for the Dutch NRA appears to be insufficient when compared to the budget of other large market Member States.[38] What appears more telling, however, is that the

37 For ES and IT, budget and staff information relate to 'NRAs' that are not independent of the postal ministry (see section 3.2.2 below).

38 The budget Dutch NRA OPTA spends on postal regulation appears insufficient (see Figure 3-2 above. No information on the staff employed with regulation of postal services was available from OPTA: Based in an interview with OPTA, however, it appears that this staff is well below 10 persons, and many of these persons do not deal with postal regulation exclusively.

NRAs in both France and the UK have a high average expenditure per staff person (after excluding funds for consultants), between €125 and €200 thousand per year. This apparent investment in expert staff may account for the high level of regulatory sophistication exhibited by these NRAs. In contrast, the relatively low level of average expenditure in Italy (€54 thousand) — with only 7 professional staff members out of a total of 47 —suggests that the Italian NRA needs to consider retaining more expert staff to address the complexities of implementing the Third Postal Directive in a period of rapid economic change.

In the second group there are eight Member States with medium-sized postal markets AT, BE, DK, FI, PL, PT, SE, NO). They comprise about 17 percent of the EU/EEA letter post. Among the NRAs that provided budget figures, the level of expenditure varies widely. The Portuguese NRA reports a substantial budget of €1.7 million. In contrast, the NRA of Poland has a budget of approximately €150,000. Average expenditure per staff person (after excluding funds for consultants) divides into two distinct groups. Three NRAs (PT, SE, NO) have a high expenditure per staff person, more than €80,000 per person per year. Two other NRAs (DK, PL) expend about one eighth to one half as much. These NRAs employ 6 to 8 legal and economic experts in postal regulation (except for DK, which has two legal experts).

In the third group there are seven Member States with small postal markets (CZ, EL, HU, IE, RO, SI, SK). Collectively, they account for 4.6 percent of the EU/EEA postal market. There is a substantial variation in resources within this group as well. The NRAs in Hungary and Ireland report annual budgets of €2.7 million €1.5 million, respectively, while the NRAs in Czech Republic, Greece, Slovakia, and Slovenia have budgets in the range of €150,000 to €800,000. On average, NRAs in this group employ approximately the same number of staff and spend about as much per employee as NRAs in the second group (medium-sized postal states),

In the fourth group there are nine Member States with very small postal markets (BG, CY, EE, LT, LU, LV, MT, IS, LI). Collectively, they account for less than 0.8 percent of the EU/EEA letter post market. Annual budgets vary substantially, from a low of €51 thousand (EE) to a high of €491 thousand (BG). These NRAs typically employ 2 or 3 persons of which 1 or 2 have legal or economic expertise. Three NRAs, however, have exceptionally large staffs for this group: Bulgaria (10 persons), Lithuania (8), and Latvia (6 persons). Average expenditure per staff person is about €73,000 (due primarily to the high average expenditure in LU), about the same as for groups 2 and 3.

This review naturally raises the question: what represents a reasonably adequate level of resources for NRAs? Since regulatory frameworks differ significantly among Member States, precise answers for each Member State are impossible. Nonetheless, some general observations may be offered. Overall, it appears that there are few 'economies of scale' in postal regulation. For Member States in groups 2, 3, and 4, the reasonable

and appropriate level of resources for a NRA does not seem to vary significantly by the size of the postal market. In each national postal market, the number and complexity of economic, legal, and policy issues posed by postal regulation seems about the same. Among these Member States, NRAs that seem to have a reasonably good level of resources (taking into both total resources and average resources per employee) include those of Greece, Hungary, Ireland, Portugal, Slovenia, Sweden, and Norway. More subjectively, it seems to us these seven NRAs are also among the most effective regulators outside of group 1. If one takes these seven NRAs (all of whom reported both budget and staff figures) as representing, on average, a reasonably 'well-resourced' NRA, then, in all but the largest Member States, a plausible minimum annual budget for a NRA is, on average, about €1,182 and a plausible total number of total staff is 9.7 persons. While a specific NRA might possibly do very well even with less than this level of resources, in general this appears to be a reasonable order-of-magnitude estimate of the minimum level of resources required to provide basic postal regulation in an average medium-sized or smaller state. Additional resources will likely be needed if the NRA is responsible for additional tasks such as adjudicating user complaints or enforcing the competition rules.

In the six Member States with the largest postal markets, estimating a reasonable level of resources is more subjective. Only three NRAs (FR, IT, UK) have reported both budget and total staff figures. Of these, the Italian NRA must be ruled out as appropriate example of a well-resourced independent regulator because it is not independent of the postal ministry[39] and expends relatively little per employee (suggesting a less highly trained staff). The remaining two NRAs — those of France and the UK —both have pioneered analyses of policy issues that NRAs in other Member States can build upon. However, they supported by very different levels of resources. The budget of the British NRA is more than six times that of the French NRA. Is the British government hopelessly extravagant when it comes to postal regulation or is the French government overly parsimonious? The best answer is probably 'neither'. Both NRAs are effective, but they have different functions. The British NRA has a substantially larger role in the development of postal policy than the French NRA. In particular, the British NRA has planned and overseen liberalisation of the national postal market. While it might be argued by some that the legislator has delegated to the British NRA more issues than is strictly necessary or appropriate for a NRA, it could also be argued that the French legislator has delegated too little authority to its NRA. On balance, for purposes of rough estimation, it does not seem implausible to consider that a well-resourced NRA in one of the six largest national postal markets should have available to it a budget and staff that lies halfway between the British and French models, i.e., a budget of about €6.7 million and total staff of about 40.

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39 See section 3.2.2, below.

These reflections imply that if all EU/EEA NRAs had adequate budgets and staff (on average), the total budget for postal regulation would be on the order of €68 million and total staff about 487 persons. This estimate implies the need for about a 75 percent increase in the expenditure on postal regulation, with substantially larger percentage increases in some smaller Member States. Keeping in mind, however, that NRAs are likely to be the primary instrument of government policy in the postal services market in the future and that the annual revenues in the current EU postal services market are about €94 billion euros,[40] an annual expenditure of €68 million on postal regulation might be considered appropriate.

For comparison, it may be noted that budget of the United States Postal Regulatory Commission in 2008 was approximately €8.9 million with a total staff of 70 persons. The volume of postal items in the United States is almost twice that in the EU/EEA area, but, on the other hand, U.S. legislation gives the postal regulator a substantially narrower regulatory mission (e.g., little or no authority over quality of service, user protection, and the services of private operators). The major difference between the U.S. and the EU/EEA area, however, is that the United States manages with only one national postal regulator rather than 30, and, as noted above, the size of the postal regulator is only very weakly related to the size of the postal market.

Financial and staff resources available to national regulatory authorities vary significantly among the Member States, even if comparison is limited to those with postal markets of comparable size. To provide a reasonable basis for comparison of resources, Member States can be divided into four groups: 6 large postal markets (more than 5 percent of the combined EU/EEA domestic letter post market); 8 medium-sized markets (1 to 5 percent); 7 small markets (0.2 to 1 percent); and 9 very small markets (less than 0.2 percent). Overall, there is a large gap between the resources of the large market NRAs and the resources of NRAs in medium and small markets. This difference suggests that the 6 largest NRAs are able to perform substantially more extensive analysis than other NRAs. A relatively low level of resources available to NRAs in very small markets suggests that they may lack the minimum tools needed to regulate postal markets effectively. Within groups of national postal markets of similar size, a significant difference among NRAs appears to be the large variation in budget per employee. NRAs which do not have a reasonable expenditure per employee may have difficulty attaining the level of expertise needed to provide effective regulation.

In the 15 Member States with medium and small markets, well established NRAs appear to have roughly similar levels of resources. This convergence across a range of postal markets suggests that, on average, an adequate annual budget for all but the largest NRAs would be (again, roughly) about €1.2 million euros for a staff of 9 or 10

40 ITA Consulting and WIK-Consult, *The Evolution of the European Postal Market Since 1997* (2009), section 3.1.

persons. For the six largest national postal markets (DE, ES, FR, IT, NL, UK), an even rougher calculation suggests that, on average, adequate resources would be on the order of €6.7 million in annual budget and a staff of 40. In total, these estimates suggest that Member States will need to increase their average expenditure on postal regulation substantially (very roughly by 75 percent) in order to provide NRAs with adequate resources to implement the Third Postal Directive. In addition, the apparent need for smaller NRAs to build upon techniques and analysis of larger NRAs implies the desirability of more cooperation among NRAs and a sharing of analytical resources.

Case history 3-4: Mission and resources of Postcomm (United Kingdom)

The Postal Services Commission (Postcomm) was set up by the Postal Services Act 2000. It has the status of an independent non-ministerial government department solely responsible for postal affairs. Postcomm is guided by three statutory objectives, in order of priority: to protect universal service, to foster competition, and to promote efficiency. Postcomm is required to give particular regard to the fulfilment of customers' needs by operators.

Referring to this objective, Postcomm performs the following tasks: license postal operators; specify, protect and refine universal service provision; control prices and compliance with quality of service standards of the dominant provider Royal Mail; ensure special tariffs; examine separation of accounts of Royal Mail; oversee network access agreements; deal with user complaints; execute market monitoring (Competitive Market Reviews, Business Customer Surveys); and advise the government on Post Office Networks.

Decision-making follows a two-tier approach. General strategies and policies are determined on the basis of a consultation procedure, the presentation of decision documents, and the passage of legal notices and directions. Breach of licence conditions entails Postcomm's enforcement action including financial penalties should the occasion arise. Decisions of the NRA do not need approval by the government, nor can the government suspend or withdraw decisions. Operators can lodge an appeal against decisions at the Court of Law.

Postcomm is steered by a board of eight independent commissioners headed by a chairman, all appointed for a four-years-term. Daily management is run by a chief executive who also serves as a commissioner. The seven directorates of Postcomm (e.g. economic policy, regulatory finance, universal service and customer protection, market development) are chaired by directors. Financial resources are mainly filled up with fees collected from universal service providers and other postal operators. In 2008, the budget amounted to € 11.512 million, and total staff was 66.

Case history 3-5: Mission and resources of ARCEP (France)

The Regulation Authority for Telecommunications (ART) was set up in January 1997. As a result of Law No. 2005-516 of 20 May 2005, which phased in competition in the postal market, ART's mission was extended to include postal services, and it was renamed Regulation Authority for Electronic Communications and Posts (ARCEP). ARCEP intends to further liberalisation, fair and effective competition, and proper functioning of the markets to the benefit of users, to guarantee provision and financing of universal service, to encourage employment, innovation and competitiveness, and to consider the interest of regions.

Within the postal sector, ARCEP's assignments cover: licensing postal operators and implementing related rights and obligations; surveillance of separation and transparency of accounts (cost allocation rules, specifications for the accounting system and reporting format) of the universal service provider La Poste; regulation of universal service rates, control of the performance of the universal service provider and of the quality of universal service; disclosure of recommendations and opinions on the financing of universal service; prevention of cross-subsidisation; settlement of disputes among operators (execution of contracts, monitoring of access agreements); handling user complaints; expression of opinions on draft legislation, decrees and regulations; submission of annual reports and accounts of activities to Parliament.

ARCEP adopts decisions following consultations on draft decisions. Default on obligations can implicate orders and sanctions on universal service providers and other authorised operators. Some decisions may be appealed to the Paris Court of Appeal, the Council of State or the Administrative Tribunal. The NRA is structured in an Executive Board and eight divisions. The Executive Board defines the major policy directions, and adopts decisions and opinions; it is composed of a Chairman and six other members, holding a six-year non-renewable mandate. Divisions are managed and co-ordinated by a Director-General and two Deputy Director-Generals. The Postal Regulation Division is composed of the units 'Authorisations and Universal Service' and 'Tariffs and Accounting' About 14.5 employees (in full time equivalents) work in the field of postal regulation out of a total staff of 165 (2007). The postal sector-related budget amounts to €1.908 million (2007) of the overall €44.66 million (2008).

Case history 3-6: Mission and resources of ANCOM (Romania)

Regulation of the Romanian telecommunications and postal markets started with the establishment of the National Regulatory Authority for Communications (ANRC) in September 2002. Competences were extended to information technologies in December 2006 (renaming to ANRCTI) and in 2007 to radio communications, audiovisual services and communications terminal equipment. With the inclusion of additional tasks in the fields of information technologies and internet domain names in September 2008 ANRCTI became the National Authority for Management and Regulation in Communications (ANCOM). ANCOM's objective to oversee communications markets as to accomplish effective competition, protect end users' rights and interests, ensure efficient use of scarce resources, encourage effective investment, and stimulate innovation.

Assignments in the postal sector encompass: granting general authorisations (universal service providers and other operators); the right to designate universal service providers; monitoring compliance with universal service obligations (density of access points, number of clearances and deliveries) of Posta Romana; control of universal service rates (accessibility, transparency, cost-orientation, uniformity at national level); implementation of separation of financial statements and accounts of the universal service provider; observance of universal service quality standards; verification of the availability of information for users; dealing with user complaints; collection and analysis of statistical data; and publication of annual reports.

Final decision making authority is vested in the President of ANCOM who is appointed by the President of the State on proposal of the government for six years. Decisions of ANCOM do not require prior approval by the postal ministry or other governmental institutions and cannot be suspended or withdrawn. Public consultation procedures ensure that the public can comment on proposed actions. Parties affected by a decision have the right to appeal to Court of Law. ANCOM is structured in eleven divisions (e.g. Legal Division, Economic Regulation Division, Enforcement Division, Technical Regulation Division), and in services directly subordinated to the President. The NRA is financed from public funds and fees for monitoring and for the use of numbering resources collected from market players.

3.2.3 Independence of NRAs

Article 22 requires that NRAs be 'legally separate from and operationally independent of the postal operators'. In an important decision in 2001, the Commission held that Article 22 requires Member States to ensure 'thanks to a proper separation of duties, that the tasks of economic and financial monitoring, on the one hand, and of supervision of [the USP], on the other, are carried out completely independently one of the other'.[41] Similarly, in 2002, the Commission warned France that it was not consistent with Article 22 to vest in a single minister the responsibility for overseeing the state's property interests in a public postal operator and its economic and financial performance and, at the same time, the responsibility for regulating the postal sector.[42] Recital 47 of Directive 2008/6 re-emphasised the importance independence of the NRA: '*In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions*'.

The fundamental importance of impartiality and independence of the NRAs is described in the *European Code of Good Administrative Behaviour* as follows:

> 1. The official shall be impartial and independent. The official shall abstain from any arbitrary action adversely affecting members of the public, as well as from any preferential treatment on any grounds whatsoever.
>
> 2. The conduct of the official shall never be guided by personal, family or national interest or by political pressure. The official shall not take part in a decision in which he or she, or any close member of his or her family, has a financial interest.[43]

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41 Commission Decision 2002/344/EC of 23 October 2001, OJ L 120, 7 May 2002, p. 19, at paragraph 29.

42 European Commission, 'Postal services: the Commission asks France to reinforce the independence of its national regulatory authority for the postal sector', IP/02/932 (6 Jun. 2002).

43 See European Ombudsman, *The European Code of Good Administrative Behaviour*, Article 8, p. 13 (2005). The code was approved by the European Parliament in 2001 for guidance of Community institutions and agencies. Nonetheless, it provides a definition of good administrative practice that is also applicable at Member State level. As European Ombudsman, P. Nikiforos Diamandouros notes in his introduction, 'the Code has been taken on board by a number of Member States and candidate countries'. Ibid. 5.

Table 3-12 Organisation of the NRA

	Type of NRA head	NRA: number of heads	NRA head: term	Who appoints NRA heads?	Minimum qualifications for NRA heads	Grounds to dismiss NRA head	Restrictions on post-NRA work?
AT	Ind Agency	3	5 yr	Other	Yes	Other	Yes
BE	Ind Agency	4	6 yr	Council	No	Other	Yes
BG	Ind Agency	5	6 yr	Council	No	Misconduct	Yes
CY	Ind Agency	1	6 yr	Council	Yes	Misconduct	Yes
CZ	Ind Agency	5	5 yr	Council	Yes	Misconduct	No
DE	Ind Agency	3	5 yr	Other	Yes	Other	
DK	Ind Agency	1	None	Other	No	Misconduct	No
EE	Ind Agency	1	None	Min Post	Yes	Discretion	Yes
EL	Ind Agency	9	4 yr	Council	Yes	Misconduct	No
ES	Min Off	1	None	Min Post	No	Discretion	Yes
FI	Ind Agency	1	None	Council	Yes	Misconduct	No
FR	Ind Agency	7	6 yr	Other	Yes	Incapacity	Yes
HU	Ind Agency	1	5 yr	Council	Yes	Discretion	Yes
IE	Ind Agency	3	4 yr	Min Post	Yes	Misconduct	Yes
IT	Minister		5 yr	Council	No	Other	
LT	Ind Agency	7	5 yr	Other	??		No
LU	Ind Agency	3	5 yr	Other	Yes	Misconduct	No
LV	Ind Agency	5	5 yr	Parl.	No	Other	Yes
MT	Ind Agency	7	3 yr	Min Post	No	Misconduct	Yes
NL	Ind Agency	4	4 yr	Min Post	No	Misconduct	No
PL	Ind Agency	1	5 yr	Council	Yes		Yes
PT	Ind Agency	5	5 yr	Council	Yes	Misconduct	Yes
RO	Ind Agency	1	6 yr	Other	Yes	Other	Yes
SE	Ind Agency	8	1 yr	Council	No	Misconduct	No
SI	Ind Agency	10	5 yr	Council	Yes	Misconduct	No
SK	Ind Agency	1	6 yr	Parl.	No	Misconduct	Yes
UK	Ind Agency	8	4 yr	Min Post	Yes	Misconduct	Yes
IS	Ind Agency	1	5 yr	Min Post	No	Misconduct	No
NO	Ind Agency	1	None	Min Post	No	Misconduct	No

Type of NRA head: Minister = A minister; Min Off = Director of an office within a ministry; Min Agency = One or more persons who are the head of an independent agency within a ministry; Ind Agency = One or more persons who are the head of an independent agency not within a ministry; ?? = Unknown. No information about law or practice; Other = Other.

Who appoints NRA heads?: Min Post = Postal Minister or ministry staff; Min Oth = Ministry other than the postal ministry; Council = Council of Ministers or Prime Minister; Parl = Parliament; Other = Other. In this column, NRAs specified the 'other' bodies appointing NRA heads as follows. AT: 'Austrian federal government'. DK; no answer. FR: 'The president by decree after consultation of committees from the Parliament. Two members by decree. Two by the president of the national assembly. Two by the president of the Senate'. LT: ' The President'. LU: ' Grand-Duc as proposed by Communications Minister'. RO: ' The President of Romania, acting from a proposal of the Government'.

Impartiality and independence are intangible qualities that do not necessary require — and are not necessarily guaranteed by — any specific organisational arrangement. Nonetheless, Member States can take several organisational steps to foster the independence and impartiality of NRAs. For example, the person or persons at the head of an independent NRA should be not appointed or subject to removal by a minister who is also responsible for overseeing the operations of a public postal

operator by, for example, appointing its directors or approving investments. Nor should the minister responsible for the public postal operator hold the purse strings of the NRA or exercise appeal authority over decisions of the NRA. If the state has an ownership interest in a public postal operator, then the regulator needs judicial-like independence from the government. The head of an independent NRA, or the members of a committee that serves as the head, should meet minimum qualifications of professional competence. The head or heads of the NRA should hold office for a fixed term of several years and enjoy legal protection against dismissal without good cause. All things being equal, an NRA headed by a multi-member committee — like a court composed of several judges — will be more stable and independent than a single chief regulator. Top officials of a NRA should not be permitted to work for the public postal operator or other interested parties immediately after serving with the NRA, lest they be tempted to make decisions that will benefit future employers.

The organisation of NRAs is summarised in Table 3-12. This table should be read in conjunction with the following table, which summarises the government's role in managing the public postal operator, if any.

In the first table, there are several possible questions about the independence and impartiality of the NRA. For example, in some Member States the NRA is an official within the postal ministry (ES, IT). Such an arrangement does not appear to meet the basic standard of independence required by Article 22. In several cases, NRAs do not have fixed terms of office of sufficient length to suggest independence, say, 3 years (DK, EE, ES, FI, SE, NO) or can be dismissed without cause (EE, ES, HU). In several cases, the heads of the NRA are appointed by the same minister that oversees the conduct of postal policy (EE, ES, IE, MT, NL, UK, IS, NO). In four of these countries (IE, UK, IS, NO), the same minister appoints both the heads of the NRA and the directors of the public postal operator.[44]

Table 3-13 summarises responses to specific questions about the authority of the government to review or ‘guide’ decisions of the NRA or control its budget. As this table shows, NRAs in some Member States are not wholly free from guidance by the government (DE, NO) or government review (EL, IE, MT, PT, SK) or suspension (BE, EL, SI, NO) of their decisions. In several cases, the postal ministry must approve the budget of the NRA (EE, MT, NL, PT, SE).

44 See section 3.1.4 (rights of ownership), above.

Table 3-13 Government supervision of NRA

	Can Govt guide NRA on policy?	Some NRA decisions require Govt approval?	Can Govt suspend NRA orders?	NRA in same bldg as Min Post?	Sources of NRA finances	Who approves NRA budget?
AT	No	No	No	No	A	Parl.
BE	No	No	Yes	No	E	Other
BG	No	No	No	Yes	DE	Parl.
CY	No	No	No	No	CDEF	Parl.
CZ	No	No	No	No	A	Parl.
DE	Yes	No		No	A	Parl.
DK	No	No	No	No	A	Parl.
EE	No	No	No	No	A	Min Post
EL	No	Yes	Yes	No	DE	Other
ES	Yes	Yes		Yes	A	Parl.
FI	Yes	No	No	No	C	Parl.
FR	No	No	No	No	A	Parl.
HU	No	No	No	No	CDE	Parl.
IE	No	Yes	No	No	D	Other
IT				Yes	AE	Parl.
LT	No	No	No	No	DE	Parl.
LU	No	No	No	No	B	Council
LV	No	No	No	No	F	Parl.
MT	??	Yes	No	No	AD	Min Post
NL		No	No		CD	Min Post
PL	No	No	No	No	A	Parl.
PT	No	Yes	No	No	CDEF	Min Post
RO	No	No	No	No	DE	Parl.
SE	Yes	No		No	AD	Min Post
SI	No	No	Yes	No	CDEF	Council
SK	No	Yes	No	No	A	Parl.
UK		No	No		CD	Min Other
IS	No	No	No	No	DE	Parl.
NO	Yes	No	Yes	No	CD	Parl.

Source of NRA finances: (A) General budget of the State or government; (B) Funds from the postal ministry; (C) Fees collected from the National USP; (D) Fees collected from postal operators generally; (E) Fees collected from non-postal operators (e.g., telecomm); (F) Other; ?? = Unknown. No information about law or practice.

Independence and impartiality of the NRAs are central to implementation of the Second Postal Directive and even more so to implementation of the Third Postal Directive. In several cases, Member States could do more to ensure institutional separation between the NRA and agencies of government which are responsible for the conduct of national postal policy and the commercial success of the USP. Of special concern are situations where the NRA is an official within the postal ministry rather than an independent agency, where the heads of the NRA which do not have fixed terms of office or sufficient length to suggest independence, and where the same minister appoints both the heads of the NRA and the directors of the public postal operator.

Case history 3-7: Independence and institutional set-up of Bundesnetzagentur (Germany)

The German postal regulator was established in January 1998 as the Regulatory Authority for Telecommunications and Post (RegTP). Taking charge of the regulation of energy networks and railway infrastructure in July 2005, RegTP was renamed Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur, BNetzA). BNetzA is a separate federal authority within the Federal Ministry of Economics and Technology. Regulation aims to promote working competition and development of markets and secure the provision of universal service.

In order to implement these goals in the postal sector, BNetzA is entrusted with the following tasks: granting licences; processing service notifications; market definition and determination of market dominance; approval or review of prices and terms of business; imposition of universal service obligations; control of universal service quality standards; implementation of separation of cost accounting of market dominant service providers; guarantee of access to postal services and infrastructure; dispute resolution and dealing with user complaints; enforcement of data protection and secrecy of post; monitoring postal markets.

Decision-making rests upon collected information and investigations. Regulatory decisions are made by ruling chambers (except for the railway sector). Affected operators have the right to participate, and business representatives can be summoned. BNetzA can urge companies to remedy misconduct, and has the right to impose sanctions. The government is not entitled to interfere in single decisions. Affected parties have the opportunity to challenge decisions before administrative courts (telecommunications and postal matters). Administrative decisions are made by the President of BNetzA.

The President and the two Vice Presidents are appointed by the Council of Ministers (of the federal government) for five-year terms. Authority is divided among nine departments (with the six units of Department 3 responsible for postal regulation) and nine ruling chambers (with Ruling Chamber 5 responsible for postal services). BNetzA is funded from the federal budget and from fees. Forty eight of about 2,500 employees (2008) are occupied with postal affairs.

Case history 3-8: Independence and institutional set-up of TKKP and RTR-GmbH (Austria)

Regulation of the Austrian postal market is carried out by the Board of Postal Regulation of Telekom-Control Commission (TKKP) and the Regulatory Authority for Broadcasting and Telecommunications (RTR-GmbH). Working in close co-operation, both institutions have the mission to ensure sustainable competition, and to achieve satisfactory provision of services at affordable prices.

Telekom-Control Commission (TKK) is a regulatory panel with powers of a court which has overseen telecommunications since 1997 (e.g. market access, approval of prices and general terms of business, frequency allocation, electronic signatures). As of 1 January 2008, TKKP was created as a second committee within TKK and became responsible for specific matters related to postal services. TKKP approves tariffs and general terms of business of reserved services, reviews universal service tariffs not subject to approval, and takes supervisory measures with respect to universal service provision (e.g., service coverage, quality standards). Each committee consists of three members and three alternate members appointed by the federal government for a five-year terms. Each committee is headed by a chairperson who must be an appointed judge. In addition, one member of TKKP must have expertise in the field of postal services. TKK and TKKP are not bound by instructions but decisions can be contested by filing complaints with high courts.

As successor to Telekom-Control GmbH, the government-owned company RTR-GmbH was established on 1 April 2001. It provides management operations for TKK and TKKP, and prepares decisions in all jurisdictions of TKKP. RTR-GmbH has direct responsibility for service notification, alternative conflict resolution and dispute settlement for retail customers (telecommunications and postal services).

Complaints against decisions of RTR-GmbH can be submitted to high courts. RTR-GmbH consists of a Supervisory Board and two divisions (telecommunications, broadcasting) chaired by managing directors. The authority has approximately 100 employees. It is financed with fees from market participants (telecommunications and broadcasting regulation, collecting services) and funds from the federal budget (telecommunications, postal and broadcasting regulation; electronic signatures; Digitisation and Television Funds). Resources from the federal budget amount to € 2.75 million while contributions can total up to € 8.25 million.
It appears that RTR-GmbH did not dispose of any permanent budget for postal regulation since RTR was allocated authority for the postal sector in 2008. The procedure to funding RTR's postal activities is expected to change during a current legislative project.

3.2.4 Access to information and enforce orders

The Third Postal Directive added Article 22a which requires Member States to ensure that the NRA has access to information from 'postal services providers' that may be necessary to (1) to ensure conformity with the provisions of, or decisions made in accordance with this Directive and (2) for clearly defined statistical purposes. However, the need to ensure access to adequate regulatory information is already implied in the Second Postal Directive, since effective regulation depends upon access to such information. Table 3-14 presents the results of a series of questions addressed to NRAs about their ability to obtain the information needed to regulate.

Table 3-14 NRA authority to gather information

	NRA: data needed for compliance?	NRA: data needed for statistics?	NRA sets form and detail of data?	NRA can require new data from USP?	Fines since 1.1.2006 re data reqs?	Court orders sought since 1.1.2006 re data?
AT	No	No	No	No	No	No
BE	Yes	No	Yes	Yes	No	
BG	Yes	Yes	Yes			
CY	Yes	Yes	Yes	Yes	Yes	No
CZ	No	Yes	Yes	Yes	No	No
DE	Yes	Yes	Yes	Yes	Yes	No
DK	Yes	Yes	Yes	Yes	No	No
EE	Yes	Yes	Yes	Yes	Yes	No
EL	Yes	Yes	Yes	Yes	Yes	No
ES	Yes	No			No	
FI	Yes	No	Yes	Yes		
FR	No	No	Yes	Yes	No	No
HU	Yes	Yes	Yes	Yes	Yes	No
IE	Yes	No		Yes		No
IT	No	Yes	Yes		No	
LT	Yes	Yes	Yes	Yes	Yes	No
LU	Yes	No	No	Yes	No	No
LV	Yes	Yes	Yes	Yes	No	No
MT	Yes	Yes	Yes	Yes	No	No
NL	No	Yes			No	
PL	Yes	Yes	Yes	Yes	Yes	No
PT	Yes	Yes	Yes	Yes	Yes	No
RO	Yes	Yes	Yes	Yes	No	
SE	Yes	Yes	Yes	Yes	No	No
SI	Yes	Yes	Yes	Yes	No	No
SK	Yes	Yes	Yes	Yes	Yes	Yes
UK	Yes	Yes	Yes	Yes	No	
IS	Yes	Yes	Yes	Yes	No	
NO	Yes	Yes	Yes	Yes	Yes	No

This table suggests that NRAs generally have sufficient authority to compel the production data needed to regulate the accounts of designated USPs. All but five NRAs (AT, CZ, FR, IT, NL) confirmed that they have adequate information to ensure compliance with Postal Directive. Most of the NRAs who responded negatively cited only a lack of authority to compel necessary information from postal operators other than designed USPs. The exceptions, therefore, are relatively minor since all Member States today rely upon designated USPs to ensure universal service.

The last two columns in Table 3-14 indicate whether the NRA has taken action to enforce orders for information since the beginning of 2006. Ten NRAs (CY, DE, EE, EL, HU, LT, PL, PT, SK, NO) have levied fines for failure to comply with information requests. In addition, the NRA in Slovakia has sought a court order to enforce an information request.

Although authority to ensure implementation of the Postal Directive is, in principle, all of the authority that NRAs need, we asked several closely related questions in order to clarify the extent of the information collection powers of the NRAs. First, we asked whether the NRA is able to obtain statistical information from all postal operators:[45] The Third Postal Directive explicitly requires Member States to give such authority to NRAs, but most NRAs agreed that they have such authority under current law. Some, however, indicated that they lacked such authority (AT, BE, ES, FI, FR, IE, LU). We also asked whether the NRA could 'establish the level of detail required and deadlines for submission'. Here the NRAs in Austria and Luxembourg indicated that they lacked such authority, while others (ES, IE, NL) failed to confirm it. Then we asked whether the NRA is authorised 'to require the USP(s) to collect data, establish accounts, and/or prepare studies where such information is not normally produced but where the NRA considers such information required to ensure compliance with the Postal Directive and decisions of the NRA implementing this directive'. In short, can the NRA not only compel postal operators to produce information in the level of detail determined necessary by the NRA but also require a postal operator to develop new studies and data collection systems. Here again, almost all NRAs confirmed such authority.

As discussed below, while NRAs report adequate authority to obtain necessary information, they often appear to lack the data required to answer key issues of accounting and price regulation. For example, one question asked NRAs to rate the sufficiency of accounting data available to them on a scale of 1 to 10.[46] Only twelve

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45 Questionnaire 201-21 ('Are all providers of postal services legally obliged to provide the NRA with operational and financial information which, in the judgement of the NRA, is required to for statistical purposes which have been clearly defined by the NRA?').

46 Questionnaire 253-70 ('In your view, based on current knowledge, to what extent does the quality of available data give the NRA sufficiently reliable information to ensure conformity with the provisions of, or decisions made in accordance with, the Postal Directive? Please rate on a scale of 1 to 10

NRAs were able to answer this question, and the average level of confidence among those that responded was only 6.75 out of 10. Another question asked whether the NRA has sufficient information to determine what percent of the costs incurred by the USP(s) in the provision of universal services are common costs that cannot be allocated to specific products?[47] Identification of such costs would seem to be an inevitable result of any basic regulatory accounting system. Yet more than one third of NRAs answered this question in the negative, and another third provided no answer.

NRAs generally affirm that they possess adequate authority to require information from postal operators, at least from USPs, but they may not have a clear idea about what information is required to enforce the Postal Directive.

3.2.5 Enforcement authority

Since the Postal Directive provides that the NRA shall be responsible for 'ensuring compliance with the obligations arising from this Directive', it implies that NRAs should be vested with appropriate enforcement authority. The enforcement authority of NRAs is summarised in Table 3-15, above. This table refers to enforcement measures in addition to authority to enforce questions for information.[48]

where 1 represents no information and 10 represents a complete set of the information needed to ensure full compliance with Postal Directive').

47 Questionnaire 253-40 ('For the most recently available annual accounting period, does the NRA have sufficient information to determine what percent of the costs incurred by the USP(s) in the provision of universal services may be appropriately allocated according to the provisions of Article 14(3)(b)(iii) of the Postal Directive (common costs that cannot be allocated)?').

48 See also section 3.8.2 on authority of NRAs to order remedies for user complaints.

Table 3-15 Enforcement authority of NRA

	NRA can fine operators for non-compliance?	Fines since 1.1.2006 for not compliance?	NRA can seek court order?	Court orders sought since 1.1.2006?
AT	No	No	No	No
BE	Yes	No		
BG	Yes		No	
CY	Yes	Yes	No	No
CZ	Yes	Yes	No	No
DE	Yes	No	No	No
DK	Yes	No	Yes	No
EE	Yes	Yes	No	No
EL	Yes	Yes	No	No
ES	Yes		Yes	
FI	No		No	
FR	Yes	No	No	No
HU	Yes	Yes	No	No
IE	No		Yes	No
IT	Yes	No		
LT	Yes	Yes	Yes	No
LU	Yes	No	No	No
LV	Yes	No	Yes	No
MT	Yes	Yes	Yes	Yes
NL	Yes	No	No	
PL	Yes	Yes	No	No
PT	Yes	No	No	No
RO	Yes	Yes	No	
SE	Yes	No	No	No
SI	Yes	Yes	No	No
SK	Yes	Yes	No	Yes
UK	Yes	Yes		
IS	Yes	No	No	
NO	Yes	Yes	Yes	No

From this table it appears that almost all NRAs (except AT, IE, FI) can levy fines for failure to comply with orders. Several NRAs have actually used this authority since the start of 2006. Several NRAs (DK, ES, IE, LT, LV, MT, NO) can request a court to issue an order to enforce their decisions.

NRAs appear to have reasonably adequate authority to enforce their orders by means of fines or court orders, although in some cases limits on the level of fines may undercut the effectiveness of the NRA's orders.

3.2.6 Procedures, transparency, and appeals

In evaluating 'best practices' among NRAs, this study must consider the procedures of NRAs as well as their substantive decisions. A basic objective of the Postal Directive is to require an appropriate level of transparency in the regulation of postal markets. To fulfil this objective NRAs themselves need to operate with an appropriate degree of transparency and due regard for the rights of affected parties. One standard for good administrative practice is *The European Code of Good Administrative Behaviour* (CGAB) issued by the European Ombudsman (see section 3.2.2, above).

Table 3-16 NRA practices and procedures

	NRA complies with EU CGAB?	Affected persons may comment before action?	All persons treated equally?	Right of access to info?	Rules on confidentiality of documents?	Committed to least restrictive approach?	Written justifications provided?
AT	No	No	No	No	No	No	No
BE	No	Yes	Yes	No	Yes	Yes	Yes
BG		Yes			Yes		
CY	Yes	Yes	Yes	Yes	Yes	Yes	Yes
CZ	Yes	No	Yes	Yes	Yes	Yes	Yes
DE		Yes	Yes	Yes	No		
DK	Yes	Yes	Yes	Yes	Yes		Yes
EE	No	No	No	Yes	Yes	Yes	Yes
EL		Yes	Yes	Yes	Yes	Yes	Yes
ES	??	Other	No	No			Yes
FI	Yes	Yes	Yes	Yes	Yes	Yes	Yes
FR	No	Yes	Yes	Yes	Yes	Yes	Yes
HU	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IE	Yes	Yes	Yes	No	Yes	Yes	Yes
IT		No	No	No	No		No
LT	??	Yes	Yes	Yes	Yes	No	Yes
LU	??	No	No	No	No	No	No
LV	??	No	No	No	No	No	
MT		Yes	Yes	Yes	Yes		Yes
NL		Yes	Yes	Yes	Yes	Yes	Yes
PL	Yes	Yes	Yes	Yes	Yes	Yes	Yes
PT		Yes	Yes	Yes	Yes	Yes	Yes
RO	No	Yes	No	No	No	No	No
SE	??						
SI	??	Yes	Yes	No	Yes	Yes	Yes
SK		Yes	Yes	Yes	Yes		Yes
UK	??	Yes	Yes	??	Yes	Yes	Yes
IS	Yes	No	No	No	No	No	No
NO	Yes	Yes	Yes	Yes	Yes	Yes	Yes

?? = Unknown. No information about law or practice

Without attempting a comprehensive checklist of good administrative procedures, this survey asked NRAs to provide information on several indicators of good administrative practice and procedure. Their answers are summarised in Table 3-16.

From this table it appears that most NRAs do not comply with, or are unfamiliar with, the European Code of Good Administrative Behaviour. The results are more mixed with respect to the use of selected procedures usually considered appropriate administrative practice. For example, several NRAs have not adopted procedures to ensure that affected parties and members of the general public have an opportunity to comment on proposed actions before the NRA takes them. Or to provide that all parties are treated in a non-discriminatory manner. Or to ensure that commenters have access to information necessary to make comments. Or to ensure decisions will restrict the rights of citizens as little as possible. Or that parties will be provided a written justification for any decision taken. While the record of NRAs overall appears commendable, there seems to be room for improvement, especially in the case of NRAs that answered such questions in the negative or failed to provide answers.

Another element of good administrative procedure is transparency, that is, keeping the public informed about the rules and regulations affecting the postal sector. In the Information Age, public notice is almost synonymous with posting on the Internet. Almost all NRAs place copies of the postal laws and regulations on the Internet (exceptions: LU, NL). Most, but not all, also post copies of decisions taken by the NRA (exceptions: AT, DE, DK, EE, EL, PL, SI, SK). While most NRAs publish annual reports, some (DK, ES, FI, HU, IT, LU, LV, NO) do not.[49]

Finally, good procedure includes a right to appeal the decision of an NRA to an impartial body. While the Second Postal Directive did not specifically require Member States to ensure a right of appeal, the Third Postal Directive does. The present status of the right to appeal the decision of the NRA is summarised in Table 3-17.

49 Questionnaire 201-36, 201-53 to 201-57.

Table 3-17 Appeal from NRA decisions

	Right of appeal from NRA ensured?	To whom is NRA decision appealed?	Can appellate body reverse NRA?	Number of appeals since 2003	Number of NRA decisions reversed?
AT	Yes	Court	Yes	1	0
BE	Yes	Court	Yes	4	
BG	Yes	Court	Yes		
CY	Yes	Court	No	39	
CZ	Yes	Court	Yes	12	2
DE	Yes	Court	Yes		6
DK	No				
EE	Yes	Court	Yes	2	1
EL	Yes	Court	Yes		
ES	Yes	Court	Yes		
FI	Yes	Court	No	4	
FR	Yes	Court	No		
HU	Yes	Court	Yes	17	2
IE	Yes	Court	No	2	
IT	Yes	Court	Yes		
LT	Yes	Court	Yes	5	3
LU	Yes	Other	Yes	0	0
LV	Yes	Court	Yes	0	0
MT	Yes	App Bd	Yes	4	1
NL	Yes	Court	Yes	2	1
PL	Yes	Court	Yes	6	1
PT	Yes	Court	Yes	3	2
RO	Yes	Court	Yes	1	0
SE	Yes	Court	Yes	10	0
SI	Yes	Court	Yes	9	0
SK	Yes	Court	Yes	1	0
UK	Yes	Court	Yes	4	2
IS	Yes	App Bd	Yes	6	1
NO	Yes	Min Post	Yes	1	1

To whom is NRA decision appealed?: Court = Court of law; Min Post = Postal Minister or ministry staff; Min Oth = Ministry other than the postal ministry; Council = Council of Ministers or Prime Minister; App Bd = Specialized board of appeals; Other = Other.

Almost all Member States provide that a party may appeal a decision of the NRA to the courts. The exceptions are Denmark, which does not permit appeal; Malta and Iceland, which have established special boards for appeals from the NRA, and Norway, which provides for appeal to the postal minister (except in cases involving competitive issues, which are appealable to minister for public administration). The last two columns in Table 3-17 show the number of cases appealed and the number of cases reversed on appeal. From these columns, it appears that in most Member States appellate review is genuine and effective.

While the overall record of NRAs with respect to administrative procedure appears commendable, there seems to be significant room for improvement. Most NRAs do not comply with, or at are unfamiliar with, the European Code of Good Administrative Behaviour. In general, greater attention to sound administrative procedure seems to be in order. On the other hand, almost all Member States provide an effective means to appeal a decision of the NRA even though not specifically required by the Second Postal Directive.

3.3 Universal service obligation

As described in chapter 2, the Postal Directive requires Member States to ensure that users enjoy the right to a 'universal postal service', i.e., a continuous, affordable, nationwide, postal service of specified quality. While Member States have some flexibility concerning which types of services are provided as part of the universal service, they must regulate the universal service so that certain criteria are met with respect to access, collection and delivery, and quality of service. Under the Second Postal Directive, a Member State is obliged to ensure universal service and to notify the Commission of the identify of one or more postal operators designated as 'universal service providers' (USPs).

3.3.1 Designation of universal service providers

Article 4 of the Second Postal Directive requires Member States to designate one or more postal operators as universal service provider(s). In 2008, all Member States except Germany have designated a single postal operator — the public postal operator or its successor — as the sole universal service provider for the entire national territory. Under the German postal law, the NRA is not required to designate a universal service provider unless it determines that 'a universal service is not being appropriately or adequately provided or where there is reason to believe that such will be the case'.[50] The German NRA has not found it necessary to designate a USP for such purposes.

All Member States except Germany have designated the public postal operator or its successor as the universal service provider. Germany has not designated a universal service provider.

50 Germany, Post Law, Article 13(1).

3.3.2 Access facilities

The Postal Directive gives Member States substantial discretion to determine the appropriate level of facilities required to access to the universal service. Article 3 states Member States must ensure that 'density of the points of contact and of the access points takes account of the needs of users'. Facilities permitting access to the postal system include postal outlets and public collection boxes.

Postal outlets are 'post offices' operated by USP employees and 'postal agencies' operated by contractors. Table 3-18 summarises the requirements relating to the post offices and postal outlets. In this table, column 2 refers to the number of postal outlets implied by a requirement to have a certain density of access points, such as one outlet per town or one outlet for certain number of residents or one outlet within a certain distance of every household.

Table 3-18 shows both the restrictions and flexibilities of the access requirements of the Postal Directive. The density of postal outlets varies substantially, from one postal outlet per 671 persons in Finland to one per 15,645 persons in Denmark. For those NRAs that answered this question, the average was one outlet per 6,383 persons.[51] Most USPs can convert from a post office to postal agency without approval of the NRA. In some Member States, however, there is a minimum number of post offices that must be operated by the USP. In most Member States, the USP must obtain approval of the NRA before it can close a postal outlet or post office.

51 Population estimates from Eurostat for 1 January 2008 were used to calculate the figures in this paragraph.

Table 3-18 Postal outlets and offices required by USO

	Min. number of postal outlets required	Min. no. of outlets req'd by density	Min. number of post offices req'd	USP may convert from office to agency?	USP may close agency?	USP may close post office?
AT				No	Yes	Yes
BE	1300	1300	589		No	No
BG				Yes	No	Yes
CY						
CZ				Yes	No	No
DE	12000			Yes	No	No
DK	350	350		Yes	No	No
EE		325		Yes	Yes	Yes
EL				Yes	No	No
ES						
FI		7900	332	Yes	No	No
FR		12000		Yes	No	No
HU		3100		Yes	No	No
IE		600		Yes	No	No
IT						Yes
LT		950		Yes	No	No
LU						
LV						
MT	59	59		Yes	No	No
NL	2000			Yes		
PL	8240	8240	8240	Yes	No	No
PT				Yes	No	No
RO						
SE				Yes	No	No
SI		558		Yes	Yes	Yes
SK				No	Yes	Yes
UK						No
IS				No	Yes	Yes
NO	430	430		Yes	No	No

Most Member States also require a minimum density of public collection boxes. While the requirement varies, the most common formula is to require a collection box within 500 to 1,000 meters of each household. Only a few NRAs could translate this requirement into a specific number of collection boxes, usually about one collection box for every 600 to 1,200 persons (HU, IE, LT, SI), although Norway requires a collection box for every 185 persons.

Pursuant to the access requirements of the Postal Directive, Member States require a minimum density of postal outlets (post offices or postal agencies) and public collection boxes, but requirements vary substantially among Member States. Member States typically allow the USP to convert a post office to a postal agency without approval of the NRA, but most Member States require NRA approval before closure of postal outlet.

3.3.3 Collection and delivery

Table 3-19 USO delivery requirements

	LP: required delivery (days/wk)	LP: substandard delivery (% persons)	LP: curbside delivery permitted?	LP: cluster box delivery permitted?	Parcels: delivery days per week	Parcels: type of delivery required	Parcels: substandard delivery (% persons)	Parcels: max. wt. inward intra-EU (kg)
AT	5/wk	0	Yes	??	5/wk		0	20 kg
BE	5/wk	0	Yes	No	5/wk	Free	0	20 kg
BG			No	Yes		Pickup		30 kg
CY	5/wk				5/wk	Free		
CZ	5/wk	0	No	No	5/wk	Free	0	30 kg
DE	6/wk	0	No	No	6/wk	Free	0	20 kg
DK	6/wk	0.01	Yes	Yes	5/wk	Free	0.05	20 kg
EE	5/wk	0	Yes	Yes	5/wk	Free	0	20 kg
EL	5/wk	7	No	No	None	Pickup		20 kg
ES	5/wk	0	Yes	Yes	5/wk	Pickup	0	20 kg
FI	5/wk		Yes	Yes	5/wk	Pickup		30 kg
FR	6/wk		Yes	Yes	6/wk	Free		20 kg
HU	5/wk	0	No	No	5/wk	Free	0	20 kg
IE	5/wk	0.2	No	No	5/wk	Free	0.2	20 kg
IT	6/wk	0	No	No	6/wk	Free	0	20 kg
LT	5/wk	0	Yes	Yes	5/wk	Free		20 kg
LU	5/wk	1	Yes	??	5/wk	Free	1	20 kg
LV	Other	0.9	Yes	Yes	Other	Pickup		20 kg
MT	6/wk	0	No	No	6/wk	Free	0	20 kg
NL			Yes		None	Free		20 kg
PL	5/wk		Yes	Yes	5/wk			20 kg
PT	5/wk		No	No	5/wk	Pickup		20 kg
RO	5/wk		Yes	Yes	5/wk	Pickup		20 kg
SE	5/wk	0	Yes	Yes	5/wk	Pickup		20 kg
SI	5/wk	0	Yes	No	5/wk	Free	0	20 kg
SK	5/wk	0.3	No	No	5/wk	Pickup	0.3	20 kg
UK	6/wk		No	No	5/wk	Free		20 kg
IS	5/wk	0.125	Yes	Yes	5/wk	Free	0	20 kg
NO	6/wk	1	Yes	Yes	6/wk	Free	0	20 kg

Parcels: type of delivery required: Free = Parcels must be delivered without charge to addressee; Charge = Parcels must be delivered to addressee for appropriate charge to addressee; Pickup = Parcels required only to be held at postal outlet nearest addressee; Other = Other; ?? = Unknown. No information about law or practice.

In contrast to flexible access requirements, collection and delivery requirements in the Postal Directive are specific. Each Member State is obliged to ensure at least each working day, not less than five working days a week, one collection and one delivery '*to*

the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations' except '*in circumstances or geographical conditions deemed exceptional*'.[52] Table 3-19 summarises the delivery requirements in the Member States.

As this table shows, only 7 Member States (DE, DK, FR, IT, MT, UK, NO) require delivery of letter post items six days per week. This is, however, the majority rule since these states account for almost 70 percent of the letter post volume in the EU/EEA postal market. Other Member States ensure five deliveries per week. Only one Member State, Greece, excepts a significant portion of population (7 percent) from the required delivery frequency, making use of the possibility to reduce standards for universal service in exceptional geographies (allowed under Article 3(3) of the Postal Directive). Most Member States permit delivery to a private box located on a public road, and almost half permit delivery to a neighbourhood 'cluster box' or centralized facility that includes many delivery boxes together.

Parcel delivery is not as prevalent as letter post delivery. Only five Member States (DE, FR, IT, MT, NO) require delivery of parcels six days per week (46 percent of the EU/EEA market). In nine Member States (BG, EL, ES, FI, LV, PT, RO, SE, SK), 14 percent of the EU/EEA market, parcels are not routinely delivered to the addressee's residence but must be collected by the addressee from the nearest post office.[53]

In most of the EU/EEA postal market (weighing Member States by postal volume), letter post items are required to be delivered six days week, although a majority of Member States only require five day delivery. Parcels must be delivered six days per week in five Member States, accounting for a little less than half of the EU/EEA market. In a significant portion of the market (9 Member States and 14 percent of the market), parcels are not routinely delivered to addressees but must be collected from the nearest postal outlet.

52 Second Postal Directive, Article 3(3).

53 In Slovakia, there is no legal requirement for delivery of parcels, but in urban areas parcels are usually delivered to the addressee, while in rural areas parcels are held at the postal outlet.

3.3.4 Quality of service standards and monitoring at national level

Article 16 of the Second Postal Directive requires Member States to establish quality of service standards. In particular, routing time targets must be established for national universal postal services. Actual performance must be monitored and published.

> Independent performance monitoring shall be carried out at least once a year by external bodies having no links with the universal service providers under standardised conditions to be specified in accordance with the regulatory procedure with scrutiny referred to in Article 21(2) and shall be the subject of reports published at least once a year.[54]

Under Article 17, NRAs shall ensure that 'the results are justified, and that corrective action is taken where necessary'.

Table 3-20 summarises the regulation of quality of service in the Member States. The table is overlaid with the shading from table 2-3 that indicates whether the service is ensured as a universal service.[55] Light gray or red shading indicates that the service is ensured as a universal service. Dark gray or dark green shading indicates that it is not ensured as a universal service. And medium gray or light green indicates that service was not confirmed as an ensured universal service by the NRA and therefore probably is not ensured as a universal service.

Virtually all Member States set quality of service for basic letter post or at least for the letters in the basic letter post. Only slightly more than half of the Member States (16) set quality of service for basic parcel post service even though this is considered a universal service in all Member States. A minority of Member States set quality of service standards for bulk mail services, services which are not considered universal services in some Member States.

In this table, discrepancies between the shading and the answers regarding quality of service regulation are notable. In some cases, Member States impose quality of service even though the service is not ensured as a universal service. For example, Sweden and Norway do not require their USPs to provide a discounted service for bulk letters, but if the USP chooses to offer this service, then the NRA regulates its quality of service. On the other hand, France apparently requires its USP to provide discounted services for bulk letters and direct mail but does not regulate the quality of service.

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54 Second Postal Directive, Article 16.
55 See section 2.3 above.

Table 3-20 Overview: quality of service standards

	Basic letter post	Bulk letters	Direct mail	Periodicals	Non-priority letter post	Basic parcel post	Bulk parcels
AT	Yes					Yes	
BE	Yes	No	No	Yes	Yes	Yes	Yes
BG	Yes			No	Yes	Yes	
CY							
CZ	Yes					No	
DE	Yes	Other	Other	Yes		Yes	
DK	Yes	Yes	Yes	Yes	Yes	Yes	Yes
EE	Other	No	No	No	No	No	No
EL	Yes	No	No	No	No	No	
ES	Yes	Yes		No		Yes	Yes
FI	Yes	No	No	No	No	No	No
FR	Yes	No	No	Yes	No	No	No
HU	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IE	Yes	Yes	No	No		No	
IT	Yes	Yes	No	No		Yes	
LT	Yes	No			No	No	
LU	Yes	R/L	No	No		Yes	No
LV	R/L	R/L			R/L	No	No
MT	Yes		Yes			Yes	
NL	Yes	No	No	No	No	No	No
PL	Yes				Yes	Yes	
PT	Yes		No	Yes	Yes	Yes	
RO	Other	Yes		Other	No	No	
SE	Other	Yes	No	No	No	No	No
SI	Yes	Yes	No	No	No	Yes	No
SK	R/L	No	No	No	R/L	Yes	
UK	Yes	Yes	Yes		Yes	Yes	Yes
IS	Yes	Yes	Yes	No		No	
NO	R/L	R/L	Yes	Yes	Yes	Yes	No

Key to shading: light gray (red) = ensured as a universal service; medium gray (light green) = not confirmed as an ensured universal service by NRA; dark gray (dark green) = not ensured as a universal service.

Methods of quality of service regulation may not meet the standards of Articles 16 and 17 in all cases. As Table 3-20 shows, while most NRAs (19) monitor quality of service of each universal service at least annually, 9 NRAs (DE, FI, IT, LU, LV, PL, RO, SI, SK), representing almost one-third of the EU/EEA postal market do not do so. Although the Postal Directive requires that quality of service monitoring be performed by external bodies having 'no links with the universal service providers, in most cases, it appears that quality of service is measured by an independent consultant retained by the USP ('USP cslt'). Only in a handful of cases (ES, IE, IT, LV, PL) is performance monitoring performed by the NRA or a consultant retained by the NRA ('NRA cslt'). Even though

NRAs are responsible for ensuring the corrective is taken, it appears that several NRAs cannot effectively penalize the USP for failure to meet quality of service targets.[56]

Table 3-21 Quality of service monitoring

	QoS measured yearly?	QoS monitoring body	QoS complies with CEN?	NRA sets monitoring standards?	Results published yearly?	Publication delay (months)	NRA can fine USP(s)?	NRA: other remedies?
AT								
BE	Yes	USP cslt	Yes	Yes	Yes	5	Yes	Yes
BG	Yes		Yes	Yes	Yes	7	No	No
CY	Yes	Other					Yes	No
CZ	Yes	USP cslt	Yes	Yes	Yes	4	Yes	No
DE	No	Other	Yes	Yes	No		No	Yes
DK	Yes	USP cslt	Yes	Yes	Yes	2	No	Yes
EE	Yes	USP cslt	No	No	Yes	4	Yes	Yes
EL	Yes	Other	Yes	Yes	Yes	3	No	Yes
ES	Yes	NRA Cslt	Yes	Yes	Yes		Yes	No
FI	No	USP cslt	No	Yes	Yes	4	No	Yes
FR	Yes	USP cslt	Yes	Yes	Yes	3	Yes	Yes
HU	Yes	USP cslt	Yes	Yes	Yes	8	Yes	Yes
IE	Yes	NRA Cslt	Yes	Yes	Yes	3	No	Yes
IT	No	NRA Cslt	Yes	No	Yes	6	Yes	No
LT	Yes	USP cslt	Yes	Yes			Yes	No
LU	No	USP cslt		Yes	No	4	No	Yes
LV	No	NRA	??	Yes	No	3	Yes	Yes
MT	Yes	USP cslt	Yes	Yes	Yes	3	Yes	Yes
NL	Yes	USP cslt	Yes	No	Yes		Yes	??
PL	No	NRA Cslt	Yes	Yes	Yes	5	No	Yes
PT	Yes		Yes	Yes	Yes	3	Yes	
RO	No	USP cslt	Yes	No	No	5	Yes	No
SE	Yes	USP cslt	Yes	No	Yes	4	Yes	Yes
SI	No	USP cslt	Yes	Yes	Yes	5	Yes	No
SK	No	USP cslt	Yes	Yes	Yes	5	Yes	Yes
UK	Yes	USP cslt		No	Yes	3	Yes	Yes
IS	Yes	USP cslt	Yes	Yes	Yes	6	No	No
NO	Yes	USP cslt	Yes	Yes	Yes	1	Yes	Yes

?? = Unknown. No information about law or practice

Overall quality of service standards and results for the Member States are shown in Table 3-22. This table shows that, for the fastest standard category of mail, quality of service results for delivery the first day after posting (D+1) range from 66 percent (PL)

56 Only two NRAs (BG, IS) report that they cannot fine the USP and have no other remedies. However, in several cases the other remedies amount to no more than calling on the USP to do better (HU, LU, PL), complaining to the ministry (DK), or suggesting fines to the ministry (EL). See Questionnaire 222-17.

to 98 percent (LU). In general, quality of service targets and results are naturally lower for larger Member States. By the third day after posting (D+3), more than 97 percent of the fastest standard category (FSC) of post mail is delivered in most Member States with the exception of Poland, Spain, and the United Kingdom. In some Member States, however, it should be noted that the FSC mail is only a small fraction of all letter mail, including Hungary (4.4 percent) and Latvia (12 percent).[57]

Table 3-22 Quality of service standards and performance, 2008

	D+1 standard (% FSC)	D+1 actual (% FSC)	D+2 standard (% FSC)	D+2 actual (% FSC)	D+3 standard (% FSC)	D+3 actual (% FSC)	D+4 standard (% FSC)	D+4 actual (% FSC)
AT								
BE	95	93.8	97					
BG	80		95					
CY	90	76.3			97	98.5		
CZ	90	90.64						
DE	80		95					
DK	93	93.7	93	98.5	93		93	
EE	90	91.5						
EL	87	79.9			98	98.2		
ES					92	90.4		
FI								
FR	83	83.9	95					
HU	85	92.69			97	99.73		
IE	94	79			99.5	97.5		
IT	89				99			
LT	85	77		95	97	99		100
LU	95	98.06	99	99.98				
LV	97	96.1			97	99.5	100	100
MT	92	93.29	97	99	99	99.7		
NL	95	96.2						
PL	82	66.3	90	88.45	94	94.04		
PT	94.5	95.0		99.2		99.8		99.9
RO	85		97					
SE	85	94.9			97	99.9		
SI	95	91.80	99.5	98.60				
SK	96.0	96.1		99.81		100.0		100.0
UK	93	85.2				95.7		
IS	85	88			97	99		
NO	85	87.1			97			

Note: "D+1 (% FSC" refers to the percent of mail in the "fastest standard category" that is delivered on the first business day after posting. "D+2" refers to the second business day after posting. Etc.

57 Questionnaire 301-45.

Comparing quality of service and actual performance suggests that NRAs may be setting quality of service according to different criteria. Some NRAs set the standard well above actual performance. For example, for Cyprus, for FSC service, the D+1 standard compared to actual performance is 90 percent to 76 percent; in Greece, 87 to 80 percent; in Ireland, 94 to 79 percent; in Latvia, 85 to 77 percent; in Poland, 82 to 66 percent; and in the United Kingdom, 93 to 85. In such cases NRAs appear to be using quality of service standards to stimulate better performance from the USP. In other Member States, the quality of service standard and actual performance are very close. In some cases, the quality of service standard is set well below actual performance as in, for example, Germany, 80 to 96 percent (2007) and Hungary, 85 to 93 percent. Here the quality of service standard appears to reflect the NRA's judgement as the basic needs of the general public.

Virtually all Member States set quality of service for letters or for basic letter post services, but only slightly more than half set standards for basic parcel post service even though it is considered a universal service. Less than half of the Member States set quality of service standards for bulk mail services. Most Member States monitor quality of service performance, but a significant minority do not. Quality of service standards appear to be set for different purposes in different Member States, e.g., in some cases to spur the USP to better performance and in others to reflect the minimum needs of the general public.

3.3.5 Financing the net cost of the USO (if any)

Under the Second Postal Directive, a Member State has four options for financing the net cost of the universal service obligation imposed on one or more USPs: (i) reserved area, (ii) compensation fund, (iii) public procurement, or (iv) direct compensation of the USP from public funds. In principle, under Community rules limiting state aid to commercial undertakings, financial support in whatever form may not exceed 'what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations'.[58]

Currently, the only significant sources of financing for the net cost of the USO appear to be the reserved area and direct payment to the USP. In neither case, however, does the benefit conferred appear to be clearly limited to the cost of the public obligation imposed. While most Member States have established a reserved area in favour of a designated USP, almost no Member State is able to demonstrate that the scope of the reserved area is limited to what is necessary to ensure universal service.[59] Only 3 Member States (ES, IT, PL) supported the USP in the most recent fiscal year by making payments to the USP. In two cases, NRAs reported that these payments represent a substantial percentage of the total cost of providing universal service: Spain, 5 percent, and Italy, 8 percent.[60] In both countries, it may be noted, the NRA is an office within the postal ministry and not truly independent.[61] The Spanish NRA has prepared a study that estimates the net cost of the USO to be 17 percent of the cost of providing universal services. The Italian NRA reports that it has not prepared a similar study.[62]

In principle, Norway is the sole exception to this pattern. Norwegian law provides that the government will compensate Norway Post for the net cost of the USO calculated in some reasonably objective and transparent manner. According to Norwegian model, the net costs are due primarily to deliveries in some communities that are more frequent than Norway Post would provide in the absence of a universal service obligation.[63] Since compensation is to be paid Norway Post from public funds, the payment must be included in the government's budget each year. In fact, however, the Norwegian

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58 See generally, European Commission, 'Community Framework For State Aid In The Form Of Public Service Compensation', OJ C297, 29 Nov 2005, p. 5, paragraph 14.
59 See section 3.4.1, below.
60 Questionnaire 123-45 and 123-46.
61 See 3.2.2, above.
62 Questionnaire 121-23. In addition, Norwegian law provides that the government will pay Norway Post annually for the net cost incurred in providing the universal service obligation (after deducting the benefits of the reserved area). Norway Post reports, however, that no payment was made in fiscal 2006, 2007, and 2008, but payment was resumed for fiscal 2009. See section 6.4.5, below.
63 See Kristin Bergum, 'Calculating the Net Cost of the USO: A Practical Example from Norway' in M. Crew, P. Kleindorfer, and J. Campbell, eds. *Handbook Of Worldwide Postal Reform* (2008). Ms. Bergum is an official of Norway Post.

government did not pay the prescribed compensation in the fiscal years 2006, 2007, and 2008, although payments were resumed in fiscal 2009.

Currently the only significant sources of financing for the net cost of the universal service obligation (if any) are the reserved area and direct payment to the USP. In those Member States that make use of one of these means of public financing (some do not use either), there appears to be no clear relation between the level of financing and the net cost of the universal service obligation, if any. In Spain and Italy — both Member States lacking a NRA independent of the postal ministry — high levels of public financing may exceed the net cost of the universal service obligation significantly, potentially raising a red flag under the rules governing state aid.

3.4 Reserved area and special rights

This section addresses special legal privileges granted to the universal service provider. Article 7 of the Second Postal Directive allows Member States to establish a limited postal monopoly or 'reserved area' for the universal service provider. The Sixth VAT Directive exempts 'public postal services' from value-added tax. Acts of the Universal Postal Union effectively grant certain rights to universal service providers (or have been implemented in a manner that grants such rights). In addition, in some Member States, national laws regulating the placement of public collection boxes or operation of vehicles give special treatment to USPs.

3.4.1 Reserved area

Article 7(1) of the Second Postal Directive limited the scope of services that could be reserved for the USP. Since 1 January 2006, the reservable area for domestic and incoming cross-border correspondence is limited to correspondence meeting two conditions: (1) each item must weigh less than 50 grams and (2) the charge for each item must be less than two and a half times the USP's public tariff for carriage of an item in the lowest weight step of the fastest standard category of service. Moreover, such services may be reserved only 'to the extent necessary to ensure the maintenance of universal service'.

Article 7 further provides that the reserved area may be extended in two respects. First, it may include direct mail falling within the same price and weight limits as correspondence but again, only 'to the extent necessary to ensure the maintenance of universal service'. Second, the reserved area may include outgoing cross-border mail falling within the same price and weight limits but only 'to the extent necessary to ensure the maintenance of universal service, for example, when certain sectors of postal activity have already been liberalised or because of the specific characteristics peculiar to the postal services in a Member State'.

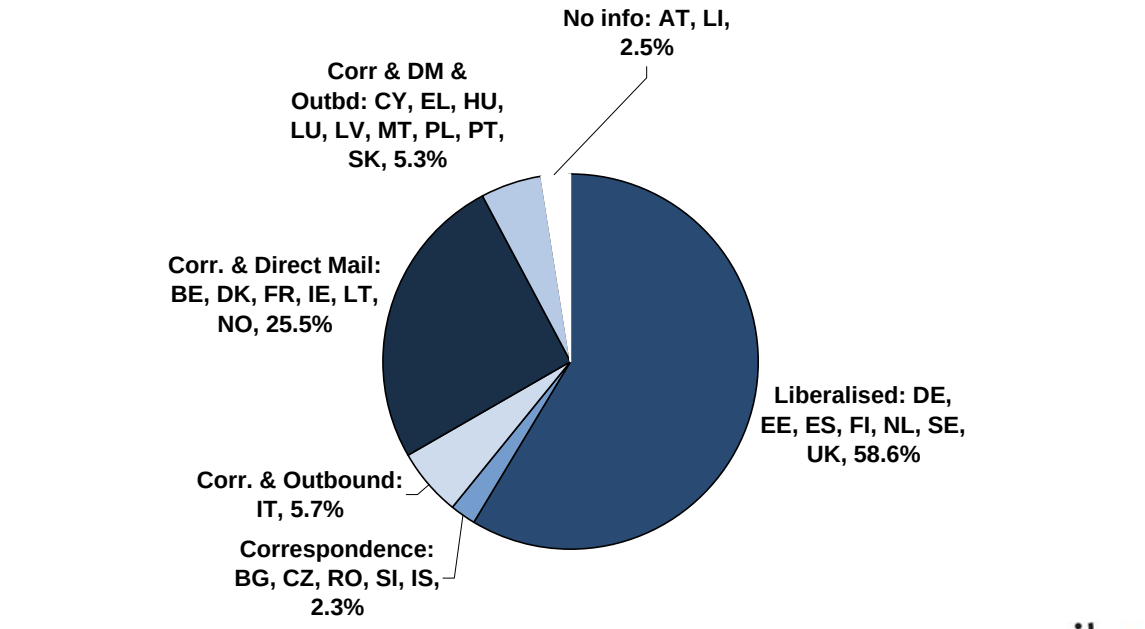
The Postal Directive's repeated insistence that a reservation may be introduced only 'to the extent necessary to ensure the maintenance of universal service' implies a duty to

adjust the reserved area to the economic requirements of universal service. In 2007, in the case of International Mail Spain, the European Court of Justice emphasised the significance of this limitation in addressing a Spanish law that included outbound cross border correspondence in the reserved area. The Court declared that a Member State may reserve cross-border mail to the universal postal service provider

> only in so far as they establish
>
> – that, in the absence of such a reservation, achievement of that universal service would be precluded, or
>
> – that that reservation is necessary to enable that service to be carried out under economically acceptable conditions.[64]

Figure 3-6 summarises the current state of the reserved area in the EU/EEA postal market.

Figure 3-6 Reserved area in EU/EEA, 2009



As this figure shows, there has already been substantial reduction of the reserved area. On 1 April 2009, 2 more Member States repealed the reserved area, Estonia and the Netherlands. This brings to 6 the roster of Member States with no reserved area (DE,

64 Case C-162/06, *International Mail Spain*, [2007] ECR I- 9911, paragraph 50.

EE, FI, NL, SE, UK). In addition, the reserved area in Spain is substantially less of a barrier to entry than in other Member States because it does not include intracity postal services. Collectively, these 7 liberalised Member States account for about 57 percent of the domestic letter post in the EU/EEA market. In 6 of the remaining Member States (BG, CZ, IT, RO, SI, IS), another 8 percent of the EU/EEA market, direct mail is outside the reserved area. In the remaining Member States, the reserved area is limited to items weighing 50 grams or less and priced at 2.5 times the public tariff for a letter of lowest weight step in the fastest standard category.

Although the Postal Directive has for ten years required Member States to limit the reserved area 'to the extent necessary to ensure the maintenance of universal service', only one Member State with a reserved area, Portugal, reported that it had conducted a study to evaluate the need for a reserved area.[65] Like earlier studies by the governments of Sweden and the United Kingdom (which have abolished the reserved area), the Portuguese study, prepared by Accenture and completed in 2006, supported liberalisation. It concluded that 'development of competition has reached different stages in the various segments and that market liberalisation presents attractive opportunities'. [66]

Looking back over the ten years since the Postal Directive initiated a process of gradual market opening, three conclusions seem apparent. First, there has been no appreciable increase in competition in postal markets due to the introduction of the present price and weight limits on the reserved area (2.5 times the basic stamp price and 50 grams). Phasing in these price and weight limits thus had little practical effect. A monopoly over the conveyance of postal items within the present price and weight limits ensures such economies of scale for the incumbent that significant competition is infeasible. Second, Member States which have repealed the reserved area have so far been able to maintain universal service with equal or even improved quality of service. At the same time, incumbent postal operators have been successful in maintaining almost all of their market shares (90 percent or more), usually with the aid of additional commercial flexibility. While the future of liberalised markets is necessarily uncertain, concerns that liberalisation would lead to a rapid decline in universal service due to widespread 'cream skimming' by new entrants have proved unfounded. Third, despite a significant disagreement over the political desirability of a reserved area, no substantial, government-endorsed defence of the reserved area has emerged in a decade despite a continuing legal obligation to adjust the scope of the reserved area to the requirements of universal service.

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65 Questionnaire 122-9.

66 'Estudo sobre o Desenvolvimento da Concorrência no Mercado Postal Português' (2006), See the summary on the internet site of the Portuguese NRA, Anacom, at http://www.anacom.pt/render.jsp?contentId=517701&languageId=1.

Since adoption of the Postal Directive in 1997, Member States have substantially liberalised the EU/EEA letter post market. Today, about 57 percent of the total market (by volume of letter post) is provided without a reserved area (or with a largely ineffective reserved area in Spain). There is no evidence that elimination of the reserved area has led to a decline in the quality of universal service; if anything, the contrary appears to be the case. In other Member States, reduction in price and weight limits for the reserved area has had only a limited effect on the reserved area as a barrier to entry.

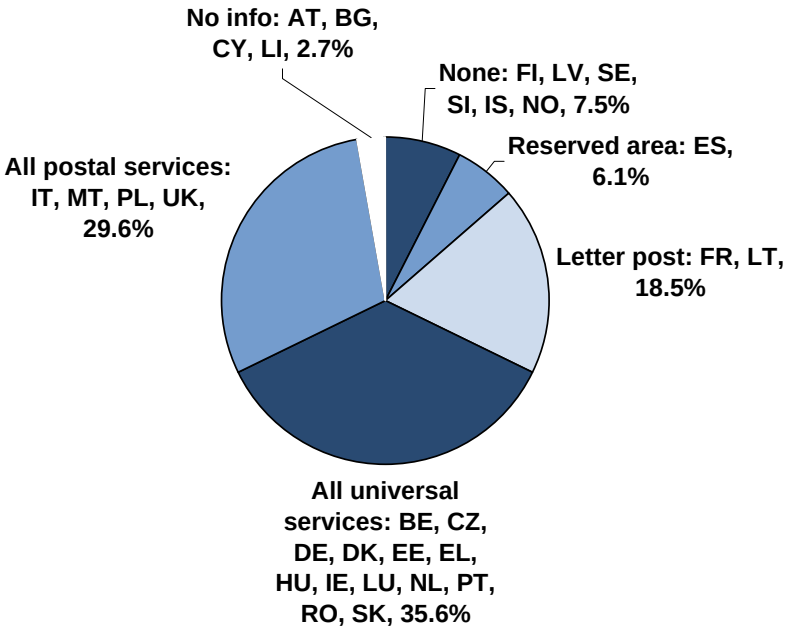
3.4.2 VAT and postal services

Member States may effectively reserve a category of products or services for selected postal operators without an explicit reserved area. A special legal right that is sufficient to give a postal operator a competitively significant advantage over potential competitors may establish a barrier against new entry.

One such legal privilege that has received much attention in the last few years is the exemption from value added tax (VAT) for postal services. The Sixth VAT Directive, dating from 1977, provides that the supply of 'public postal services' should be exempt from VAT. In practice, Member States have interpreted this phrase differently and have provided different exemptions for postal services.[67] Figure 3-7 summarises the current state of VAT exemptions for postal services.

67 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, OJ 1977 L 145, p. 1, Article 13A(1)(a).

Figure 3-7 VAT treatment of postal services



As this figure shows, VAT treatment of postal service varies substantially among Member States. Six Member States (FI, LV, SE, SI, IS, NO) provide no VAT exemption for postal services. Three (ES, FR, LT) limit the VAT exemption to reserved or letter post services. Thirteen Member States (BE, CZ, DE, DK, EE, EL, HU, IE, LU, NL, PT, RO, SK), accounting for more than a third of the EU/EEA postal market, exempt all universal services of the USP from VAT. It must be recalled, however, that different Member States have different views as the range of universal services. Germany, for example, exempts universal services from VAT but does not exempt bulk parcel service, a service which is not within Germany's definition of universal service. Four Member States (IT, MT, PL, UK) exempt all services of the USP from VAT including services that are not universal services.

The Commission has concluded that the VAT exemption for postal services inevitably distorts competition among postal operators. In 2003, the Commission called upon the Parliament and the Council to amend the Sixth VAT Directive to equalise VAT for all postal operators.[68] The Parliament and Council have not acted on this proposal. In

68 Proposal for a Council Directive Amending Directive 77/388/EEC as Regards Value Added Tax on Services Provided In The Postal Sector, COM(2003) 234. The Commission concluded, 'In the context of postal services, the current exemption causes a distortion between similar services supplied by the public operator and the private operator because only the services of the former are exempt'. Page 3. See also, Amended Proposal for a Council Directive Amending Directive 77/388/EEC as Regards Value Added Tax on Services Provided In The Postal Sector, COM(2004) 468.

2006, the Commission has initiated infringement proceedings against the United Kingdom, Germany, and Sweden for application of VAT to postal services in a manner that appeared to violate the directive. In July 2007, the Commission issued a reasoned opinion formally requesting these Member States to modify their VAT legislation.[69]

In April 2009, in the *TNT Post UK* case, the European Court of Justice clarified the effect of the exemption for postal services in the Sixth VAT Directive.[70] The Court held that the exemption for public postal services applies to operators and not to classes of services.

> *[P]ublic postal services within the meaning of Article 13A(1)(a) of the Sixth Directive must be regarded as operators*, whether they are public or private . . . who undertake to supply postal services which meet the essential needs of the population and therefore, in practice, to provide all or part of the universal postal service in a Member State, as defined in Article 3 of Directive 97/67. [Para. 36 (emphasis added)]

The Court concluded that Royal Mail was a public postal operator and TNT was not because of differences in the legal obligation under which each operated:

> As the facts in the main proceedings demonstrate, on account of the obligations described in paragraph 12 of this judgment, which are required under its licence and connected with its status as the universal service provider, an operator such as Royal Mail supplies postal services *under a legal regime which is substantially different* to that under which an operator such as TNT Post provides such services. [Para. 39 (emphasis added)]

On the other hand, the Court concluded that the exemption in the Sixth Directive could not be interpreted to apply to all services offered by a 'public postal operator' but only those 'postal services supplied in its capacity as the universal service provider'. Para. 45. Specifically the exemption could not apply to 'specific services dissociable from the service of public interest, including services which meet special needs of economic operators' Hence, the exemption cannot apply to ' services supplied by the public postal services for which the terms have been individually negotiated'. Para 47. In sum, the court decided that the VAT exemption for public postal services adopted in the Sixth VAT Directive applies to: '*operators, whether they are public or private, who undertake to provide, in a Member State, all or part of the universal postal service*'.[71]

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69 European Commission, IP/06/484 (10 Apr 2006), IP/07/1164 (24 Jul 2007).

70 TNT Post UK Ltd v. The Commissioners for Her Majesty's Revenue and Customs, Case C-357/07 (23 Apr 2009).

71 Ibid., Ruling, paragraph 1. The Court's ruling implies that, because of the Sixth VAT Directive, a Member State inevitably creates a market distortion by obliging a postal operator to provide universal

Given the distortive effects of different VAT regimes for different postal operators, this survey asked Member States if they were planning to modify national VAT legislation to provide equal treatment for all post operators.[72] One Member State, the Czech Republic, reported plans to equalise customs treatment, while six others replied that there were no such plans (DK, EE, FR, HU, LU, LV, NL). Most did not answer this question. These answers, however, predate the Court's ruling in *TNT Post UK*. It appears likely that Member States will have to reconsider the scope of their VAT exemptions for postal services in light of this ruling.

Different VAT regimes for universal service providers and other postal operators continue to distort postal markets. The recent (April 2009) ruling by the European Court of Justice in the *TNT Post UK* case clarifies but does not resolve this problem. Prior to the recent decision, however, few Member States reported plans to equalise the application of VAT in the foreseeable future.

3.4.3 Customs laws

The Universal Postal Convention provides simplified customs documentation for use by universal service providers and exempts them from liability under national customs laws.[73] The Convention does not, however, require governments to limit these privileges to USPs.[74] Nor does the Convention make clear to what extent such customs privileges should be or must be accorded to the commercial shipments of the USPs.

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service '*under a legal regime which is substantially different*' from the legal regime applicable to other operators. Under the Third Postal Directive, however, Member States must employ non-discriminatory procedures for designation of USPs or procurement of universal services from postal operators. Implications for the Court's ruling for implementation of the Third Postal Directive are discussed later in this study. See section 3.4.2, below.

72 Questionnaire 122-25.

73 Article 18 of the Universal Postal Convention (2004) says that, 'The postal administrations of the countries of origin and destination shall be authorised to submit items to customs control, according to the legislation of those countries'. Nonetheless, Regulation RL 152, adopted by the UPU's Postal Operations Council, sets out simplified documentation for use by postal administrations. Article 22(3) declares, 'Postal administrations shall accept no liability for customs declarations in whatever form

The Community Customs Code permits, but does not require, specialised customs procedures for 'postal traffic'.[75] Implementing regulations adopted by the Commission, however, provide that all 'consignments sent by letter or parcel post' may be cleared through customs using UPU documentation.[76] It is understood that the Commission has been encouraging Member States to accept the principle of equal customs treatment of all postal service providers, whether public or private, since 2003.[77] So far, however, there has been no agreement on this principle at the Community level. The Commission currently plans to address these issues, at least in part, in a Commission regulation implementing the Modernised Customs Code, which will replace the Community Customs Code in 2013.[78]

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these are made or for decisions taken by the Customs on examination of items submitted to customs control'.

74 The Universal Postal Convention (2004) requires signatory countries to provide certain customs treatment to 'postal administrations' but does prohibit them from providing similar customs treatment to private operators that tender similar items for customs entry under similar conditions. The Universal Postal Convention (2008), which becomes effective on 1 January 2010, is similar except that it requires certain customs treatment for 'designated operators' where 'designated operators' are defined as 'any governmental or non-governmental entity officially designated by the member country to operate postal services and to fulfil the related obligations arising out of the Acts of the Union on its territory'. Under the 2008 Convention, a signatory country also has the right to expand the scope of UPU customs treatment by naming multiple 'designated operators'. See UPU Congress, *Acts of the 24th Congress* (draft versions of Constitution, Article 1.6bis and Convention, Article 18).

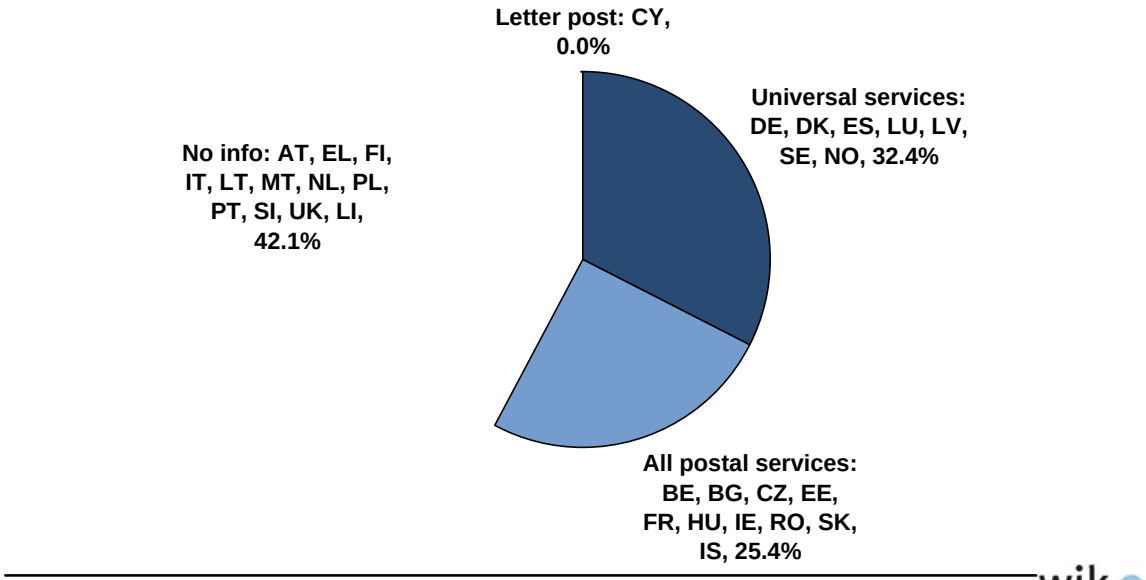
75 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302, 19 Oct 1992, p. 1, as amended, Article 38(4).

76 Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92, OJ L 253, 11 Oct 1993, p. 1, as amended, Articles 237 and 238.

77 See TAXUD 798/2003 - rev 2 (Sep. 22, 2004) and TAXUD 1842/2007. [Documents were mentioned to the authors by the Commission, DG TAXUD, but not made available during the study, and could therefore not be verified.]

78 The new customs code was established by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code), OJ L145, 4 Jun 2008, p. 1. Information on current plans for implementing regulation was provided by DG Taxation and Customs Union.

Figure 3-8 Scope of UPU customs treatment for international postal services



Most Member States appear to provide the benefits of UPU customs treatment to some or all products of the USP without providing private operators similar customs treatment for similar products. Ten Member States (BE, BG, CZ, EE, FR, HU, IE, RO, SK, IS), representing one quarter of the EU/EEA market, provide special customs treatment for all products of the USP. Seven Member States (DE, DK, ES, LU, LV, SE, NO), comprising a third of the EU/EEA postal market, limit UPU customs privileges to universal services. Cyprus reports that it provides UPU customs treatment only to correspondence and direct mail. A few Member States (CY, CZ, EE, SE) state that postal operators other than the national USP — e.g., other national postal operators designated as USPs or ETOEs — may make use of UPU-defined customs procedures for the importation of similar postal items. No Member State seems to provide the same customs treatment for all postal items regardless of whether the items are imported by a public postal operator, universal service provider, or private operator. A substantial number of NRAs did not answer these questions, apparently because they do not review international postal practices.

International postal markets continue to be distorted by preferential customs rules for universal service providers. The Commission has been encouraging Member States to accept the principle of equal customs treatment of all postal service providers since 2003, but there has been no agreement on this principle at Community level so far. The Commission currently plans to address these issues, at least in part, by implementing the Modernised Customs Code, which will replace the Community Customs Code in 2013. Most NRAs do not appear to review international postal practices, although there some notable exceptions.

3.4.4 International postal practices

Regulations governing international postal services continue to create distortions in cross border postal services and substantial barriers to entry. The most significant problems appear to be created by terminal dues, restrictions on remail and extraterritorial office of exchanges (ETOEs), and codes for International Mail Processing Centres (IMPCs).[79]

Terminal dues. 'Terminal dues' are the fees that public postal operators charge each other for the delivery of cross border mail. Historically, terminal dues were set by the Universal Postal Union (UPU). UPU terminal dues introduced two types of distortions into the exchange of international services. First, UPU terminal dues were not aligned with postage rates for delivery of comparable domestic mail. For most Member States, the result was that terminal dues discriminated in favour of foreign mailers and against national mailers. Second, terminal dues were available only to public postal operators, not to competing private operators.

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79 The Commission, supported by the ECJ, has long maintained that cross border intra-Community postal services should be conducted on terms that are as open and undistorted as domestic postal services, if not more so. In the Postal Green Paper (1992), the Commission proposed that cross border services should be excluded from the reserved area and that terminal dues should be based on domestic postage rates. *Green Paper on the Development of the Single Market for Postal Services*, COM/1991/0476 (11 Jun 1992), pp. 195-96, 220-21 ('The case for using inland tariffs as a basis for compensatory systems for mail exchanged between postal administrations rests on two principles: firstly the principle of having tariffs related to costs, and secondly the principle of taking action to avoid distortions of competition' [p. 220]).

Article 13 of the Postal Directive requires Member States to 'encourage' their USPs to adopt terminal dues agreements that respect principles similar to those in effect for domestic mail. Specifically, terminal dues 'shall be fixed in relation to the costs' of handling and delivery and should be transparent and non-discriminatory.

Terminal dues are also regulated under the competition rules because the Commission has held that a multilateral terminal dues agreement among USPs in the Member States is a horizontal price-fixing agreement. In 2004, however, the Commission held that a five-year extension of the terminal dues agreement called 'REIMS II' would be declared exempt from the competition rules since conditions set out in Article 81(3) were satisfied (after amendments to the original agreement).[80] In particular, reflecting greater liberalisation of outgoing cross-border mail in Directive 2002/39/EC, the Commission required the seventeen European public postal operators party to REIMS II to deliver incoming cross-border mail tendered by private operators and other parties on the same terms as applied to other public postal operators ('third party access'). Each public postal operator was likewise required to grant other public postal operators effective access to the generally available domestic rates in the country of delivery ('level 3 access'). The Commission's order embraced the principle that 'terminal dues' must reflect the actual cost of delivery and endorsed use of penalties to encourage public postal operators to meet quality of service targets for cross-border mail.[81] The Commission's exemption of multilateral terminal dues from the competition rules ended on 31 December 2006.

In April 2008, sixteen national USPs reported agreement to a REIMS III agreement.[82] Whether or not the REIMS III agreement may be considered consistent with the competition rules is unclear.[83] The Commission no longer gives parties to a price-fixing agreement an individual decision on the applicability of Article 81(3). Parties to an agreement that may be considered to fix prices or limit competition must make their own evaluation as to whether the exculpatory conditions of Article 81(3) are satisfied. The text of the REIMS III agreement is confidential so outside parties cannot judge its lawfulness. Moreover, the Third Postal Directive has changed the legal context of such an agreement so that what was once considered exempt under Article 81(3) might not

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80 Commission Decision 2004/139/EC in Case No COMP/C/38.170 — REIMS II Renotification OJ L 56, 24 February 2004, p. 76. 'REIMS' was originally an acronym for 'remuneration in the exchange of international mails'.

81 Commission Decision of 23 October 2003, REIMS II Notification, OJ L56, 24 Feb 2004, p. 76.

82 International Post Corporation, 'IPC Continues to Monitor Performance-Based Cross Border Mail Payments' (press release 1 April 2008). The postal operator involved were the national USPs of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Norway, Sweden and Switzerland.

83 In an interview for this study officials from DG Competition indicated that the public postal operators have signed a new REIMS agreement, 'REIMS III'. These officials indicated that no action was planned against this agreement, in part because there were no complaints. They agreed, however, that it is difficult for an affected party to complain if the terms of the agreement are secret. The non-transparency of this procedure seems inconsistent with promotion of open cross border postal market.

be so considered in the future.[84] Based on information gathered by WIK, it appears that the national USPs of all Member States are parties to the REIMS III agreement except the national USPs of the Netherlands, Portugal, Spain, and United Kingdom. These four Member States account for about 35 percent of the total EU/EEA letter post market.

In the last six years, it has become clear that these remedies, while salutary, have been incomplete. Several problems remain. First, conditions that the Commission imposed on the REIMS agreement are limited to public postal operators that participate in REIMS. Several important public postal operators have withdrawn from REIMS, including Royal Mail, TNT, and the Spanish Post Office. Non-REIMS post operators can and do insist that public postal operators in other Member States provide delivery for rates that are more favourable than the rates charged local mailers (or charged by destination post office to mailers in other Member States).[85] Second, the REIMS requirements do not address distortions in trade to and from the EU/EEA area. For example, UPU terminal dues rules create distortions in commerce between the EU and the United States by favouring public postal operators over private operators. Third, it has proven extremely difficult in practice for private operators to access terminal dues. Six years after the Commission's decision in REIMS II, only one private operator, IMX, has been granted 'third party access' and only then after a protracted battle with postal operators and threats of legal action. Fourth, the REIMS agreement remains non-transparent so that users and the general public are unable to evaluate possible distortions created.

One factor contributing to the continuing distortions in international postal services is the failure of most NRAs to implement Article 13. Only six NRAs (CY, CZ, IE, MT, PT, SK) from small Member States reported that they 'review or oversee the terminal dues charged by the USP(s) on intra-Community cross-border universal services to ensure they comply with the principles of the Postal Directive.[86] When asked whether these NRA ensured that terminal dues are geared to costs, however, most of these NRAs could refer only to the REIMS terminal dues agreement (which applies to a small

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84 Article 81(3) declares that prohibitions against anti-competitive agreements in Article 81(1) 'may be declared inapplicable' if the agreement 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; [or] (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'. Thus, whether or not an agreement qualifies under Article 81(3) requires a balancing of several factors. In the wake of the Third Postal Directive some of these factor may be evaluated differently. For example, since the scope of competition has been enlarged by elimination of reserved areas, there may be greater risk of 'eliminating competition in respect to a substantial part of the products in question'. Then, too, conditions which may appeared to be ' indispensable to the attainment of these objectives' — such as conditions which tend to restrain or distort competition between different cross border and domestic mail streams — may appear less 'indispensable' after the 'free market opening' required by the Third Postal Directive.

85 Non-REIMS postal operators able to insist upon favourable rates because in the absence of a special arrangement they have a right to delivery rates based on UPU terminal dues rates. UPU terminal dues are less than comparable domestic postage in most Member States.

86 Questionnaire 251-42.

number of trading partners) or the UPU terminal dues agreements (which is not cost-based).[87] One NRA suggested that the Commission's exemption of the REIMS II agreement from competition rules thwarted its efforts to require more cost-based terminal dues. Most significantly, most NRAs did not or could not answer any questions relating to terminal dues and international postal services.

Remail and ETOE restrictions. Provisions of the Universal Postal Convention permit Member States and/or their USPs to intercept and return 'remail', i.e., mail which is posted in one country by a sender who 'resides' (in some undefined sense) in another country.[88] The UPU has also encouraged its member countries to discriminate between (A) cross border postal items dispatched by a public postal operator from its national territory and (B) cross border postal items dispatched by the same public postal operator from an office located outside its national territory (an 'extraterritorial office of exchange' or ETOE).[89] The bottom line effect of both rules is to create an allocation of the cross border postal market whereby each public postal operator has a competitive advantage for mail originating in its national territory.

Anti-remail activities by the USPs have been the subject of considerable litigation. In the *GZS* case, decided in 2000, the European Court of Justice rejected the practice of some public postal operators surcharging inbound cross border mail by more than enough to align delivery fees with domestic postage rates.[90] In 2001, the Commission condemned Deutsche Post for using an unreasonably expansive definition of 'senders resident in Germany' to surcharge cross border mail tendered by the British Post Office.[91]

IMPC codes. According to regulations of the Universal Postal Convention, international mail is exchanged between international mail processing centres (IMPCs). All universal service providers operate one or more IMPCs in their national territories. Some also dispatch international mail from IMPCs located outside their national territories (ETOEs). In addition, in a few cases, private companies have applied for and received IMPC status for their mail dispatch facilities. Each IMPC has a code assigned by the UPU. As a practical matter, an IMPC code is the key to participation in the international postal system in partnership with the national post offices. An IMPC will not accept a shipment of inbound international mail for delivery unless the mail is received from a facility with a proper IMPC code to which terminal dues can be charged. Airlines and

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87 Questionnaire 251-44. See also Questionnaire 251-45 (relation of terminal dues to quality of service) and 251-46 (transparency of terminal dues).

88 Universal Postal Convention (2004), Article 27. In their answers, NRAs did not appear to know who has the authority to return international mail under this article. It seems probable that in such cases, the USP exercises this authority without supervision by the NRA.

89 Universal Postal Union, Beijing Congress, Resolution C44/2004.

90 Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH (GZS) and Citicorp Kartenservice GmbH, Joined Cases C-147/97 and C-148/97, [2000] ECR I-825.

91 See section 4.1.1.2(b), below.

customs officials also provide special treatment for mail shipments accompanied by IMPC codes.

In 2007, the UPU decided to suspend the issuance of IMPC codes to private postal operators and ETOEs, and this practice continues to the present.[92] The practical effect is a collective practice of refusing to deal with private operators and ETOEs who wish to tender international mail to IMPCs for delivery by public postal operators under the same trading terms given to those who have IMPC codes. In essence, the UPU's restriction of IMPC codes is the anti-competitive counterpart of the Commission's pro-competitive requirement of third party access provision in the REIMS II agreement.

International postal markets continue to be distorted by a number of practices unique to international postal affairs. Chief among these are practices related to terminal dues (especially outside the REIMS area), restrictions on remail and ETOEs (extraterritorial office of exchanges), and the restrictive use of IMPC (international mail processing centres) codes. With a few exceptions, NRAs have generally not implemented the principles set out in Article 13 of the Postal Directive.

92 Universal Postal Union, Nairobi Congress (2008), Document 18.

Case history 3-9: Customs reforms under the U.S. postal reform of 2006

In 2006, the United States adopted a major postal reform act for first time since 1970. The 'Postal Accountability and Enhancement Act' divides the postal products of the U.S. Postal Service into two categories, 'market dominant' and 'competitive'. Market dominant products are those in which the Postal Service exercises 'sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products'. Products which are not market dominant are competitive.

For competitive products, the 2006 act requires that, in several respects, the laws must be applied equally to competitive products of the Postal Service and to similar products of private postal operators. In regard to customs laws and other laws regulating the import and export of goods, the 2006 act declares:

> With respect to shipments of international mail that are competitive products . . . that are exported or imported by the Postal Service, the Customs Service and other appropriate Federal agencies shall apply the customs laws of the United States and all other laws relating to the importation or exportation of such shipments in the same manner to both shipments by the Postal Service and similar shipments by private companies.

The law further obliges the Secretary of State of the United States to encourage foreign customs authorities to 'make available to the Postal Service and private companies a range of non-discriminatory customs procedures that will fully meet the needs of all types of American shippers'.

These provisions were supposed to be implemented by June 2007. So far, however, U.S. customs authorities have resisted introduction of new customs regulations that would apply in an identical manner to similar shipments transported by public and private delivery services.

3.4.5 Other special rights

The survey also inquired about certain other special rights that have been traditionally given to public postal operators. In brief, it appears that in at least 10 Member States (BG, CY, EL, ES, HU, IE, PL, PT, RO, UK) the USP(s) has been granted special or exclusive rights in respect to the placement of collection boxes on public streets.[93]

In at least 3 Member States (BE, CY, EL), the USP(s) are not subject to the same requirements and fees as other postal operators with respect to the licensing and registration of vehicles (no information from AT, BG, EE, FI, IT, NL, PT, LI). On the other hand, only a few NRAs reported that USP(s) were not subject to the same requirements and fees as other postal operators with respect to the operation and inspection of vehicles (BE, CY, EL)[94] or regulations pertaining to parking restrictions or vehicular operation (BE, EL). [95]

In several Member States, universal service providers continue to enjoy special rights with respect to the placement of public collection boxes. Special rights for USPs with respect to the licensing and operation of vehicles appear to be less common, but responses of NRAs were incomplete on these points.

93 Questionnaire 122-30 (no information from AT, BE, FI, SK, LI).
94 Questionnaire 122-31 (no information from AT, BG, EE, FI, IT, NL, PT, LI).
95 Questionnaire 122-33 (no information from AT, BG, CY, DE, EE, ES, FI, IT, NL, PT, NO, LI).

3.5 Authorisation and licensing

Article 9 of the Postal Directive allows Member States to establish procedures for authorising postal service providers. The scope of permissible authorisations varies depending on whether the postal service being authorised is 'within the scope of universal service area' or outside the scope of universal service. 'Within the scope of the universal service' is undefined but apparently refers to postal services that compete with universal services. Article 9 also permits Member States to establish a 'compensation fund' to compensate the USP for some of the costs incurred in providing universal service. Article 9 was clarified and amended in the Third Postal Directive.

3.5.1 Authorisations within the universal service area

Article 9 of the Second Postal Directive declares that for non-reserved services that are 'within the scope of the universal service', Member States may introduce 'authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the essential requirements and to safeguard the universal service'. The Directive provides for two types of authorisations: (1) a *general authorisation* and an *individual licence*. The essential difference between the two is that an individual licence requires the operator to obtain specific approval from regulatory authorities before starting operations whereas a general authorisation does not. An individual license may also include rights and conditions specific to the licensee ('which gives an undertaking specific rights, or which subjects that undertaking's operations to specific obligations'), whereas it appears that a general authorisation may not.[96]

96 The Second Postal Directive, Article 2(14) defines 'individual licence' to mean an authorisation which is granted by a national regulatory authority and which gives an undertaking specific rights, or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, *where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority*' [emphasis added]. The same paragraph defines 'general authorisation' to mean 'an authorisation, regardless of whether it is regulated by a class licence or under general law and regardless of whether such regulation requires registration or declaration procedures, *which does not require the undertaking concerned to obtain an explicit*

Within the universal service area, the Directive offers several options for authorisation of postal operators. A Member State may require postal operators to obtain either a 'general authorisation' or an 'individual licence' to supply some or all services. One portion of the universal service area could be subject to an individual licence while another portion may be subject to a general authorisation (e.g., an individual license for carriage of letters weighing up to 1 kg. and a general authorisation for carriage of other types of letter post items). Alternatively a Member State may wholly refrain from establishing authorisation procedures.

In practice, five approaches to authorisation of postal operators have emerged among the Member States. They are, in order of increasing restrictiveness:

- no authorisation procedure;
- general authorisation for some or all letter post services;
- general authorisation for all services in universal service area;
- individual licence for some or all letter post services; and
- individual licence for all services in the universal service area.

Table 3-23 summarises the use of these authorisation procedures among the Member States. The relative prevalence of different authorisation methods may be seen more clearly in Figure 3-9.

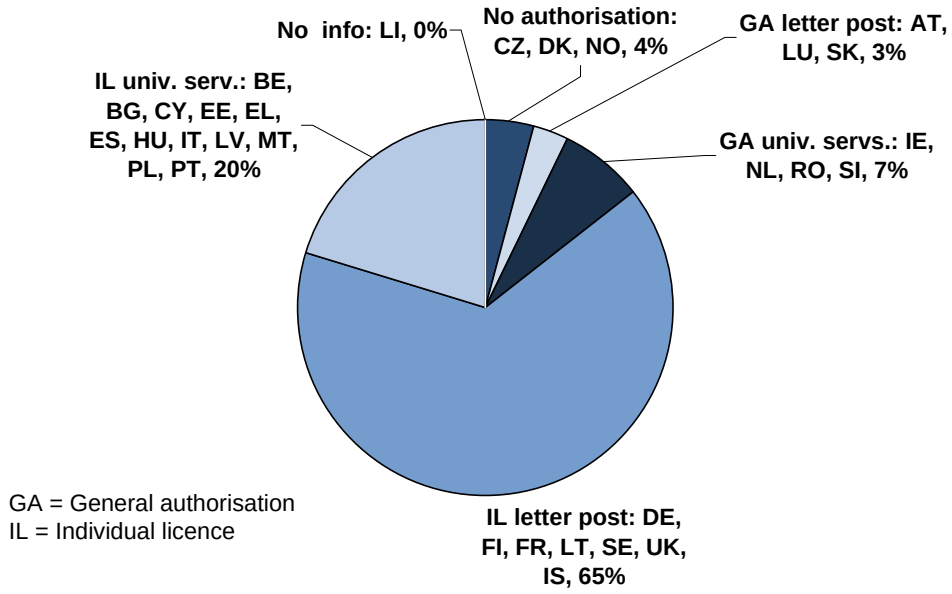
decision by the national regulatory authority before exercising the rights stemming from the authorisation' [emphasis added].

Table 3-23 Authorisation procedures for service within US area

	Univ. servs. subject to licence	Period of licence	Univ. servs. subject to GA	Authorisation regs published?	Authorisation regs apply equally?	USP(s) authorised under Art. 9?
AT	None		Cor	Yes	No	
BE	USO	>7 yr	None	Yes	No	
BG	USO		None	Yes		
CY	USO	Other	None	Yes	Yes	Yes
CZ	None		None			
DE	C/DM-1000	None	Other	Yes	Yes	Yes
DK	None		None			
EE	USO	3 to 7	None	Yes	Yes	Yes
EL	USO	Other	None	Yes	No	
ES	USO	None	None	Yes	No	
FI	Cor	>7 yr	None	Yes	Yes	Yes
FR	Cor	>7 yr	None	Yes	Yes	Yes
HU	USO	None	None	Yes	Yes	Yes
IE	None		USO	Yes	No	
IT	USO	3 to 7	None	Yes	No	
LT	Cor	None	None	Yes	No	
LU	None		Cor	Yes	No	
LV	USO	>7 yr	None	Yes	Yes	Yes
MT	USO	>7 yr	None	Yes	Yes	
NL	None		USO			
PL	USO	Other	None	Yes	No	
PT	USO	>7 yr	None	Yes	No	
RO	None		USO	Yes	Yes	Yes
SE	LP	None	None	Yes	Yes	Yes
SI	None		USO	Yes	No	
SK	None		LP	Yes	No	No
UK	C/DM-350	None	None	No		
IS	Cor	>7 yr	None			
NO	None		None			

Univ. servs. subject to licence and Univ. servs. subject to GA: Cor = All correspondence; C/DM-350 = Correspondence and direct mail up to 350 grams; C/DM-1000 = Correspondence and direct mail up to 1000 grams; LP = Letter post items (correspondence, direct mail, newspapers and periodicals); USO = Universal service items (letter post items and parcels up to universal service weight limit); Other = Other.

Figure 3-9 Authorisation procedures



Most Member States require an individual license for providers of postal services within the universal service area, but there are several alternative approaches as well. Twelve Member States (BE, BG, CY, EE, EL, ES, HU, IT, LV, MT, PL, PT) require an individual license for all services within the universal service area. Seven Member States (DE, FI, FR, LT, SE, UK, IS), representing almost two-thirds of the EU/EEA market, require an individual license only if the postal operator is conveying correspondence or, in some cases, other types of letter post items. Seven Member States require only a general authorisation, in some cases for the carriage of letter post items (AT, LU, SK) and in other cases for carriage of all universal service items (IE, NL, RO, SI). Germany is the only Member State that has introduced both individual licenses and general authorisations. In Germany, an individual license is required for carriage of correspondence and direct mail weighing less than 1000 grams, while a general authorisation is required for providing other services within the universal service area. Three Member States (CZ, DK, NO) have no authorisation procedures.

Table 3-24 Designated and authorised postal operators in 2008

	Desig-nated USPs	Public procurement operators	US IL operators authorised	US IL are USPs	US IL operators active	US GA operators authorised	US GA are USPs	US GA operators active	Non-US operators authorised
AT	1	0	1	1	1	11	1		0
BE	1	0	10	0	10				208
BG	1	0	10	0		0			77
CY	1	0	1	1	1	0	0	0	17
CZ	1	0	0	0	0	0	0	0	88
DE	0	0	1453	0	20		0		
DK	1	0	0	1	1	900	1	1	0
EE	1	1	2	0	1	0	0	0	39
EL	1	0	6	1		0	0	0	425
ES	1	0	544	1			1		2652
FI									
FR	1	0	21	1	0	0			
HU	1	0	0	1	0	0	1	0	178
IE	1	0	0	0	0	34	0	34	34
IT	1	0	429	0	0	0	0	0	1468
LT	1	0	14	0	0	0	0	0	78
LU	1	0	0	0	0	24	0	0	24
LV	1	1	52	1	19	0	0	0	52
MT	1	0	2	0	2	0	0		16
NL	1	0	0	0	0	0	0	0	
PL	1	0	6	1	1	0	1	1	179
PT	1	0	11	1	1	0	0	0	61
RO	1	0	0	0	0	741	1	1	779
SE	1	0	31	1	2	0			0
SI	1	0	0	0	0	12	1	1	
SK	1	0	0	0	1	21	0	0	
UK	1	0	18	1	13	0	0	0	0
IS	1	1	2	1	0		1	0	1
NO	1								

General key: US = universal service; IL = individual licence; GA = general authorisation

Table 3-24 provides statistics on the number of individual licences and general authorisations granted in the Member States and the number of active operators actually providing a 'significant level of postal services' at the end of 2008. Numbers in this table should be interpreted with caution.[97] In some Member States (e.g., CZ, DK,

97 This table has been substantially edited by WIK to correct inconsistent answers by NRAs. For example, in several cases, NRAs stated in answer to Q241-1 or Q241-10 that no individual licence or no general authorisation was required to provide service within the universal service area and then, in answer to Q301-12 to Q301-17 — the source for this table — that a certain number of individual licences or general authorisations were issued or that a certain number of postal service providers were actively providing a significant level of service under such authorisations. Note that in this table,

IT, FR, PT, RO, SI, SK), it seems that a large number of authorisations may have been issued, but that the number of postal service providers — other than the national USP — providing a significant level of services within the universal service area may be very few or none.[98] The bottom line is that it appears that authorisation procedures based on individual licences are operating in practice in 6 Member States (BC, DE, ES, LV, SE, UK), representing about 54 percent of the EU/EEA postal market. Ireland appears to be the only Member State in which a general authorisation for services within the universal service area is operating in practice.

The Postal Directive provides that authorisation procedures — i.e., a requirement for either a general authorisation or an individual license — may be introduced 'to the extent necessary in order to guarantee compliance with the 'essential requirements' (a term referring to certain non-economic objectives discussed below) and to safeguard the universal service'.[99] Accordingly, we asked NRAs in Member States where individual licenses were required why it was considered necessary to introduce an individual license rather than rely on non-postal laws, designation of the USP, market forces, and other mechanisms.[100] Typical answers were as follows:

- BE: Non-postal laws do not guarantee sufficiently enforcement. Licensed operators (operating inside USO) are obliged to participate to the financing of USO through a compensation fund, if activated in case the reserved area would not be sufficient.

- DE: Safeguarding quality standards and nationwide provision; market review; compensation fund.

- EE: Individual license requires provision of postal services at least at western part or at eastern part of the country or in whole country.

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zero indicates a positive answer by the NRA of a null quantity. A blank space indicates no answer by the NRA.

98 In Questionnaire Q301-10 to Q301-17, we asked NRAs to specify, for each of the years 2005 to 2008, both how many operators were authorised by individual licence or general authorisation and how many operators were 'actually providing a significant level of postal services'. In Denmark, the NRA stated that no general authorisation is required to provide services in the universal service area (Q241-10), that the number postal operators authorised by general authorisation in each of the years 2005, 2006, 2007, and 2008 was 900, the same for each year (Q301-15), and that the number of postal operators with a general authorisation actually providing a significant level of postal services was 1, the USP, for the years 2006, 2007, and 2008 (Q301-17). In Italy, there are undoubtedly many private operators, but the NRA positively states that the number of licensed operators providing a significant level of postal services was 0 for the years 2005, 2006, 2007, and 2008 (Q301-14). In some cases (e.g., DK, LU, RO, SI, SK,), the number of general authorisations issued to operators ('GA operators authorised') may refer to services outside the universal service area rather than inside the universal service area.

99 Second Postal Directive, Article 9(2).

100 Questionnaire 241-7, 241-8.

- EL: Considered necessary in order to ensure that the universal service is continually and thoroughly provided.
- ES: Ensure the provision of USP. They contribute to the USP fund. Ensure compliance with requirements in favour of users.
- FR: Safety of users, staff, and the service provider's equipment. Confidentiality of items of correspondence. Protection of any personal data and privacy of users. Technical requirements must be environment-friendly. By law, La Poste is designated as universal service provider in France. The other operators have not any universal service obligation.
- HU: Geographical covering required by the postal legislation, quality requirements. Increased control is indispensable: the confidentiality of correspondence and the protection of the content of parcels have to be previously controlled.
- MT: It is generally felt that due to the market structure of the postal market the licensing regime constitutes an adequate means to clearly delineate the products that must and can be offered within the universal services area.
- PL: Technical and operational competence, availability of services, quality and performance of services.
- SE: An individual license gives the NRA authority to supervise and make sure that the postal service is reliable. The postal regulation in Sweden is not precise or detailed; therefore, the licence terms and conditions are used to specify the requirements on postal operators and specifically on the USP.
- UK: Operators must have sound arrangements, for protecting mail and delivering it safely. Common Operating Procedures - operators must have arrangements in place to facilitate the repatriation of misdirected mail to the correct network.

Alternatively, we asked those who required a general authorisation why it would not be sufficient to rely upon other mechanisms to safeguard essential requirements and ensure universal service.[101] In this case, the following explanations were provided:

- DE: Market overview; postal secrecy; data protection; monitoring and enforcing obligations.

101 Questionnaire 241-15.

- IE: Easiest way to impose obligations on service provider; provides undertaking not to infringe reserved area.
- LT: Protection of the reserved area until deadlines set by the Third Postal Directive.
- LU: By granting a general authorisation, the declaration sheet inherent to the procedure, may attract the attention of the provider to the obligations he has to fulfil or to respect.
- RO: Consumers protection; necessary supervision of the NRA.

Viewed sceptically, many of the reasons proffered by the NRAs do not seem very clear or convincing (and many NRAs gave no reasons at all). It is unclear what authorisation procedures are needed to ensure universal service if a universal service provider has been designated to provide universal service. Or why authorisation procedures are needed to safeguard the reserved area when the legislator has undoubtedly provided legal penalties for infringement. Or why authorisation procedures are needed to ensure data protection when most data is today transmitted and stored outside the postal system and therefore addressed in non-postal laws. To the extent that NRAs suggest that authorisation procedures are necessary so that the NRA can prevent postal service providers from engaging in unsafe, incompetent, or unwise operations, one must question whether such 'management oversight' functions are truly necessary or permitted by the Postal Directive. On the other hand, some justifications for imposition of authorisation procedures on postal service providers may be considered more plausible. These include ensuring confidentiality of correspondence (if not required by the postal statutes); protection of users (especially in multi-operator environments); implementation of a compensation fund (so far, rarely used); and collection of industry statistics.

Overall a general authorisation seems capable of protecting appropriate public interests as well as an individual licence with one major exception. Unlike a general authorisation, an individual licence allows the NRA to attach particular USO requirements to the authorisation of one postal operator, the USP. This is, for example, the practice in the United Kingdom and Sweden. The general authorisation is insufficient for this purpose because, by definition, it cannot be particularised to specific operators.[102]

Article 9 of the Postal Directive further provides that all authorisations for service within the universal service area — whether individual licenses or general authorisations —

102 An authorisation for an undertakings 'which subjects that undertaking's operations to specific obligations' is an 'individual licence'. See Second Postal Directive, Article 2(14).

may be subject to certain types of conditions. The rules defining what types of conditions may be attached to authorisations are complicated, but they are important because authorisation conditions can impose substantial barriers to new entry.

Table 3-25 Permitted conditions for authorisations within universal service area

Second Postal Directive	Third Postal Directive
Conditions to ensure essential requirements:	Conditions to ensure essential requirements:
— confidentiality of correspondence;	— confidentiality of correspondence;
— security of the network as regards the transport of dangerous goods;	— security of the network as regards the transport of dangerous goods;
— data protection;	— data protection;
— environmental protection;	— environmental protection;
— regional planning.	— regional planning.
	— respect for the terms and conditions of employment, 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.
Conditions to ensure universal service:	Conditions to ensure universal service:
— universal service obligations, where appropriate;	— universal service obligations;
— requirements concerning the quality, availability, and performance of the relevant services, if necessary;	—requirements concerning the quality, availability, and performance of the relevant services, if necessary and justified;
— an obligation not to infringe the exclusive or special rights granted to the USP(s) for the reserved postal services;	— an obligation to make a financial contribution to a compensation fund to support universal service, where appropriate;
	— an obligation to make a financial contribution to the NRA's operational costs, where appropriate;
	— an obligation to respect working conditions laid down by national legislation;
	Limitations on conditions to ensure universal service (except for USPs designated under Article 4):
	— may not impose universal service obligations.
	— may not, with respect to the same elements of the universal service or parts of the national territory, require both universal service obligations and financial contributions to a compensation fund;
	— may not duplicate conditions which are applicable to undertakings by virtue of other, non-sector specific national legislation;
	— may not impose technical or operational conditions other than those necessary to fulfil the obligations of this Directive.

Source: see Second Postal Directive, Article 9, and Third Postal Directive, Article 9.

The types of conditions that may be attached to authorisations for postal service providers operating within the universal service area are summarised in Table 3-25. In brief, authorisations may be subject to two categories of conditions: (i) conditions necessary in order to guarantee compliance with the essential requirements and (ii) conditions necessary to ensure provision of the universal service. In the Second Postal Directive, 'essential requirements' refers to five types of non-economic conditions. In the Third Postal Directive, the definition of essential requirements includes a sixth category of non-economic considerations (respect for terms and conditions of employment, etc.). In the Second Postal Directive, there are three types of conditions that may be used to ensure universal service. In the Third Postal Directive, there are five types of conditions and four limitations on use of these conditions in authorisations for postal service providers that are designated as USPs under Article 4. In the Third Postal Directive, there is an additional rule: the number of authorisations — whether by general authorisation or individual license — cannot be limited in number except in the case of postal service providers that are designated as USPs under Article 4.

Table 3-26 Authorisations within US area: conditions based on essential requirements

	Confidentiality of correspondence	Dangerous goods security	Terms of employment	Data protection	Environmental protection	Regional planning
AT	No*	No*	No*	No*	No*	No
BE	Yes**	Yes**	No**	Yes**	Yes*	Yes
BG	Yes*	Yes	??	Yes**	Yes	No
CY	Yes*	Yes**	*	Yes*	Yes*	No
CZ	No*	No*	No*	No*	No*	No*
DE	Yes*	No*	Yes*	Yes*	No*	No
DK						
EE	No*	No*	No*	No*	No*	No
EL	Yes*	Yes*	Yes*	Yes*	Yes*	Yes*
ES	Yes**	Yes**	No*	Yes**	No	No
FI	No*	No*	No*	No*	No	No
FR	Yes**	No*	No*	Yes**	Yes*	No
HU	No*	No*	No*	No*	No*	No*
IE	Yes	Yes*	No*	No*	No*	No*
IT	Yes*	Yes**	Yes**	Yes**	Yes**	No
LT	Yes*	No	No	No	No	No
LU	Yes*	Yes*	No*	No*	No*	No
LV	*					
MT	Yes*	Yes	No*	Yes	No	No*
NL						
PL						
PT	Yes*	No*	No*	Yes*	Yes*	No
RO	Yes*	No*	No*	Yes*	No*	No*
SE	Yes	No	No	No	No	No
SI	Yes*	No*	No*	Yes*	No*	No
SK	No**	No	No	No	No	No
UK	No*	No*	Yes*	No*	No*	No
IS	Yes**	No*	No**	Yes**	No**	No
NO						

Key: "*" indicates that essential requirement is governed, or also governed, by provisions of non-postal legislation;
"**" indicates that the postal authorisation condition and the non-postal provisions are essentially duplicate
?? = Unknown. No information about law or practice.

The current situation with respect to authorisation conditions is summarised in the next two tables. Table 3-26 shows what conditions have been introduced to protect 'essential requirements' (as defined by both the Second and Third Postal Directives). Table 3-27 shows what conditions have been introduced to ensure universal service.

Table 3-27 Authorisations within US area: conditions to ensure universal service

	USO require-ment	Quality, availability, perform-ance	Support for compen-sation fund	Support for NRA costs	Respect for labor laws	Respect for reserved area	Financial guarantees	Technical expertise	Statistical data to NRA
AT	No	No	No	No	No	Yes	No	No	No
BE	Yes	Yes	Yes	No	No	Yes	No	Yes	Yes
BG	No	Yes	No	Yes	No	Yes	No	No	Yes
CY	No	Yes	Yes	Yes		Yes	Yes		Yes
CZ	No	Yes	No	No	No	Yes	No	No	No
DE	No	No	No	No	Yes		No	Yes	Yes
DK									
EE	Yes	No	No	No	No	No	No	No	No
EL	No	No	Yes	Yes	Yes	Yes	No	No	Yes
ES	No	No	No	No	No	Yes	No	No	No
FI	Yes	Yes	No	Yes	No	No	No	No	No
FR	No	No	No	No	No	Yes	No	Yes	Yes
HU	Yes	Yes	No	Yes	No	Yes	Yes	Yes	Yes
IE	No	No	No	No	No	Yes	No	No	No
IT	No	Yes	Yes	Yes	Yes	Yes	No	No	Yes
LT	Yes	No	No	Yes	No	Yes	No	No	Yes
LU	No	No	No	No	No	Yes	No	No	No
LV									
MT	No	No	No	Yes	No	Yes	No	No	Yes
NL									
PL									
PT	No	Yes	No	No	No	Yes	No	Yes	Yes
RO	No	Yes	No	Yes	No	Yes	No	No	Yes
SE	Yes	Yes	No	Yes	No	No	No	No	Yes
SI	No	No	Yes	Yes	No	Yes	No	No	Yes
SK	No	No	No	No	No	Yes	No	No	Yes
UK	Yes	No	No	Yes	No	No	No	No	Yes
IS	No	No	No	Yes	No	Yes	No	No	No
NO									

Table 3-26 suggests that Member States frequently include authorisation conditions that address essential requirements already covered in other non-postal laws. For example, an authorisation condition may prohibit a postal operator from transporting dangerous goods even though another law also prohibits or penalises the transportation of dangerous goods. In general, the Third Postal Directive discourages this practice because a postal operator should not be subject to a greater penalty — loss of the entire business — than other companies when the public interest being protected is the same in both cases. It appears, therefore, that authorisation conditions relating to essential requirements will have to be reconsidered as the Third Postal Directive is implemented.

Table 3-27 summarises the authorisation conditions related to ensuring universal service. This table suggests that such conditions are so far imposed in a relatively light-handed manner in most Member States. The most popular condition, respect for the reserved area, will disappear after introduction of the Third Postal Directive. Seven Member States include universal service conditions (BE, EE, FI, HU, LT, SE, UK). In Sweden and the UK, significant universal service obligations have been imposed only on one operator. In three Member States (BE, EE, HU), the universal service obligation has been imposed on postal operators other than designated USPs. It appears that such conditions will have to be reconsidered when the Third Postal Directive is transposed.[103] Two types of conditions are relatively rare but raise questions under the Postal Directive: financial guarantees (CY, HU) and technical expertise (BE, DE, FR, HU, PT). Such conditions do not seem to be permitted by the Second Postal Directive. Under the Third Postal Directive, such conditions are permitted only to the extent 'necessary to fulfil the obligations of this Directive'. Since the universal service is typically ensured by the operation of one or more designated USPs, it is unclear which obligation of the Directive justifies regulation of the technical expertise of other providers of postal services within the universal service area.

Member States employ a variety of authorisation procedures for services within the universal service area. While 11 Member States require an individual license for all services within the universal service area, 7 Member States, representing almost two-thirds of the EU/EEA market, require an individual license only if the postal operator is conveying letter post items, and 6 Member States require only a general authorisation. Overall, a general authorisation procedure seems capable of protecting the same interests as those protected by an individual licence procedure with one exception — the individual licence allows the NRA to attach universal service obligations to the authorisation of one postal operator, the universal service provider. In Member States which do not rely upon licence conditions to impose the USO, the USO is usually imposed in a legislative designation of the public postal operator as the USP.

Member States and NRAs have attached several types of conditions to authorisations for service within the universal service area. Many include conditions that address essential requirements already covered in other non-postal laws. In 4 Member States, it appears that universal service obligations have been imposed on postal operators other than designated USPs. Such conditions will have to be reconsidered in light of the Third Postal Directive. Two other types of conditions are relatively rare but also raise questions under the Postal Directive: financial guarantees and technical expertise.

103 Questionnaire 241-36. Third Postal Directive, Article 9(2) states, 'Obligations and requirements referred to in the first indent and in Article 3 may only be imposed on designated universal service providers'.

3.5.2 Authorisations outside the universal service area

Article 9 of the Postal Directive also provides for authorisation procedures for services outside the universal service area. It declares, 'For non reserved services which are outside the scope of the universal service as defined in Article 3, Member States may introduce general authorisations to the extent necessary in order to guarantee compliance with the essential requirements'. Thus, only general authorisations, not individual licences, may be employed.

The present state of authorisations for providing services outside the universal service area is summarised in Table 3-28. Ten Member States (CZ, DK, FI, FR, LU, NL, SE, SI, UK, IS), collectively representing 54 percent of the EU/EEA market, require no authorisation. On the other hand, 18 Member States require an authorisation and account for about 44 percent of the market. Of these 18 Member States, 7 (BE, BG, EL, ES, LV, MT, PL) require an authorisation which is called a 'general authorisation' but which does not permit the operator to begin services without receiving an explicit decision by the NRA. Such an authorisation must be considered as an 'individual licence' according to the definitions of the Postal Directive even if the requirements are relatively relaxed. Since the Postal Directive does not permit introduction of individual licenses for services outside the universal service area, these authorisations may need to be reconsidered. The remaining 11 Member States (AT, CY, DE, EE, HU, IE, IT, LT, PT, RO, SK) might be considered to require a 'general authorisation' for services outside the universal service area.

The types of non-universal services most commonly subject to authorisation are parcel (A) and express (B) services. The conditions included with such authorisations are generally based on essential requirements (conditions A through F in the table). However, in several cases Member States have attached additional conditions relating to the provision of universal service or other issues (G through O). These conditions appear to exceed what is permitted by the Postal Directive.

Table 3-28 Authorisations outside US area

	GA required?	Start service immediately?	Non-Univ. serv. subject to GA	Conditions
AT	Yes	Yes	F	
BE	Yes	No	ABE	ABDEFK
BG	Yes	No	B	ABDEGIKN
CY	Yes	Yes	ABCEF	ABCDEKN
CZ	No			
DE	Yes	Yes	B	ADN
DK	No			
EE	Yes	Yes	B	
EL	Yes	No	ABCEF	ABCDEFIJKO
ES	Yes	No	ABE	ABDK
FI	No			
FR	No			
HU	Yes	Yes	AB	O
IE	Yes	Yes	AB	ABO
IT	Yes	Yes	ABDE	ABCDEIJKMN
LT	Yes	Yes	AB	AIKN
LU	No			
LV	Yes	No	AB	ABIKN
MT	Yes	No	AB	
NL	No			
PL	Yes	No	AB	ABDKMN
PT	Yes	Yes	AB	ADEGJKN
RO	Yes	Yes	AB	ADIKN
SE	No			
SI	No			
SK	Yes	Yes	A	KN
UK	No			
IS	No			
NO				

Non-Univ. serv. subject to GA: (A) Parcel services for parcels outside universal service area; (B) Express or courier services; (C) Delivery services for unaddressed advertising; (D) Delivery services for messages transmitted electronically; (E) Mail preparation or sorting services; (F) Other.

Conditions: (A) Confidentiality of correspondence; (B) Restrictions on transport of dangerous goods; (C) Respect for regulations on terms and conditions of employment; (D) Data protection requirements; (E) Environmental protection requirements; (F) Regional planning requirements; (G) Quality, availability, performance, or price standards; (H) Contribution to a compensation fund; (I) Contribution to the costs of the NRA; (J) Obligation to respect working conditions in national legislation; (K) Non-infringement of reserved area of USP(s); (L) Minimal capital or financial guarantees; (M) Technical or operational competence; (N) Reporting of statistical data; (O) Other.

Since services outside the universal service area are, by definition, not required to ensure the universal service and were presumably provided without regulation prior to the Postal Directive, we asked NRAs why authorisation procedures were considered necessary to guarantee compliance with 'essential requirements' (the only permissible justification under the Second Postal Directive) or collection of statistics (also permitted under the Third Postal Directive). A sampling of responses follows:

- BE: General non-postal laws don't guarantee sufficiently enforcement (by tribunals). The NRA is explicitly competent to observe the compliance with specific rules essential requirements and imposes sanctions in case the postal legislation is not respected.
- EE: Requirement of notification guarantees for NRA an overview of postal operators. This lets NRA to collect data of postal market for statistical reasons.
- HU: Non-infringement of reserved area of USP(s). Contribution to the costs of the NRA. Reporting of statistical data.
- IE: Not currently covered by general or postal laws. Achieves same objective in a more flexible manner.
- IT: General authorisation allows greater control, also referring specifically to reserved postal services within the universal service area.

In general, however, the Postal Directive does not seem to sanction use of authorisation procedures to terminate the right of a company to provide services *outside* the universal service area if the NRA finds that the company has encroached upon the reserved area (HU, IT) or other requirements of the postal laws (BE, IE). Rather, it would appear that the NRA should enforce any penalties prescribed in law for such transgressions.

In 10 Member States, accounting for the majority of the EU/EEA postal market by volume, no authorisations are required for providing postal services outside the universal service area. In the other Member States, authorisations are usually required. In several cases, these authorisations appear to be ‘individual licences’ whereas only general authorisations are permitted by the Postal Directive. In some Member States, authorisations appear to include conditions that are more restrictive than permitted by the Postal Directive.

3.5.3 Authorisation procedures

Article 9(3) of the Second Postal Directive further requires Member States to respect certain procedural requirements in administering general authorisations and/or individual licenses. Under the Second Postal Directive, Member States must ensure that procedures and requirements related to authorisations are transparent, non-discriminatory, proportionate, and based on objective criteria. The Third Postal Directive adds that procedures and requirements be precise, unambiguous, and made public in advance.

If authorisation procedures must be applied in a non-discriminatory manner, are Member States required to authorise all postal service providers, including the universal service provider designated under Article 4?[104] Member States have split on this issue. Most Member States do not subject the universal service provider to authorisation procedures. However, in 10 Member States (CY, DE, EE, FI, FR, HU, LV, RO, SE, SK), the universal service provider is authorised under Article 9 in the same manner as other postal service providers. Similarly, in answer to the basic question of whether 'the same authorisation procedures apply to the USP(s) as to all other postal operators?', the Member States split evenly. 11 NRAs (CY, DE, EE, FI, FR, HU, LV, MT, RO, SE, SK) answered affirmatively and 11 (AT, BE, EL, ES, IE, IT, LT, LU, PL, PT, SI) negatively. Those who answer negatively generally pointed out that that the statute treats the public postal operator differently from other postal service providers because it is considered the universal service provider.[105]

Member States are split fairly evenly on whether the designated universal service provider(s) should be subject to authorisation procedures in the same manner as other postal service providers. In implementing the Second Postal Directive, the majority view is that the universal service provider is not required to be authorised under Article 9.

104 It seems clear that an Article 9 authorisation *may* be applied to USPs that are designated under Article 4. In the Third Postal Directive, Article 9 explicitly declares, 'Obligations and requirements referred to in the first indent [of Article 9(2)] may only be imposed on designated universal service providers'. Similarly, although less explicit, Article 9 of the Second Postal Directive states that authorisations may 'where appropriate, be subject to universal service obligations'. Since Article 9 may be applied to USPs designated under Article 4 and since Article 9 must be applied in a non-discriminatory manner, it appears plausible that Article 9 authorisations should must be applied in an equal manner to all postal service providers to which it is potentially applicable.

105 Questionnaire 241-70, 241-71, 241-72.

3.5.4 Compensation fund

In connection with authorisation procedures, the Second Postal Directive permits a Member State to establish a 'compensation fund'. The Directive explains that the purpose of the compensation fund as follows:

> In order to ensure that the universal service is safeguarded, where a Member State determines that the universal service obligations, as provided for by this Directive, represent an unfair financial burden for the universal service provider, it may establish a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries.

According to the Directive, a Member State 'may make the granting of authorisation subject to an obligation to make a financial contribution to that fund'. Since an authorisation to provide services outside the scope of the universal service may only be conditioned on compliance with non-economic essential requirements, it appears that only postal operators authorised to provide services within the scope of universal service can be required to contribute to the compensation fund.

Table 3-29 summarises the current state of compensation funds in the Member States. In brief, 12 Member States (BE, CY, DE, EE, EL, ES, FR, IT, NL, PT, SI, IS) have adopted legislation authorising the creation of a compensation fund, but only two (EE, IT) Member States have actually established the fund. In neither case does the compensation fund appear to cover a significant percentage of the cost of providing universal service.[106] No Member State has conducted an economic study that analyses the need for a compensation fund.

Only Estonia and Italy have introduced a compensation fund for postal services. In neither case does the fund contribute significantly to supporting universal service. Compensation funds have been authorised but not established in 10 other Member States. No Member State has conducted an economic study that analyses the need for a compensation fund even though use of compensation fund is limited to situations where a Member State determined that the USO represents an unfair financial burden for the USP.

106 The Italian NRA indicated the contribution was 'very low (near 0%)'. The Estonian NRA did not answer this question. Questionnaire 241-78.

Table 3-29 Compensation fund for USP(s)

	Comp. fund authorised by law	Who decides to establish?	Who administers fund?	Comp. fund is esta-blished?	Economic study on need	Contri-butors to fund	Basis for contri-butions	Contri-butions by USP(s)?
AT	No							
BE	Yes	Min Post	NRA	No	No	Lic area	Lic rev	Yes
BG	No							
CY	Yes	NRA	NRA	No	No	US area		Yes
CZ	No							
DE	Yes	NRA	NRA	No	No	Other	Lic rev	Yes
DK	No							
EE	Yes	Min Post	NRA	Yes	No	Lic area	Other	Yes
EL	Yes	Other	NRA	No		Lic area		No
ES	Yes	Other	Other	No	Yes	US area	US rev	Yes
FI	No							
FR	Yes	Min Post	NRA	No	No			
HU	No			No	No			
IE	No							
IT	Yes	NRA	NRA	Yes	Yes	Lic area	US rev	No
LT	No							
LU	No							
LV	No							
MT	No							
NL	Yes	Other	NRA	No				
PL								
PT	Yes		Other	No	No			
RO	No			No				
SE	No							
SI	Yes	NRA	NRA	No	No			
SK	No			No	No			
UK	No							
IS	Yes	NRA	NRA	No	No			
NO	No							

Contributors to fund: Lic area = Postal operators providing services within a licensed area; US area = Postal operators providing services within the scope of universal service; All PO = Postal operators providing services within and outside the scope of universal service

3.6 Regulation of the accounts of USPs

Article 14 of the Postal Directive requires NRAs to regulate the accounts of 'universal service providers' but not other providers of postal services. The accounting provisions of Article 14 may be thought of as a two-step process. The first step is to develop a scheme for *separation of accounts*. This is, in essence, a system of boxes (or accounting categories) to which the costs and revenues may be assigned. In general, the boxes will correspond to products or groups of products, such as letter service, direct mail service, and parcel postal service. The basic issue presented by separation of accounts is, 'Does the USP's accounting system provide the right number and size of accounting boxes'? The second step is *allocation of costs*. Deciding how much cost should be assigned to each box is difficult because many types of postal costs are incurred as common costs. For example, if a postman walks down the street delivering letters, direct mail, and parcels to a series of addresses, how much of the postman's salary should be assigned to the box of costs associated with letters? With direct mail? With parcels? The next two sections review how Member States have implemented provisions of the Postal Directive requiring separation of accounts and allocation of costs. Additional sections address more technical accounting issues.

3.6.1 Separation of accounts

In the Second Postal Directive, Article 14(2) sets out the principles for separation of the accounts of the universal service provider(s) as follows:

> The universal service providers shall keep separate accounts within their internal accounting systems at least for each of the services within the reserved sector on the one hand and for the non-reserved services on the other. The accounts for the non-reserved services should clearly distinguish between services which are part of the universal service and services which are not. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

Article 14 thus requires three separations of accounts. The first separation is between the accounts for all universal services collectively, on the one hand, and the accounts for all non-universal services collectively, on the other. The second separation is between all reserved services collectively and all non-reserved universal services collectively. The third separation requires separate accounts for each of the reserved services.

The obligations of Article 12 serve by implication to extend the accounting separation required by Article 14. Article 12 requires that 'for each of the services forming part of the provision of the universal service' prices must be geared to costs and non-discriminatory. In addition, under the Second Postal Directive, cross subsidisation of non-reserved universal services from revenues earned from reserved services is generally barred. To ensure that *each* universal service is geared to cost, non-discriminatory, and free of cross-subsidy, it seems necessary for the NRA to review cost and revenue data for *each* non-reserved universal service, not merely for all non-reserved universal services collectively as required by Article 14.[107] In this manner, Article 12 implies that the USP must maintain separate accounts for each universal service subject to price control.

In addition, Article 12 establishes specific criteria for the rates of 'individual agreements' and 'special tariffs'. The NRA must ensure that such rates are cost-based and non-discriminatory. Hence, the NRA needs accounts for such services. Then, too, Article 12 requires that special tariffs 'take account of the avoided costs, as compared to the standard service'. This obligation likewise implies a need for separate accounts, in this

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107 Article 12 of the Second Postal Directive required the NRA to control 'cross-subsidisation of universal services outside the reserved sector out of revenues from services in the reserved sector'. In the Third Postal Directive, this provision is omitted so Member States can decide how best to monitor cross-subsidies. See Directive 2008/6/EC, Recital 40.

case, accounts that separate the costs of upstream services from the costs of downstream services.

Finally, although not explicitly required in the Second Postal Directive, implementation of Articles 12 and 14 would seem to require the USP to report appropriate accounting data to the NRA on a regular basis. Otherwise, the NRA cannot know when rates become misaligned with costs due to changes in costs.

Table 3-30 Regulation of USP(s) accounts generally

	Did NRA approve system of accts?	Year first approved	Has NRA studied other NRAs?	Standard EU accounting useful?	Frequency of cost reports to NRA?
AT	Yes	2005	??	??	Other
BE	Yes	2001	Yes	Yes	1/yr
BG	Yes	2009		Yes	
CY	Yes	2009	No	Yes	1/yr
CZ	Yes	2007	No	Yes	1/yr
DE	Yes		No	No	Other
DK	No		No	Yes	None
EE	Yes	2007	No	Yes	4/yr
EL	Yes	2000			1/yr
ES	Yes	2005	No	Yes	1/yr
FI					
FR	Yes	2007	No	No	1/yr
HU	Yes	2005	No	No	1/yr
IE	Yes	2001	No	No	1/yr
IT	No		No		1/yr
LT	Yes	2004	Yes	Yes	1/yr
LU	Yes	2005	No	Yes	None
LV	Yes	2008	No	Yes	1/yr
MT	Yes	2005	Yes	Yes	1/yr
NL	No				
PL	No		Yes	Yes	1/yr
PT	Yes	1998	No	Yes	2/yr
RO	No		Yes	Yes	1/yr
SE	No		No	No	1/yr
SI	Yes	2007	No	Yes	1/yr
SK	Yes	2003	No	Yes	2/yr
UK	No		Yes	Yes	1/yr
IS	No		No	Yes	1/yr
NO	Yes	1998	No		1/yr

?? = Unknown. No information about law or practice

Table 3-30 provides an overview of accounting regulation by Member States. At the outset, it may be noted that 8 NRAs (DK, IT, NL, PL, RO, SE, UK, IS) have not 'established or explicitly approved' the system of accounts used by the USP(s).[108] Seven more NRAs only approved the system of accounts in the last couple of years (BG, CY, CZ, EE, FR, LV, SI). Relatively few NRAs (6) consulted their colleagues before establishing accounting regulations. Those that did consult with their colleagues mentioned the accounting systems of Ireland, France, Netherlands, Sweden, the UK as useful models, as well as the CERP report on accounting practices.[109] Broadly speaking, this table suggests that the efforts of NRAs to 'ensure that the accounting of the universal service providers is conducted in accordance with the provisions of [Article 14]' remain a work in progress which has benefited from limited consultation among NRAs.

Opinions varied, however, about the usefulness of a more coordinated approach in the future. A distinct majority of NRAs (18 out of 23 that answered) believe that a standardised system of accounts would be useful. Those that supported a more uniform approach to accounting mentioned[110] such reasons as the following:

- CY: If the same accounting treatment is universally applicable, then it will be possible to compare the various service providers within Europe under the same terms.
- CZ: Unified rules would be useful; lack of practical experience.
- DK: Would make it easier to benchmark costs and efficiency of the USPs in EU.
- LT: It will be very helpful for the NRA in discussion with universal postal operator.
- LU: This would allow, without any doubt, better price comparisons and benchmarking among all member states.
- SI: Because of higher transparency and possibility of benchmark.
- UK: Comparability between countries of USP providers and unit costs.

On the other hand, those who did not think a more standardised approach to accounting would be useful included some of the NRAs with the most sophisticated accounting systems:

108 Questionnaire 253-3.
109 Questionnaire 253-7.
110 Questionnaire 253-9.

- DE: not useful, because of (i) differentiated administrational and operational procedures; (ii) strong differentiated market-situations (degree of liberalisation, market environment, business-strategies, [etc.]
- FR: Too complex to implement because too much differences between countries.
- IE: Accounts must reflect they way the operator conducts its business; accounts can only be standardised [as] operations / products [are] standardised.
- SE: Country specific differences and varying quality of accounting and cost accounting system would probably make it impossible.

Table 3-31 Separation of accounts generally

	Did NRA approve product accts?	Year first approved	Num. of reserved product accts	Unreserved product accts req'd?	1st year of unreserved product accts	Num. of unreserved product accts	Adequacy of accounting data
AT	No	2008		No	??	1	8
BE	Yes	2001	296	No		1321	8
BG		2003	1	Yes	2003	6	
CY	Yes	??	na	Yes	??		??
CZ	Yes	2001	1	Yes	2007	14	10
DE	No	2000	na	No			
DK	No	2006	1	Yes	??		
EE	Yes	2006	1	Yes	2006	15	10
EL		2001	14	Yes	2001	18	
ES	Yes	2004	13	Yes	2005	15	7
FI							
FR	Yes	2006	8	No		12	
HU	Yes	2004	4	Yes	2004	3	5
IE	Yes	2009	32	Yes	2009	66	7
IT	Yes	<1998	7	Yes	<1998	11	
LT	Yes	2004	12	Yes	2004	148	7
LU	No	2003	5	Yes	2003	7	5
LV	No	2008	na	No			7
MT	Yes	2005	3	No		9	7
NL	No	2001	na	No			
PL	No	2004	12	No			6
PT	No	<1998	14	Yes	1999	36	
RO	No	2008	2	Yes	2008	152	
SE	No	2004	na	No			#
SI	Yes	2007	6	Yes	2007	23	8
SK	Yes	2003	10	Yes	2003	96	7
UK	No	2005		Yes	??		4
IS	No	1998	2	Yes	2006		
NO	Yes	1998	0	No		0	10

?? = Unknown. No information about law or practice

A summary of the state of accounting separation is set out in Table 3-31. Again, it may be noted that 12 NRAs (AT, DE, DK, LU, LV, NL, PL, PT, RO, SE, UK, IS) — representing 58 percent of the EEA/EA letter post market — were unable to affirm that they have approved the number and organisation of the USP's product accounts. In Member States with a reserved area, some NRAs (BG, CZ, DK, EE) accepted consolidation of all reserved services into a single account. In other Member States, accounts for reserved services were reported in as many as 32 (IE) or even 296 (BE) separate accounts. Even after allowing for differences among Member States, this range suggests substantially different approaches to implementing the Directive. Most NRAs also reported that USPs submit separate accounts for each universal service outside the reserved area. However, 10 NRAs (AT, BE, DE, FR, LV, MT, NL, PL, SE, NO), accounting for 56 percent of the total market, do not require product accounts for unreserved universal services. In the case of Germany and Sweden, where there is no reserved area, the result is the NRA has no product accounts at all. The Danish NRA likewise seems to receive no product accounts but relies instead on review by an independent auditor.[111]

In those Member States — one-third to one-half of EU/EEA countries — that ensure the provision of bulk mail products as a universal service,[112] the requirement that prices must be based on costs appears to imply a more detailed separation of accounts for services provided under individual agreements or subject to special tariffs. Each individual agreement is, arguably, a separate universal service product. Hence, we asked whether cost accounts are maintained for each individual agreement or, perhaps, for all individual agreements collectively. Each special tariff is, by definition, a tariff for a service that provides less than the full range of features provided in a corresponding 'standard service'. The term 'standard service' refers to 'the complete range of features offered for the clearance, transport, sorting and delivery of individual postal items'. In the Second Postal Directive, Article 12 requires that the special tariff 'shall' take into account the 'avoided costs' which are incurred in providing the standard service but not incurred in the partial service offered under the special tariff. In the Third Postal Directive, the 'shall' is changed to 'should' and moved to a recital (Directive 2008/6/EC Recital 39). In either case, where a special tariff is offered, it appears necessary to separate the costs of the corresponding standard service into upstream and downstream components in order to identify the 'avoided costs'. Hence, we asked whether the NRA required the accounts of 'standard services' to be divided into upstream and downstream components.

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111 The Danish regulator noted, 'NRA does not receive (or require) info regarding specific allocation of costs to different services, functions or proportion of costs allocated by the different criteria. Statements from the independent auditors secure USP compliance'. Questionnaire 253-15.

112 See section 2.3,, above.

Table 3-32 Accounts for individual agreements (IAs) and special tariffs (STs)

	Bulk services within USO	USP(s) has IAs?	IA: cost-based price req'd?	IA: NRA has cost data?	USP(s) has STs?	Up- and down-stream accts?	Num. of up-/down-stream accts.	ST: 1st year of data to NRA
AT		Yes	All IAs	??	Yes	??		??
BE	LDP	Yes	Each IA	Yes	Yes	No		
BG		Yes	None		Yes	No		
CY	LP	No	None	Yes	Yes	Yes		??
CZ		No			No			
DE		Yes	None	No	Yes	No		
DK	LP	??	None	No	Yes	No		
EE		Yes	None	No	Yes	No	0	
EL	LD		None			Yes		2001
ES		Yes	None	No	Yes	No	28	
FI								
FR	LD	Yes		No	Yes	Yes	5	2006
HU	LDP	Yes	None	No	Yes	No		
IE	LD	No			Yes	Yes	66	2009
IT	LD	No			No			
LT	L	No			Yes	Yes	6	2004
LU		??	None	No	Yes	No		
LV	L	No			No			
MT	D	??	None	No	No			
NL		Yes	None	No	Yes	No		
PL		Yes	None	No	Yes	No		
PT	LDP				Yes	No		
RO		Yes	None		Yes	No		
SE		Yes	All IAs	Yes	Yes	No		
SI	L	No			Yes	Yes	4	2007
SK	LD	Yes	All IAs	No	Yes	No		
UK	LDP	??	None	No	??	No	0	
IS	LD	Yes	None	Yes	Yes	No		
NO		No			No			

Bulk services within USO: L = bulk letters; D = direct mail; P = bulk parcels.
IA: cost-based price req'd?: Each IA = Yes, for each individual agreement; All IAs = Yes, for all individual agreements collectively; None = No, no cost and revenue accounts for individual agreements; ?? = Unknown. No information about law or practice.

Answers to these questions are summarised in Table 3-32. In this table, the first column identifies bulk mail services — bulk letters (L), direct mail (D), or bulk parcels (P) — which were identified by the NRA as ensured and regulated as universal services.[113] From Table 3-32 it appears that at least 16 Member States, representing about 55 percent of the EU/EEA letter post market, regulate one or more bulk mail services (bulk letters, direct mail, periodicals, bulk parcels) as universal services. In five of these (BE,

113 See section 2.3, above. In some cases, the NRAs did not indicate whether or not a particular postal service was ensured as a universal service.

FR, HU, SK, IS), the NRA reports that the USP(s) make use of individual agreements. Nonetheless, only two of these NRAs (BE, SK) have separate accounts for individual agreements, either individually or collectively. In the Member States which include one or more bulk services in the USO, 11 NRAs (BE, CY, DK, FR, HU, IE, LT, PT, SI, SK, IS) report that their USPs make use of special tariffs. Only 6 NRAs, however (CY, EL, FR, IE, LT, SI) report separate accounts for upstream and downstream components.

The final column in Table 3-31 reports the assessments of the NRAs regarding the sufficiency of the separation of accounts by USP(s). The question addressed to the NRAs was, 'To what extent does the separation of accounts provided by the current system of accounts give the NRA sufficient information to ensure conformity with the provisions of, or decisions made in accordance with, the Postal Directive?' NRAs were asked to express their answer as number on a scale of 1 to 10 where 1 represents no information and 10 represents a complete set of the information needed to ensure full compliance with Postal Directive. Of the 16 NRAs who answered this question, 3 NRAs (CZ, EE, and NO) expressed complete satisfaction with the quality of the separation of accounts (10 of 10). The average level of satisfaction was 7.3 of 10.[114]

Implementation of the separation of accounts of USPs required by the Postal Directive remains a work in progress. A substantial number of NRAs — representing a majority of the EEA/EA letter post market — were unable to affirm that they have approved the number and organisation of the USP's product accounts. In those Member States with a reserved area, some NRAs accept consolidation of all reserved services into a single account, which appears at variance with the directive. Overall, even after allowing for differences among Member States, the range in accounting practices suggests that NRAs have adopted substantially different approaches to implementing the directive. In those Member States that regulate bulk mail services as universal services, few NRAs can confirm separate accounts for upstream and downstream services, yet it appears that some method of separating upstream and downstream accounts is required to implement the 'avoided costs' requirements of Article 12. Overall, NRAs express only a moderate level of satisfaction (7.3 out of 10) with the separation of costs currently presented by regulatory accounts.

114 Average excludes assessments from NRAs who requested that their evaluations be kept confidential.

3.6.2 Allocation of costs generally

Allocation of costs lies at the heart of accounting regulation under the Postal Directive. Without a reliable and accurate allocation of costs, accounting regulation is essentially an empty exercise.

In the Second Postal Directive, Article 14(3) sets out the principles for the allocation of costs as follows:

> (a) costs which can be directly assigned to a particular service shall be so assigned;
>
> (b) common costs, that is costs which cannot be directly assigned to a particular service, shall be allocated as follows:
>
> (i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;
>
> (ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;
>
> (iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the reserved services and, on the other hand, to the other services.

In brief, paragraphs 3(a), 3(b)(i), and 3(b)(ii) require the assignment of costs to each particular service so far as it is possible to do so by direct or indirect means. Paragraph 3(b)(iii) requires the allocation of the unassignable common or ‘overhead’ costs to each particular service based on the proportion of assigned costs.

Table 3-33 summarises the capacity of NRAs to allocate costs according the overall schema established by Article 14(3). Almost all NRAs report that they have approved the cost allocation system of the USP. Nonetheless, most NRAs appear unable to allocate costs according to the four broad categories prescribed by the Directive. Nine NRAs (CZ, EE, HU, MT, PL, PT, SK, NO), collectively representing about 10 percent of the EU/EEA market, seem to have sufficient data to distinguish between direct costs,

assignable common costs (i.e., (b)(i) or (b)(ii) separately or collectively), and unassignable common costs, at least roughly.[115] The Belgian NRA reports that all assignable costs are direct costs, a singular position. Three other NRAs (AT, DE, SI), report that they can make at least calculations but did not provide any additional information.

Table 3-33 Allocation of costs generally (I)

	Cost allocation per Art 14(3)?	NRA app'd cost system	Year of approval	Direct costs (% total cost)	(b)(i) costs (% total cost)	(b)(ii) costs (% total cost)	(b)(iii) costs (% total cost)
AT	Yes	Yes	2005	[Yes]	[Yes]	[Yes]	[??]
BE	Yes	Yes	2001	90	[No]	[No]	10
BG				[]	[]	[]	[]
CY	??	Yes	??	[No]	[No]	[No]	[No]
CZ	Yes	Yes	2007	8	65	15	12
DE	Yes	Yes		[Yes]	[No]	[No]	[Yes]
DK	Yes	No		[No]	[No]	[No]	[No]
EE	Yes	Yes	2004	5	[No]	[No]	2
EL	Yes	Yes	2001	[]	[]	[]	[]
ES	Yes	Yes	2005	[No]	[No]	[No]	[No]
FI							
FR	Yes	Yes	2008	[]	[]	[]	[]
HU	Yes	Yes	2006	0.7	80.1	18.3	0.9
IE	Yes	Yes	2001	[No]	[No]	[No]	[No]
IT	Yes	No		[No]	[No]	[No]	[No]
LT	Yes	Yes	2003	[??]	[??]	[??]	[??]
LU	Yes	Yes	2005	[No]	[No]	[No]	[No]
LV	Yes	Yes	2003	[No]	[No]	[No]	[No]
MT	Yes	Yes	2005	7	[No]	[No]	10
NL		No		[No]	[No]	[No]	[No]
PL	Yes	Yes	2004	5.4	67.9	6.8	19.9
PT	Yes	Yes	1998	#	[No]	#	#
RO	Yes	No		[No]	[No]	[No]	[No]
SE	Yes	Yes	??	#	#	#	#
SI	Yes	Yes	2008	[Yes]	[Yes]	[??]	[??]
SK	Yes	Yes	2003	0	6	77	17
UK	??	No		[No]	[No]	[No]	[No]
IS	Yes	No		[No]	[No]	[No]	[No]
NO	Yes	Yes	1998	79	[No]	[No]	6

Note: "direct" costs refer to costs directly assigned under Art. 14 (2)(a) of the Second Postal Directive, and (b)(i), (b)(ii), and (b)(iii) costs refer to common costs allocated under the corresponding paragraphs of Art. 14(2)(b).
Cols 4 to 7: if no figure is presented, the bracketed note indicates whether the NRA has sufficient information to determine the figure.
?? = Unknown. No information about law or practice.

115 Three NRAs (EE, MT, NO) report that they cannot distinguish between (b)(i) and (b)(ii) costs but can provide a collective figure.

In the Third Postal Directive, Article 14(3)(b) is amended by adding a fourth paragraph that addresses the allocation of common costs between universal service and non-universal services. It provides as follows:

> (iv) common costs, which are necessary for the provision of both universal services and non-universal services, shall be allocated appropriately; the same cost drivers must be applied to both universal services and non-universal services.

Although Member States are not obliged to implement the Third Postal Directive until the beginning of 2011, Member States were nonetheless implicitly obliged under the Second Postal Directive to adopt a reasonable approach towards the division of common costs between universal and non-universal services.

Table 3-34 Allocation of costs generally (II)

	NRA review of cost allocation to non-US?	Same cost drivers used?	Common costs of US (% total)	Common costs of non-US (% total)	Adequacy of cost allocation data
AT	Yes	Yes			8
BE	Yes	Yes	10	10	7
BG					
CY	No				??
CZ			14	12	10
DE	Yes	Yes			8
DK	No				??
EE	Yes	Yes	93	96	10
EL					
ES	Yes	Yes			6
FI					
FR					
HU	Yes	Yes	99.3	98.06	5
IE	Yes	Yes	30.8	30.8	7
IT	No				
LT	Yes	Yes			7
LU	Yes	??			??
LV	No				7
MT	Yes	Yes	90	18	7
NL	No				
PL	Yes	Yes			6
PT	Yes	Yes			
RO	No				
SE	Yes	Yes	#	#	#
SI	No				8
SK	Yes	Yes	100	100	7
UK	Yes	??	12	12	3
IS	No				7
NO	No		25	75	10

?? = Unknown. No information about law or practice

Table 3-34 summarises the current manner of allocating common costs between universal and non-universal services. This table seems to indicate that those NRAs that can implement the first three paragraphs of Article (3)(b) will be able to extend implementation to paragraph (iv). On closer inspection, however, appears that even for these NRAs improvements in cost allocation will be needed. For example, it does not seem plausible that the percentage of common costs for universal service and non-universal service will be exactly the same.

The final column of Table 3-34 reports the answers of NRA for an evaluation of the sufficiency of the cost allocation information. Specifically, the question addressed to NRAs was, 'to what extent does the allocation of costs provided by the current system of accounts give the NRA sufficient information to ensure conformity with the provisions of, or decisions made in accordance with, the Postal Directive?' Of the 17 NRAs that answered this question, 3 NRAs (CZ, EE, and NO) expressed complete satisfaction with the quality of the cost allocation (10 of 10), as they did with the cost separation scheme. The average level of satisfaction was 7.2 of 10, although if NRAs were weighted by the size of their letter post markets, the weighted average would be 5.9 of 10.[116]

Although there are some notable exceptions, few NRAs appear able allocate costs according to the four broad categories prescribed by Article 14 of the Postal Directive and those that are able to do account for only a small percentage of the EU/EEA postal market. Fragmentary data suggests that NRAs are adopting significantly different approaches to cost allocation. On average, NRAs express a moderate level of satisfaction (7.2 out of 10) with the cost allocation data available to them.

116 Averages exclude assessments from NRAs who requested that their evaluations be kept confidential.

3.6.3 Allocation of delivery costs

To understand better how NRAs are allocating costs, we asked more detailed questions about the allocation of the costs associated with delivery. Allocation of delivery costs is particularly important because delivery (as opposed to other activities such as collection, sorting, and transportation) represents the largest fraction of total costs and includes a substantial percentage of common costs. It appears that some Member States have introduced elements of long run incremental costing into their implementation of Article 14. In allocating costs of delivery, they have concluded that common costs may be or should be allocated to specific products by taking into account not the actual number of deliveries per week provided for each product but the number of the deliveries per week required by factors such as service commitments,[117] the actual needs of mailers, and/or the threat of competitive entry. Other NRAs suggest that common costs of delivery should be, or are required by the Directive to be, allocated to specific products based upon either the actual number of deliveries per week or, alternatively, on the minimum number of deliveries per week required for the universal service by Article 3(3). The following table summarises responses of NRAs to questions relating to the allocation of delivery costs.

Table 3-35 suggests that about one third of NRAs can state with some confidence the percentage of costs incurred in delivery, about 50 percent. Of these, 3 NRAs (CZ, FR, SK) appear able to apply the cost allocation scheme set out in Article 14.

The eighth column in this table reports the answer to a fundamental question, 'Are the common costs of delivery allocated to different universal service products based upon the number of days per week that each product is actually delivered?' Eleven of the 13 NRAs that answered this question stated that common costs are not allocated according to the actual delivery frequency. The survey then asked whether the Postal Directive required allocation of delivery costs according the number of days per week that each product is actually delivered? The response to this question was more uncertain. Three NRAs (EE, ES, HU) say, 'no", while 3 NRAs (FR, LV, PL) indicated that the allocation of delivery costs should be based on no less than minimum number of days per week required by law.

Allocation of delivery costs is an especially difficult technical task, but it also so central to effective implementation of Article 14. With some notable exceptions, few NRAs appear to have developed a reasoned approach towards the application of Article 14 to the allocation of delivery costs.

117 Fewer deliveries per week are required, for example, if the service commitment is delivery within three days of posting rather than delivery the day after posting.

Table 3-35 Allocation of delivery costs

	NRA can calculate delivery cost?	Delivery cost (% total)	Direct costs (% del. costs)	(b)(i) costs (% del. costs)	(b)(ii) costs (% del. costs)	(b)(iii) costs (% del. costs)	% delivery costs allocated to FSC	Cost based on actual del. freq.?	Actual del. freq. req'd?
AT	Yes							??	??
BE									
BG									
CY	No							??	??
CZ	Yes	50		78	10	12		No	
DE									
DK	No								
EE	No								No
EL									
ES	Yes	58.38					46.20	No	No
FI									
FR	Yes	49		22	78	0	60	No	No*
HU	Yes	45.07		95.07			7.12	No	No
IE	Yes	36					40.6	No	
IT	No								
LT	Yes	47						No	??*
LU	No							??	
LV	No							Yes	No*
MT	No							No	*
NL	No							??	
PL	??							No	No*
PT	Yes	#					#	No	
RO	Yes	38						No	??
SE	Yes	#	#		#		#	Yes	#
SI	No							??	
SK	Yes	46	0	5	95	0	6	No	
UK	Yes	45					19		
IS	No								
NO	No								

Note: "direct" costs refer to costs directly assigned under Art. 14 (2)(a) of the Postal Directive, and (b)(i), (b)(ii), and (b)(iii) costs refer to common costs allocated under the corresponding paragraphs of Art. 14(2)(b).

Actual del. freq. req'd: "*" indicates a position that the Directive requires at least the minimum lawful frequency of delivery as the basis for cost allocation.

?? = Unknown. No information about law or practice.

3.6.4 Data quality

Cost data about postal operations is necessarily collected by means of sampling systems and cost models. The quality of the data collections systems must be reviewed periodically to ensure that final information is accurate. Fifteen NRAs (AT, DE, EE, ES, FR, HU, IE, LT, LV, PL, PT, SE, SK, UK, NO), accounting for about three-quarters of the EU/EEA letter post market, reported that they had conducted a 'formal review of the quality and reliability of the data collection systems'. Nine NRAS (FR, IE, LT, LV, PL, SE, SK, NO) have done so in the last two years. We asked the NRAs to assess the quality of data on a scale of 1 to 10: 'to what extent does the quality of available data give the NRA sufficiently reliable information to ensure conformity with the provisions of, or decisions made in accordance with, the Postal Directive?' Two NRAs (EE, NO) rated the quality of data to be completely sufficient for purposes of implementing the Directive (10 of 10). The average assessment among the 14 NRAs was 6.9 of 10 (weighted average, 6.1).[118]

Fifteen NRAs, accounting for about three-quarters of the EU/EEA letter post market, have reviewed the quality of the data systems of the USP. NRAs report moderate satisfaction (6.9 out of 10) with the quality of data systems.

118 Average excludes assessments from NRAs who requested that their evaluations be kept confidential.

3.6.5 Verification and publication of regulatory accounts

Article 14(5) of the Postal Directive states, 'National regulatory authorities shall ensure that compliance with one of the cost accounting systems described in paragraphs 3 or 4 is verified by a competent body which is independent of the universal service provider. Member States shall ensure that a statement concerning compliance is published periodically'. Member State implementation of this provision is summarised in Table 3-36.

Table 3-36 Transparency of accounts regulation

	Ind. body reviews USP accts?	Last review of USP accts	Body reviewing USP accts	NRA issues SOC?	Last publish SOC	Publish summary of reg. accts	Publish cost allocation system?	USP financial accts audited?	Last publish financial accts
AT	Yes	2005	Other	No	??	No	No	Yes	2008
BE	Yes	2007		No		No	Yes	Yes	2007
BG									
CY	No	??		No		Yes	No	No	
CZ	Yes	2007	Other	Yes	2008	No	Yes	Yes	2007
DE	Yes			No		No	No	Yes	2008
DK	Yes	2008	NRA CPA	No	2006	Yes	Yes	Yes	2008
EE	No	2007		Yes	2007	No	No	Yes	??
EL	Yes		USP CPA	No		No		Yes	
ES	Yes	2006	NRA CPA	No		No	No	Yes	2007
FI									
FR	Yes	2007	USP CPA			No	Yes	Yes	2007
HU	Yes	2007	NRA	No		No	No	Yes	2007
IE	Yes	2007	USP CPA	No		No	Yes	Yes	2007
IT	Yes	2007	USP CPA	No		No	No	Yes	2007
LT	Yes	2007	Other	Yes	2007	Yes	No	Yes	2007
LU	??	2004		No		No	No	Yes	2007
LV	Yes	2006	NRA	No		Yes	Yes	Yes	2006
MT	Yes	2008	USP CPA	No		No	No	Yes	2008
NL		2007	USP CPA		2006	No		Yes	2007
PL	Yes	2007	NRA CPA	Yes	2008	No	No	Yes	2007
PT	Yes	2006	NRA CPA	Yes	2006	No	No	Yes	2007
RO	Yes	2007	USP CPA	No		No	No	Yes	
SE	Yes	2007	NRA	Yes	2007	No	No	Yes	2008
SI	Yes	2007		Yes	2007	No	No	Yes	<1998
SK	Yes	2007	NRA CPA	Yes	2007	No	No	Yes	2007
UK	??	??		No		No	No	Yes	2008
IS	No					Yes	No	Yes	2008
NO	Yes	2007	NRA	Yes	2007	Yes	Yes	Yes	2007

Note: "SOC" = statement of compliance required by Postal Directive Article 14(5).
Body reviewing USP accts: NRA = National regulatory authority (NRA) or staff; NRA CPA = Professional accounting firm employed by NRA; USP CPA = Professional accounting firm employed by USP; USP = Audit unit of the USP; Other = Other; ?? = Unknown. No information about law or practice.

Almost all Member States provide for review of the cost accounting system of a USP by an independent body. However, three NRAs (CY, EE, IS) state that no independent body reviews the accounts of the USP, and two (LU, UK) state that they do not know if such a review is provided. In 9 Member States (DK, ES, HU, LV, PL, PT, SE, SK, NO), accounting for about one third of the EU/EEA postal market, the independent reviewing body is the NRA or an accounting firm retained by the NRA. In 7 Member States (EL, FR, IE, IT, MT, NL, RO), the auditor is an accounting firm retained by the USP, so its independence may be open to question.

Nine NRAs (CZ, EE, LT, PL, PT, SE, SI, SK, NO) periodically issue the 'statement of compliance' required by Article 14(5), but they account for only 9 percent of the EU/EEA postal market. At least 15 NRAs do not issue the required statement of compliance, and they account for almost two-thirds of the market. The Danish NRA reports that the Danish USP is required to publish a statement of compliance issued by independent auditors retained by the NRA.[119]

The Directive does not require publication of a summary of the regulatory accounts of the USP. Nonetheless, such information could enable users and citizens to evaluate better the efficiency of different services (both relative to one another and to the services of other USPs) and the potential for unfair discrimination. By comparing such information year to year, users and citizens will be able to assess improvements and changes in the universal service over time. This information may also help users and citizens evaluate the performance of the NRA, both absolutely and relative to other NRAs. Despite lack of direction from the Directive, 6 NRAs declared they do publish a summary of regulatory accounts (CY, DK, LT, LV, IS, NO).

Similarly, the Directive does not require NRAs to publish the details of the cost allocation system used to evaluate the accounts of the USP. Publication of this methodology — which would not include any cost data — could likewise help the public understand the nature of regulatory supervision. Seven NRAs (BE, CZ, DK, FR, IE, LV, NO) publish this information.

119 Questionnaire 253-77.

NRAs can do better in monitoring USP accounts and informing the public about accounting regulation. While almost all NRAs provide for review of the cost accounting system of a USP by an independent body, in some cases the auditor is an accounting firm retained by the USP so its independence may be open to question. Half of the Member States do not issue a periodic statement confirming USP compliance with Article 14 of the Postal Directive even though this statement is required by the directive. Seemingly good practices — such as publication of a summary of the regulatory accounts and publication of the details of the cost allocation system — while not required by the Directive are implemented by several NRAs, and there is no apparent reason why other NRAs should not do so.

3.6.6 Publication of audited financial accounts

Article 15 of Postal Directive requires publication of periodic financial reports by the USP. The USP's financial accounts must be reviewed by an independent auditor, and they must be published in accordance with the Community and national legislation applicable to commercial undertakings. As shown in Table 3-36, almost all NRAs confirmed that the USP does in fact publish its financial accounts in accordance with this provision.[120]

Virtually all USPs publish audited financial statements as required by Article 15 of the Postal Directive.

120 Questionnaire 253-70. No answers from AT, BG, FI, NL, LI.

3.7 Regulation of prices and terminal dues

Article 12 of the Postal Directive lays down criteria for the regulation of the prices of universal services. Article 13 applies similar principles to 'terminal dues', i.e., the charges that USP in one Member State charges to a USP for the delivery of cross border intra-Community mail. Article 12 of the Second Postal Directive was revised in significant respects by the Third Postal Directive.

3.7.1 Scope of price regulation

Article 12 of the Second Postal Directive provides that 'Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with' several criteria such as cost-orientation, affordability, transparency, and non-discrimination.

Table 3-37 provides an overview of the scope of rate regulation by Member States. The table is overlaid with the shading from table 2-3 that indicates whether the service is ensured as a universal service.[121] Light gray or red shading indicates that the service is ensured as a universal service. Dark gray or dark green shading indicates that it is not ensured as a universal service. And medium gray or light green indicates that service was not confirmed as an ensured universal service by the NRA and therefore probably is not ensured as a universal service.

As this table shows, all Member States regulate tariffs for basic letter post service except Latvia.[122] Twenty-four Member States, accounting for 92 percent of the EU/EEA postal market, also control prices for basic parcel post service, while 5 Member States (CY, DK, LV, NL, IS) apparently do not.[123] In addition, rates for services for bulk mail service and non-priority letter post service may or may not be regulated. Twenty-two

121 See section 2.3, above.
122 Questionnaire 211-5.
123 Failure to answer by two NRAs (NL, RO) while confirming price regulation of other postal services appears to imply an absence of control over prices of basic parcel post service.

NRAs regulate rates for bulk letters (89 percent of the EU/EEA letter post market); 14 NRAs regulate rates for direct mail (79 percent); 12 NRAs regulate rates for newspapers and periodic publications (53 percent); and 8 NRAs regulate rates for bulk parcels (56 percent).[124] Rates for non-priority letter post service, which is not offered in all Member States, are regulated by 15 NRAs (58 percent).

Table 3-37 Overview: regulation of rates

	Basic letter post	Bulk letters	Direct mail	Periodicals	Non-priority letter post	Basic parcel post	Bulk parcels
AT	Yes					Yes	
BE	Yes	Yes	Yes		Yes	Yes	Yes
BG	Yes			No	Yes	Yes	
CY	Yes	Yes	No	Yes	No	Yes	No
CZ	Yes					Yes	
DE	Yes	Yes	Yes	Yes		Yes	Yes
DK	Yes	Yes	Yes	No	Yes	No	No
EE	Yes	Yes	No	No	No	Yes	Yes
EL	Yes	Yes	Yes	Yes	Yes	Yes	
ES	Yes	Yes	No	No	No	Yes	Yes
FI	Yes	Yes	No	No	Yes	Yes	No
FR	Yes	Yes	Yes	Yes	Yes	Yes	No
HU	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IE	Yes	Yes	Yes	No		Yes	
IT	Yes	Yes	Yes	Yes		Yes	
LT	Yes	Yes			Yes	Yes	
LU	Yes	Yes	No	??		Yes	??
LV	No	No				No	No
MT	Yes		Yes	Yes		Yes	
NL	Yes	No	No	No	No		No
PL	Yes				Yes	Yes	
PT	Yes	Yes	Yes	Yes	Yes	Yes	Yes
RO	Yes	Yes		Yes	Yes	Yes	
SE	Yes	Yes	Yes	Yes	Yes	Yes	Yes
SI	Yes	Yes	No	Yes	No	Yes	No
SK	Yes	Yes	Yes	No	Yes	Yes	
UK	Yes	Yes	Yes		Yes	Yes	Yes
IS	Yes	Yes	No	No		No	
NO	Yes	Yes	Yes	Yes	Yes	Yes	No

Key to shading: light gray (red) = ensured as a universal service; medium gray (light green) = not confirmed as an ensured universal service by NRA; dark gray (dark green) = not ensured as a universal service.

?? = Unknown. No information about law or practice.

In some cases, it may be noted, NRAs fail to regulate the rates of services considered to be universal services (shaded light grey or red). This seems to be inconsistent with Article 12. The most prominent example is the failure to control rates for basic parcel post service just noted. In addition, Latvia declares that bulk letter service is ensured as

124 In several cases, NRAs which responded some questions did not respond to others even though, presumably, an NRA which knows whether or it regulates bulk letter post rates also knows whether or not it regulates bulk parcel rates. Hence, the non-answers probably indicate a lack of price regulation.

a universal service but does not regulate the prices. Three NRAs (BG, EE, IS) report that the periodicals service is ensured as a universal service but do not ensure that the prices of that service meet the requirements of Article 12. The Danish NRA declares that bulk parcel service is a universal service but does not control its tariffs.

As noted in chapter 2, the Postal Directive may also imply the necessity or desirability of regulating tariffs of non-universal services under certain circumstances, especially where the postal operator is the USP.[125] Under current practice, 8 NRAs (DE, EE, ES, FI, LU, RO, SE, NO), accounting for 34 percent of the EU/EEA market, report regulation of tariffs for bulk mail services even though such services are not ensured as universal service by the government. Similarly, 4 NRAs (DE, DK, SE, NO) control rates of non-universal direct mail rates; 3 NRAs (RO, SE, NO) control rates of non-universal periodical mail rates; and 6 NRAs (BE, EE, ES, HU, PT, UK) control rates of non-universal bulk parcel rates. In all cases, it appears the regulation of rates is limited to the rates of the national USP.

All Member States control tariffs for basic letter post service, and the great majority, but not all, Member States control tariffs for basic parcel post service. Member States generally regulate prices of additional postal services if the services are ensured as universal services, although in some cases they do not (notably in the case of basic parcel post). In addition, in a number of cases, Member States regulate the rates of bulk postal services which are provided by the national USP but not ensured as universal services.

125 See section 2.4, above.

3.7.2 Cost-oriented, transparent, and affordable rates

Article 12 of the Second Postal Directive provides that for each of the services forming part of the provision of the universal service prices must be 'geared to costs', 'transparent and non-discriminatory', and 'affordable'. These standards imply a broad range of price controls. Rate controls on postal services are usually forward-looking in the sense that they are set before the USP changes prices. If the USP is required to obtain approval of the NRA before each price change, the method of control is usually referred to as 'ex ante' regulation. If the NRA adopts a rule that allows the USP to change prices provided they remain below a certain specific limit (which may be expressed as a mathematical formula, often allowed relating to more general price indices), the price control is called a 'price cap'. In addition, NRAs may apply price controls after prices have been changed. That is, an NRA may rely upon investigations of prices already in effect and determine whether they are inconsistent with legal norms. Such price controls are usually referred to as 'ex post' regulation.

The most fundamental universal service is basic letter post service. In trying to understand how Member States regulate postal rates, the survey began by asking how NRAs control basic letter post rates and what other rates are regulated at the same time. Table 3-38 summarises the answers.

All NRAs except the Finnish NRA rely upon forward looking price controls — either ex ante approval or price cap — for regulating the tariffs for basic letter post service.[126] Most NRAs regulate prices for other postal services at the same time. Several NRAs (CY, EL, IE, MT, UK), however, feel that they did not have sufficient cost and revenue information to establish all prices or price caps accurately.[127] Despite high public interest in basic letter post rates, only 11 NRAs (DE, HU, IE, IT, LT, MT, PL, PT, SK, UK) solicited public comment before reviewing the last rate change. Eleven NRAs (DE, FR, HU, IE, MT, PL, PT, SI, SK, UK, NO) issued a reasoned decision explaining its review of rates. Two NRAs (IT, LT) solicited public comment but did not issue a reasoned opinion, while three NRAs (FR, SI, NO) gave a reasoned opinion but did not solicit public comment.

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126 In some cases, the forward-looking control is limited to a subset of the basic letter post. For greater detail on methods of price regulation see section 3.7.4, below. The answers of the Latvian NRA with respect to price regulation are incomplete and unclear but it appears that price cap regulation is employed, at least for basic letter post. See Questionnaire 251-2, 251-31, 251-32.

127 The NRA of the Netherlands noted that this information was 'not applicable' to its regulation. Questionnaire 251-2.

Table 3-38 Forward-looking price control procedures

	Ex ante/ price cap control of basic letter post?	Most recent control	Next most recent control	Other rates controlled at same time	NRA had adequate data?	User comments solicited?	Reasoned decision issued?
AT	Yes	2009	2009		??		
BE	Yes	2008	2007	E	Yes	No	No
BG	Yes	2009	2009				
CY	Yes	2009	2003		No	No	No
CZ	Yes	2008	2005	E	Yes	No	No
DE	Yes	2009	2008	B	Yes	Yes	Yes
DK	Yes	2008	2007	ABC	Yes	No	No
EE	Yes	2009	2009				
EL	Yes	2008	2007	ABCDE	No	No	No
ES	Yes	2009	2009	AG	Yes	No	No
FI	No	2009	2009				
FR	Yes	2009	2008	ABCE	Yes	No	Yes
HU	Yes	2008	2007	ABCG	Yes	Yes	Yes
IE	Yes	2007	2005	AB	No	Yes	Yes
IT	Yes	2006	2003	AC	Yes	Yes	No
LT	Yes	2007	1999	ACEF	Yes	Yes	No
LU	Yes	2005	2003			No	No
LV	Yes	2009	2008			Yes	No
MT	Yes	2006	2009	AB	No	Yes	Yes
NL	Yes	2009	2009	EG	??		
PL	Yes	2008	2009	CE	Yes	Yes	Yes
PT	Yes	2008	2008	BCE	Yes	Yes	Yes
RO	Yes	2009	2007		Yes	No	No
SE	Yes	2009	2009				
SI	Yes	2008	2006	ADE	Yes	No	Yes
SK	Yes	2007	2009	ABCEFG	Yes	Yes	Yes
UK	Yes	2008	2009	ABCDE	No	Yes	Yes
IS	Yes	2009	2009				
NO	Yes	2008	2007		Yes	No	Yes

Other rates controlled at same time as basic letter post: (A) bulk letters; (B) direct mail; (C) non-priority letter post; (D) periodicals; (E) basic parcel post; (F) bulk parcels; (G) other; ?? = Unknown. No information about law or practice.

To ensure that prices of universal services are cost-oriented, NRAs must begin by answering the question, which costs? What standard or benchmark does the NRA rely upon for the purpose of evaluating the appropriateness of changes in the prices of universal services?' Historical costs of the USP? Projected future costs? Or some other measure of cost? Moreover, to ensure that the price of *each* universal service is geared to costs, it appears necessary for the NRA to determine the costs and revenues for each service. Costs and revenues depend in turn on the expected volume of mail for each service. In addition, a vigilant regulator might require the USP to reduce its unit

costs over time, i.e., improve its productivity. Table 3-39 summarises the practices of NRAs in relating prices to costs.

Table 3-39 Standards for price control

	Rate control based on costs?	Type of costs used	NRA verifies cost per product?	NRA verifies revenue per product?	Min. cost assignable to product	Public rates for all products?	Non-discrimi-nation req'd?	Affordability defined?
AT	Yes	Fut. cost	??	??		Yes	Yes	??
BE	No					Yes	Yes	No
BG	Yes	Past cost	Yes	Yes		Yes	Yes	No
CY	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	No
CZ	Yes	Past cost	No		FAC	Yes	Yes	No
DE	Yes	Fut. cost	No	Yes	LRIC	Yes	Yes	Yes
DK	No					Yes	Yes	No
EE	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	Yes
EL	Yes	Fut. cost	No	No	FAC	Yes	Yes	No
ES	Yes		Yes	Yes		Yes	Yes	No
FI	No					Yes	Yes	No
FR	Yes	Past cost	Yes	Yes	LRIC	Yes	Yes	No
HU	No					Yes	Yes	No
IE	Yes	Fut. cost	Yes	Yes	FAC	Yes	Yes	No
IT	Yes	Past cost	Yes	Yes		Yes	Yes	No
LT	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	No
LU	No					Yes	Yes	No
LV	Yes	Fut. cost	Yes	Yes	FAC	Yes	Yes	No
MT	Yes			Yes		Yes	Yes	No
NL	No					Yes	Yes	No
PL	Yes	Fut. cost	No	No		Yes	Yes	Yes
PT	Yes	Other	Yes	Yes	Other	Yes	Yes	Yes
RO	Yes	Fut. cost	Yes	Yes	FAC	Yes	Yes	No
SE	Yes	Past cost	Yes	Yes		Yes	No	No
SI	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	Yes
SK	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	Yes
UK	Yes	Fut. cost	Yes	Yes	LRMC	Yes	Yes	No
IS	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	No
NO	Yes	Past cost	Yes	Yes	FAC	Yes	Yes	No

Type of costs used: Past cost = Historical costs of USP(s) plus appropriate increase; Fut. cost = Estimate of probable future costs of USP(s); Other = Other; ?? = Unknown. No information about law or practice.

Min. cost assignable to product: SA = Stand alone cost; FAC = Fully allocated cost; LRIC = Long run incremental cost; LRMC = Long run marginal cost.

At the outset, it appears that 6 NRAs (BE, DK, FI, HU, LU, NL), collectively representing about 14 percent of the EU/EEA letter post market, do not use cost data to regulate rates of universal services.[128] On the other hand, other NRAs seem to take a fairly detailed look at cost and revenue data in their review of new rates. Most NRAs (12) base their decisions on historical cost data but a substantial minority of 8 NRAs (AT, DE, EL, IE, LV, PL, RO, UK), representing almost half of the EU/EEA market, attempt the more difficult exercise of estimating future costs. Almost all NRAs try to verify future revenues as well as costs for each product.

Most NRAs consider that for a tariff to be 'geared to cost' it must cover fully allocated cost. This would appear to be the implication of Article 14(3). On the other hand, the three largest NRAs (DE, FR, UK), accounting for almost 60 percent of the EU/EEA market, consider that the minimum cost that must be covered by each rate is the long run incremental or long run marginal cost. Most economists would suggest that this is the standard most consistent with the public interest.[129]

The definition of 'affordability' as a standard for postage rates has proved elusive for most NRAs. Six NRAs (DE, EE, PL, PT, SI, SK) report a definition of 'affordability'. The most elaborate answer is the German. Affordable rates are rates that meet one of two tests: (1) not greater than the real price payable on 31 December 1997 or (2) not greater than the price justified by the cost of efficient service (where a postal operator is obliged to provide service). The Portuguese NRA considers that cost-orientation ensures affordability. The Estonian and Slovenian NRAs define affordability as accessible or affordable for all users, which is not very enlightening. The Polish NRA relates affordability to the minimum wage in an unspecified manner.[130]

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128 Questionnaire 251-12. Specifically, the question asked, 'Overall, in order to evaluate a proposed change in the prices of universal services or to establish price caps, does the NRA rely primarily upon an analysis of either (A) the historic costs of the USP (adding an appropriate allowance for cost increases) or (B) an explicit estimate of future costs of the USP(s)?'.

129 The Portuguese NRA seems to use long run marginal cost as well. See answer to Q251-17 ('Operational costs (based on Fully Allocated Costs according to Directive Art 14 (2), excluding, e.g., overheads)'). In section 6.3.9, below, we suggest a possible 'best practice' approach that could help to reconcile these different perspectives.

130 Questionnaire 251-23.

Article 12 of the Postal Directive requires Member States to ensure that the tariff for each universal service is ‘geared to costs’, ‘transparent and non-discriminatory’, and ‘affordable’. With the exception of Finland, all NRAs rely on forward looking price controls — either ex ante review or price caps — to regulate the tariffs for basic letter post service. Most regulate rates for other services at the same time. Despite the high public interest in basic letter post rates, less than half of the NRAs solicit public comment in reviewing rate changes or issue a reasoned decision explaining their rate decisions. Although the directive requires that prices should be based on costs, 6 NRAs do not appear to base rate regulation on cost data. The remaining NRAs appear to take a fairly detailed look at cost and revenue data in their review of rates although some NRAs feel that they did not have adequate data in reviewing rates. Most NRAs consider that, in order to be ‘geared to cost’, the rate for each product must cover its fully allocated cost. On the other hand, the three largest NRAs (DE, FR, UK), representing almost 60 percent of the EU/EEA market, consider that the minimum cost that must be covered by each rate should be the long run incremental or long run marginal cost, a standard more consistent with economic theory. Only a handful of NRAs have attempted to define ‘affordability’; none of these definitions appears to be clearly and objectively related to the ability of a person to afford to make use of universal postal services.

3.7.3 Uniform rates

By way of a limited exception to the principle of cost-based pricing, Article 12 of the Second Postal Directive allows a Member State to require that a postage rate be applied uniformly throughout the national territory. In the Third Postal Directive, this exception is limited to tariffs for single-piece items and tariffs required 'to protect general public interests, such as access to culture, ensuring participation in a democratic society (freedom of press) or regional and social cohesion'.[131]

Table 3-40 Overview: required uniform rates

	Basic letter post	Bulk letters	Direct mail	Periodicals	Non-priority letter post	Basic parcel post	Bulk parcels
AT	Yes					Yes	
BE	Yes	Yes	Yes	Yes	Yes	Yes	Yes
BG	Yes			No	Yes	Yes	
CY							
CZ	No					No	
DE	No	No	No	No		No	No
DK	Yes	Yes	Yes	Yes	Yes	Yes	No
EE	R/L	R/L	No	No	No	Yes	Yes
EL	Yes	Yes	Yes	Yes	Yes	Yes	
ES	Yes	Yes	Yes	No	No	Yes	Yes
FI	Yes	No	No	No	No	No	No
FR	Yes	Yes	Yes	No	Yes	Yes	No
HU	No	No	No	No	No	No	No
IE	No	No	No	No		No	
IT	Yes	No	Yes	Yes		Yes	
LT	Yes	Yes			Yes	Yes	
LU	Yes	Yes	R/L	Yes		Yes	??
LV	R/L	R/L	R/L		R/L	No	No
MT	Yes		Yes	Yes		Yes	
NL	Yes	No	No	No	No	Yes	No
PL	Yes				Yes	Yes	
PT	Yes	Yes	Yes	Yes	Yes	No	No
RO	Yes	Yes		Yes		Yes	
SE	Yes	No	No	No	Yes	Yes	No
SI	Yes	Yes	No	Yes	No	Yes	No
SK	No	No	No	No	No	No	
UK	Yes	Other	Other		Yes	Yes	Yes
IS	Yes	Yes	Yes	Yes		No	
NO	R/L	R/L	R/L	No	R/L	No	No

Key to shading: light gray (red) = ensured as a universal service; medium gray (light green) = not confirmed as an ensured universal service by NRA; dark gray (dark green) = not ensured as a universal service; ?? = Unknown. No information about law or practice.

Table 3-40 summarises the practice of uniform rate requirements among the Member States. The table is overlaid with the shading from table 2-3 that indicates whether the

131 Directive 2008/6/EC, Recital 38. For additional discussion, see section 5.6.2, below.

service is ensured as a universal service.[132] Light gray or red shading indicates that the service is ensured as a universal service. Dark gray or dark green shading indicates that it is not ensured as a universal service. And medium gray or light green indicates that service was not confirmed as an ensured universal service by the NRA and therefore probably is not ensured as a universal service.

As this table shows, 23 Member States representing 77 percent of the EU/EEA market require uniform national tariffs for basic letter post items (in EE, LV, NO, limited to items within the reserved area), and 18 Member States, representing 72 percent of the market, require uniform rates for basic parcel post items. On the other hand, 5 Member States (CZ, DE, HU, IE, SK), representing almost one quarter of the EU/EEA postal market, do not require uniform tariffs for basic letter post service, even though the USPs may provide uniform tariffs voluntarily. Ten Member States (CZ, DE, FI, HU, IE, LV, PT, SK, IS, NO), accounting for slightly more than one quarter of the market, do not require uniform tariffs for basic parcel post service. Most Member States (exceptions: FI, HU, SK) that ensure provision of a non-priority letter post require uniform tariffs.

For the bulk mail services, Member States are fairly evenly divided on the requirement for uniform tariffs. With respect to bulk letter services, 11 Member States (BE, DK, EL, ES, FR, LT, LU, PT, RO, SI, IS) require uniform tariffs for all items and 3 Member States (EE, LV, NO) require uniform tariffs for reserved items, altogether about one third of the EU/EEA postal market. Nine Member States (DE, FI, HU, IE, IT, NL, SE, SK), accounting for more than one third of the EU/EEA market, do not. For direct mail service, 12 Member States (BE, DK, EL, ES, FR, IT, LU, LV, MT, PT, IS, NO) require uniform tariffs and 9 Member States (DE, EE, FI, HU, IE, NL, SE, SI, SK) do not. The UK requires uniform tariffs only for the most basic bulk mail services, which constitute about one quarter of bulk letters and direct mail in that country. Ten Member States (BE, DK, EL, IT, LU, MT, PT, RO, SI, IS) require uniform tariffs for periodicals and 4 Member States (BE, EE, ES, UK) for bulk parcels.

Most Member States require a uniform national tariffs for basic letter post service (23 Member States) and basic parcel post service (18 Member States). Most Member States that ensure provision of a non-priority letter post as a universal service also require uniform tariffs for this service. Member States are split fairly evenly on whether to require uniform tariffs for bulk letter and direct mail services. Only a minority of Member States require uniform tariffs for periodicals or bulk parcels.

132 See section 2.3, above.

3.7.4 Methods of rate regulation

The Postal Directive offers no guidance on the method to be used to regulate prices of universal services. Economists customarily recognise three basic approaches. The first is 'ex ante' regulation, according to which the USP must receive specific approval of the NRA before it can change prices. The second is 'price cap' regulation, which permits the USP to change prices without specific prior approval provided the prices remain below a pre-approved level or formula. The third type of regulation is 'ex post' regulation, which allows the USP to change prices without prior consent but which also allows the NRA to modify prices if, after investigation, it appears that the prices are inconsistent with statutory or regulatory standards (e.g., 'cost-based' or 'affordable' or not 'abusive'). A Member State may choose to regulate some universal services by one method and other universal services by another method.

Table 3-41 summarises the methods of price regulation employed by NRAs. As in other overview tables, the table is overlaid with the shading from table 2-3 that indicates whether the service is ensured as a universal service.[133]

Table 3-41 shows that NRAs use a wide variety of price regulation methods. In terms of volume, the majority rule is price caps. Nine NRAs (BE, DE, DK, EE, IT, NL, PT, SE, UK) impose price caps on rates for basic letter post items, at least when those items are within a reserved or licensed area or below a certain weight (DK, 50 grams; SE, 500 grams). In Germany, price cap controls apply only to non-bulk letter post items and only if the postal operator has a market dominant position.[134] Collectively, Member States with price caps account for 62 percent of the EU/EEA postal market. Sixteen NRAs (AT, BG, EL, ES, FR, HU, IE, LT, LU, MT, PL, RO, SI, SK, IS, NO) require ex ante approval of rates for basic letter post items, at least for reserved items.[135] Collectively, these Member States account for about 35 percent of the EU/EEA letter post market. Finland chooses to regulate rates for basic letter post by ex post review only.

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133 See section 2.3, above.

134 German Post Law, Article 19 ('All rates charged by a licensee in a market for postal services subject to licence shall require approval by the Regulatory Authority, provided the licensee has a dominant position in the relevant market. Sentence 1 shall not apply to rates payable for conveyance services involving a minimum mailing volume of 50 letter post items').

135 In addition, in the Czech Republic, ex ante approval is required for 'five selected most important services' within the basic letter post service. Otherwise ex post review is employed. Questionnaire 211-6.

Table 3-41 Overview: method of price regulation

	Basic letter post	Bulk letters	Direct mail	Periodicals	Non-priority letter post	Basic parcel post	Bulk parcels
AT	EA-rl/EP					EP	
BE	PC	PC-rl	PC-rl		PC-rl	PC	Other
BG	EA				EA	EA	
CY							
CZ	Other						
DE	PC-md/EP	EP-md	EP-md			EP-md	EP-md
DK	PC-50	PC-50	PC-50		PC-50		
EE	PC	EP-rl				PC	EP
EL	EA	EA	EA	EA	EA	EA	
ES	EA-rl/PC	EA-rl/PC				PC	PC
FI	EP	EP			EP	EP	
FR	EA-rl/PC	EA-rl/PC	EA-rl/PC	EA	EA-rl/PC	PC	
HU	EA-rl/PC	EA-rl	EA-rl	EP	EA-rl	EP	EP
IE	EA-rl/EP	EA-rl/EP	EA-rl/EP			EP	
IT	PC	PC	PC	PC		PC	
LT	EA	EP			EA	EA	
LU	EA	Other				EA	
LV							
MT	EA		EA	EA		EA	
NL	PC						
PL	EA				EA	EA	
PT	PC-rl/EA	PC-rl/EA	PC-rl/EA	EA	PC-rl/EA	EA	EA
RO	EA	EA			EA	EA	
SE	PC-50/EP	EP	EP	EP	EP	EP	EP
SI	EA	EA		EA		EA	
SK	EA	EA	EA		EA	EA	
UK	PC	PC-md/EP	PC		PC	PC	PC
IS	EA-rl/EP	EA-rl/EP					
NO	EA-rl/PC	EA-rl/PC	EA-rl/PC	PC	PC	PC	

Key to all columns: EA = Ex ante for all items in this service category; PC = Price cap for all items in this service category; EP = Ex post for all items in this service category; EA-rl/PC = Ex ante for items in reserved or licensed area, otherwise price cap; EA-rl/EP = Ex ante for items in reserved or licensed area, otherwise ex post; PC-rl/EP = Price cap for items in reserved or licensed area, otherwise ex post; EA-md/PC = Ex ante where there operator has dominant position, otherwise price cap; EA-md/EP = Ex ante where there operator has dominant position, otherwise ex post; PCmd/EP = Price cap where there operator has dominant position, otherwise ex post; PC-50 = Price cap for items weighing up to 50 grams; PC-rl/EA = Price cap for items in reserved or licensed area; otherwise ex ante; PC-rl = Price cap for items in reserved or licensed area only; EP-md = Ex post where there operator has dominant position; EA-rl = Ex ante for items in reserved or licensed area; EP-rl = Ex post for items in reserved or licensed area; PC-500/EP = Price cap for items weighing up to 500 grams; otherwise ex post; Other = Other .

Key to shading: light gray (red) = ensured as a universal service; medium gray (light green) = not confirmed as an ensured universal service by NRA; dark gray (dark green) = not ensured as a universal service.

With respect to basic parcel post items, 7 NRAs (BE, EE, ES, FR, IT, UK, NO), accounting for about 57 of the EU/EEA market, impose price caps. Ten NRAs (BG, EL, LT, LU, MT, PL, PT, RO, SI, SK), representing about 6 percent of the EU/EEA market, require ex ante approval of rates. Seven NRAS (AT, CZ, DE, FI, HU, IE, SE), about 30 percent of the market, review single-piece parcel rates ex post.

Rates for unreserved bulk postal services are less strictly regulated. Nine Member States (EL, ES, FR, IT, PT, RO, SI, SK, NO), comprising about 35 percent of the EU/EEA postal market, regulate unreserved bulk letter service by ex ante or price cap

methods. Bulk parcel rates are generally unregulated except for a price cap system in Spain.

As part of this survey, we invited NRAs to summarise their views on when ex ante price regulation is most appropriate.[136] Some answered that ex ante price regulation is always appropriate for universal services. For example:

- EE: All universal services should have ex ante price regulation. This guarantees equal prices to all users and all over the country.
- IE: In principle ex ante rate cases are the only effective way of controlling such prices, although there may be some timing/resource issues in a liberalised market.
- PL: All types of universal services should be regulated by means of ex ante price regulation to ensure the prices are affordable, cost-oriented, transparent and non-discriminatory.

Other NRAs (BE, DK) replied that ex ante regulation should never be used. Still other NRAs declared that ex ante regulation should be used when the USP has a market dominant position or monopoly power:

- DE: Single piece letters of the incumbent (market dominant operator) subject to ex-ante regulation.
- HU: Domestic reserved area.
- PT: The reserved services and services for which the operator has a dominant position, in order to avoid that it uses the revenues from the reserved area to finance the provision of other services under competition and to protect consumers.
- SI: Reserved area and services with no or low level of competition.
- UK: Services where the incumbent is found to have significant market power. Here ex post regulation would allow the incumbent time to engage in anti-competitive behaviour and increase market uncertainty.

Similarly, we asked NRAs to advise on the most appropriate use of price cap regulation.[137] Answers to this question tend to complement the views expressed on ex ante regulation:

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136 Questionnaire 251-24 ('Based on your experience, please describe briefly what types of universal services are most appropriately regulated by means of ex ante price regulation and why').

- DK: Single piece letter post. We don't expect any significant competition in the single letter market.
- IT: Price cap method allows [the NRA] to improve the USP efficiency. At present in Italy all universal services are regulated by means of ex ante price regulation using price cap mechanism.
- SE: Price cap is most appropriate for services that are used by consumers (stamped, single piece, overnight delivery) to protect them from unjustified price increase. This is a safety mechanism on top of the cost orientation.
- SI: Services with low or middle level of competition.

The French NRA stated that all universal services should be regulated by forward-looking regulatory mechanism but expressed no view on when the ex ante or price cap method is to be preferred.

What seems to emerge from this review is a consensus among NRAs that forward-looking price regulation should be applied to universal service products where there is no significant competition. NRAs hold different views about the relative merits of ex ante versus price cap methods. NRAs also differ on whether forward-looking price regulation is also appropriate for universal service products where the USPs faces significant competition.

Price caps are used to regulate rates of basic letter post services in 9 Member States, representing 62 percent of the total EU/EEA postal market. Sixteen Member States, representing 35 percent of the postal market, regulate basic letter post services by ex ante review. Finland relies on ex post review. Three Member States either do not regulate basic letter post rates or did not answer. Basic parcel post rates are also regulated by price caps in 7 Member States accounting for more than half of the postal market. Other Member States use ex ante and ex post methods roughly equally. Rates for unreserved bulk postal services are less strictly regulated, in part because these services are not ensured as universal services in some Member States. In general, there appears to be a consensus among NRAs that forward-looking price regulation — either ex ante review or price caps — is appropriate for universal service products where there is no significant competition. NRAs differ on whether forward-looking price regulation is appropriate for universal service products where the USPs faces significant competition.

137 Questionnaire 251-25 ('Based on your experience, please describe briefly what types of universal services are most appropriately regulated by means of price cap regulation and why'). Although the questionnaire defined its use of the terms 'ex ante' and 'price cap' regulation, it is clear from the answers that several NRAs did not understand this distinction. On other hand, most NRAs did make this distinction in their answers.

3.7.5 Individual agreements and special tariffs

Article 12 of the Second Postal Directive provides that 'the application of a uniform tariff does not exclude the right of the universal service provider(s) to conclude *individual agreements* on prices with customers'. Article 12 thus recognises that USPs may conclude individual agreements with users and limits the authority of Member States to require uniform tariffs in individual agreements. The directive does not otherwise define the term 'individual agreement'.

Article 12 also provides for 'special tariffs'. The Second Postal Directive indicates that 'special tariffs' include prices offered to 'businesses, bulk mailers or consolidators of mail from different customers' for something less than the complete range of features covered by the standard tariff. In general, special tariffs must conform to the same principles as tariffs for universal services generally. Specifically, special tariffs for large businesses or for companies that consolidate the mail of smaller firms should 'take account of the avoided costs, as compared to the standard service' and 'shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services'. Moreover, special tariffs must be made available to 'private customers who post under similar conditions'.

Individual agreements and special tariffs are apparently a large factor in the overall supply of postal services. In Member States which regulate bulk letters and direct mail as universal services, the requirements of Article 12 necessitate an extra measure of regulatory attention.

The first issue presented by individual agreements is definitional. Are 'individual agreements' different from 'special tariffs'? Does the Postal Directive require or allow NRAs to regulate individual agreements differently than special tariffs? The great majority of NRAs (23) view individual agreements as equivalent to special tariffs. Five NRAs (AT, BE, ES, FR, SK), however, consider individual agreements to be something different. They explained the distinctions as follows:[138]

- BE: Individual agreements or conventional agreements signed between the USP and a customer in function of certain conditions; specials tariffs are publicly available and show discounts as a function of certain specific criteria.
- ES: Special tariffs are public discount schemes; there are no special tariffs in Spain, but there are many individual tariffs that involve similar discounts.
- FR: Individual agreements were concluded between parties at a price determined during commercial negotiations; special tariffs are included within

138 Questionnaire 252-1, 252-2.

the offer list provided by the postal operator, depend on the degree of concentration and preparation of mail.

- SK: Special tariffs take account [of] the avoided costs; individual agreements are for the "highest TOP" clients and take account [of and grant a] bonus for long term co-operation.

NRAs do not appear well-informed about individual agreements. Only the Belgian NRA reports it has access to all individual agreements. Eight NRAs (AT, ES, FR, HU, IE, LV, PL, SK) declare that they do not have access to individual agreements, even though four of these (AT, ES, FR, SK) declare that they ensure individual agreements are transparent. Seven NRAs (AT, BE, ES, FR, NL, SK) report that individual agreements are equally available to similarly situated mailers, while three NRAs (LV, NL, PL) report that they are not, which would appear to be discriminatory.

How important are individual agreements? The French NRA estimates that they account for about 3 percent of correspondence. The estimate of the Slovakian NRA is 21 percent. The Spanish NRA estimates that 87 percent of correspondence within the reserved area is transmitted by individual agreement.[139]

Special tariffs are better understood and more common. Special tariffs appear to be offered by almost all USPs (exceptions: CZ, EE, ES, IT, LV, MT). Seventeen NRAs, representing 80 percent of the EU/EEA postal market, report that they have 'complete and up to date' information on all special tariffs.[140] However, only 8 NRAs (BE, DE, FR, IT, LT, PT, SK, UK) declare that they can calculate avoided costs, the basic requirement of Article 12 (these 8 NRAs, however, account for 70 percent of the postal market). It should be noted that the term 'avoided costs' has been interpreted differently by different NRAs. Three NRAs (DE, LT, SK) interpret 'avoided costs' to refer to the full retail price minus the costs saved by virtue of the downstream access. Three NRAs (IE, IT, UK) interpret 'avoided costs' to refer to the end to end cost minus the costs saved.[141]

Tables 3-43, 3-44, and 3-45 summarise the regulation of the special tariffs for bulk letters, direct mail, and bulk parcels, respectively. In each table, the first column indicates whether the NRA reports that the bulk service is ensured as a universal service.[142] From these tables, it appears that special tariffs are an important element of the EU/EEA postal market. Although estimates of market share are incomplete, the weighted averages of the available data suggest that about 78 percent of letter mail and

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139 Questionnaire 252-5. The Belgian NRA states that the scope of individual agreements is confidential.
140 Questionnaire 252-14 (BE, BG, CY, DE, EL, FR, HU, IE, IT, LT, PL, PT, SE, SI, SK, UK, NO).
141 Questionnaire 252-16. For a discussion of this issue, see UK Postcomm, 'Promoting Effective Competition In UK Postal Services Through Downstream Access' (2004).
142 See section 2.3, above.

99 percent of direct mail is conveyed under special tariffs. The importance of special tariffs in the bulk parcel market cannot be estimated for lack of data.

Table 3-42 Special tariffs (STs) for bulk letter services

	Bulk letters within USO?	STs for bulk letters?	Maximum discount (%)	Criteria for special tariff	ST volume (% letters)	ST based on avoided costs?	Trans-parent rates?	Available to consoli-dators?	Available to private operators ?
AT									
BE	Yes	Yes		ABCDEF	#	L/P	L/P	L/P	L/P
BG		Yes	48	ABCDEF	51		L/P		
CY		Yes	29	AB		L	L/P	No	No
CZ		No							
DE		Yes	26	ABCEF		L	L	L	L
DK	Yes	Yes				L	L	L	L
EE	No								
EL	Yes	Yes	14.5	ABCF	89	L	L	L	L
ES	No			A					
FI	No	??							
FR	Yes	Yes	86	ABDE	60	L/P	L/P	L/P	L/P
HU	Yes	Yes	24.2	ABCG	87.2	L	L	L/P	L/P
IE	Yes	Yes	25.4	ABCEFG	25	L/P	L/P	L/P	L/P
IT	Yes	Yes		BCDEF					
LT	Yes	Yes	38	ABCEF		L/P	L/P	P	P
LU	No	Yes	19	ABCEF	80	??	L	??	??
LV	Yes	No							
MT	No	No				L	L	L	
NL	No	No				No	L/P	No	L
PL	No	Yes				L	L	No	No
PT	Yes	Yes	21	ABG		L/P	L/P	L	L
RO	No	Yes	35	ABF		L	L		
SE	No	Yes	23	ABF	73	L/P	L/P	L/P	L/P
SI	Yes	Yes	2	AB	22.53	L/P	L/P		
SK	Yes	Yes	18	ABCE	70	P	P	P	P
UK	Yes	Yes	34	ABCDF	87	L	L	L/P	L/P
IS	Yes	Yes	30	ABE	80	L/P	L/P	L/P	L/P
NO	No	Yes		ABFG		L	L/P	L/P	L/P

Criteria for special tariff: (A) Volume of mailing; (B) Presorting and bundling of mail; (C) Suitability for mechanised sorting and handling; (D) Lack of errors or omissions in addressing; (E) Standard sizes or packaging (e.g. standard envelope, flat, parcel); (F) Transport to a sorting centre or office near addressee; (G) Other.
ST based on avoided costs?: L/P = Required by law and verified in practice; P = Not required by law but verified in practice; L = Required by law but not verified in practice; No = Not required by law or verified in practice; ?? = Unknown. No information about law or practice; Other = Other.

Special tariffs for bulk letters are employed in 21 Member States, representing 82 percent of the total EU/EEA postal market. Eighteen NRAs report that adherence to the avoided cost rule of Article 12 is required by law, but only 8 of these NRAs (BE, FR, IE, LT, PT, SE, SI, IS), representing 27 percent of the postal market, confirm that

compliance has also been verified in practice. Similarly, 21 NRAs report that rate transparency is required by law, but only 12 NRAs have verified the practice. The requirement in Article 12 that special tariffs must be made available to other postal operators on equal terms is apparently required by law in only 13 Member States (nonetheless, representing 79 percent of the postal market), and compliance has been verified by 8 NRAs (BE, FR, HU, IE, SE, UK, IS, NO), representing 50 percent of the postal market.

Table 3-43 Special tariffs (STs) for direct mail services

	Bulk direct mail within USO?	STs for bulk direct mail?	Maximum discount (%)	Criteria for special tariff	ST volume (% direct mail)	ST based on avoided costs?	Trans-parent rates?	Available to consoli-dators?	Available to private operators ?
AT									
BE	Yes	Yes		ABCDEF	#	L/P	L/P	L/P	L/P
BG		Yes	48	ABCDEF			L/P		
CY		Yes	29	AB		L	P	No	No
CZ									
DE		Yes	8	ABCEF		L	L	L	L
DK	No	Yes				L	L	L	L
EE	No								
EL	Yes	Yes	25.0	ABCF	84.5	L	L	L	L
ES	No				100				
FI	No								
FR	Yes	Yes		ABDEF		L/P	L/P	L/P	L/P
HU	Yes	Yes	24.2	ABC	100	L	L/P	L/P	L/P
IE	Yes	Yes	43.7	ABFG	100	L/P	L/P	L/P	L/P
IT	Yes								
LT	??	??							
LU	No	Yes	19	ABCEF		??	??	??	??
LV	No	No							
MT	Yes	No				L	L	L	
NL	No								
PL	No	Yes				L	L	L	L
PT	Yes	Yes	18	AG		L/P	L/P	L	L
RO	No	Yes	35	ABF		L	L		
SE	No	Yes	18	ABF	100	L/P	L/P	L/P	L/P
SI	No	??							
SK	Yes	Yes	16	AB	80	P	P	P	P
UK	Yes	Yes	34	ABCDF		L	L	L/P	L/P
IS	Yes	Yes	30	ACE		L/P	L/P	L/P	L/P
NO	No	Yes		ABFG		L	L	L/P	L/P

Criteria for special tariff: (A) Volume of mailing; (B) Presorting and bundling of mail; (C) Suitability for mechanised sorting and handling; (D) Lack of errors or omissions in addressing; (E) Standard sizes or packaging (e.g. standard envelope, flat, parcel); (F) Transport to a sorting centre or office near addressee; (G) Other.

ST based on avoided costs?: L/P = Required by law and verified in practice; P = Not required by law but verified in practice; L = Required by law but not verified in practice; No = Not required by law or verified in practice; ?? = Unknown. No information about law or practice; Other = Other.

Special tariffs for direct mail are employed in 18 Member States, representing 76 percent of the total EU/EEA postal market. Sixteen NRAs report that adherence to the avoided cost rule of Article 12 is required by law, and 6 of these NRAs (BE, FR, IE, PT, SE, IS), representing 27 percent of the postal market, confirm that it has also been verified in practice. Sixteen Member States require rate transparency by law, and half have verified this in practice. Thirteen Member States require that special tariffs be made available to postal operators, and 8 NRAs (BE, FR, HU, IE, SE, UK, IS, NO), representing 50 percent of the EU/EEA postal market, have verified in practice.

Table 3-44 Special tariffs (STs) for bulk parcel services

	Bulk parcels within USO?	STs for bulk parcels?	Maximum discount (%)	Criteria for special tariff	ST volume (% parcels)	ST based on avoided costs?	Trans-parent rates?	Available to consoli-dators?	Available to private operators?
AT									
BE	Yes	Yes		A	#	L/P	L/P	L/P	L/P
BG		Yes	35	ABCDF			L/P		
CY		Yes	29	A		L/P	L/P	No	No
CZ									
DE		Yes		ACE		No	No	No	No
DK	Yes	Yes				L	L	L	L
EE	No								
EL		Yes	30	ABF		L	L	L	L
ES	No					L	L	L	L
FI	No								
FR	No								
HU	Yes	No			0				
IE	No	No			0	L	L	L	L
IT	No								
LT		No							
LU	No	Yes	50						
LV	No	No							
MT	No	No					L	L	L
NL	No								
PL	No	Yes				L	L	L	P
PT	Yes	Yes	15	A		L/P	L/P	Other	Other
RO	No	No							
SE	No	Yes		AF					
SI	No	No							
SK	No	Yes		AB	75	P	P	P	P
UK	Yes	Yes	34	ABCEF	65	L	L	L/P	L/P
IS	No	No							
NO	No	No							

Criteria for special tariff: (A) Volume of mailing; (B) Presorting and bundling of mail; (C) Suitability for mechanised sorting and handling; (D) Lack of errors or omissions in addressing; (E) Standard sizes or packaging (e.g. standard envelope, flat, parcel); (F) Transport to a sorting centre or office near addressee; (G) Other.

ST based on avoided costs?: L/P = Required by law and verified in practice; P = Not required by law but verified in practice; L = Required by law but not verified in practice; No = Not required by law or verified in practice; ?? = Unknown. No information about law or practice; Other = Other.

Special tariffs for bulk parcels are reported in only 12 Member States, representing 54 percent of the EU/EEA postal market. Nine NRAs report that adherence to the avoided cost rule of Article 12 is required by law, but only 3 of these NRAs (BE, CY, PT), representing 4 percent of the postal market, confirm that it has also been verified in practice. Eleven Member State require rate transparency by law, and four have verified this in practice. Seven Member States require that special tariffs be made available to postal operators, and 2 NRAs (BE, UK), representing 25 percent of the EU/EEA postal market, have verified in practice.

Postal services provided under special tariffs are an important component of the EU/EEA postal services market, accounting for the conveyance of perhaps three quarters of all letters and direct mail items. Not all USPs offer bulk mail services, but bulk mail tariffs are available to large mailers in approximately half to three quarters of the EU/EEA postal market if national markets are weighted by volume. For bulk letters and direct mail, the requirements of Article 12 have generally been translated into national law, but implementation has been verified by NRAs in only about one-third to one half of the Member States. For bulk parcel services, adherence to the requirements of Article 12, both in law and in practice, has been more sporadic.

Case history 3-10: Access to information on special tariffs in Germany

According to the German Postal Act, rates for non-bulk (less than 50 items) letter post services charged by a licensee who has a dominant position in the market require prior approval by the BNetzA, the German NRA. There is an exception for rates for network access, which shall be subject to approval by the BNetzA only when the incidental services are included by the licensee in its General Terms and Conditions.

To ensure compliance with the legal provisions and to prevent anti-competitive behaviour, BNetzA may require the submission of contracts. However, according to the German law, BNetzA may require submission of contracts and other information only for the approval of rates related to network access. In such case, transparency is necessary to enable the BNetzA to examine whether the rates of providing network access are reasonable and competitive.

Acting under this provision, in 1999 BNetzA requested Deutsche Post to submit all of its access agreements with competitors, customers and subsidiaries and other associations. Deutsche Post asked the administrative court to block this request. Deutsche Post argued that the requested contracts are not access agreements, since they did not contain elements of pure transport service. In fact, Deutsche Post argued, the requested contracts pertained only to preparatory work which did not constitute postal conveyance.

Acting on an appeal from the lower courts, in January 2008 the Higher Administrative Court in Münster rejected Deutsche Post's position in all respects. The court stated that BNetzA has the right to request information about access agreements because of the need to ensure their compliance with law. The court further concluded that the requested contracts could be considered access agreements because the term 'mail-transportation' not only includes the pure act of transportation but also the whole supply chain from the addresser to the addressee.

The Federal Administrative Court of Germany has recently upheld this ruling. After a lengthy legal proceedings Deutsche Post has been required to provide BNetzA all the requested contracts on network access.

3.7.6 Rate investigations

As an additional indicator of the vigour of price regulation, this survey requested NRAs to report the number of formal rate proceedings. While the extensive judicial and policy proceedings of the British regulator, Postcomm, are well known, the objective of this portion of the survey was to obtain a complete census of substantial public proceedings by the NRAs.

To do so, the survey attempted to draw a clear distinction between (A) proceedings in which the NRA solicits one or more rounds of public comments and supplements the public input with reports from expert consultants where appropriate and (B) informal or non-public administrative proceedings in which the NRA adopts a decision without a public proceeding. In an earlier study by WIK, we asked NRAs to state the 'number of formal NRA investigations begun in respect to tariffs for generally applicable postal services' without defining the term 'formal NRA investigation'.[143] Since the answers ranged from 0 to 443 per year, it seemed evident that NRAs were interpreting the term 'formal NRA investigation' in very different ways, so much so that statistical analysis was impossible.

In this survey, the questionnaire sought to explain the idea of a formal regulatory proceedings with the following introductory instruction:

> This submodule [unit of the questionnaire] seeks information on the regulatory caseload of the NRA. This submodule is divided into two types of cases: 'judicial' and 'policy' cases. A 'judicial' type case is one in which the NRA determines how the law or regulations apply to specific parties, for example, deciding whether a proposed rate is lawful or whether an individual license should be granted or a complaint about cross-subsidy is justified. A mere registration by a postal operator pursuant to a general authorisation procedure is not a formal judicial type case. A 'policy' type case is one in which the NRA investigates a general matter of policy that may or may not be later embodied in a new or modified regulation, for example, an investigation into the proper scope of the universal service obligation or the best way to phase out the reserved area or the most appropriate form of a general authorisation procedure. This submodule asks for the number for 'formal' or significant cases. While administrative procedures vary from Member State to Member State, in general a formal 'judicial' type proceeding will involve giving affected parties a right to participate and respond to factual claims by opposing parties and a right to appeal an adverse decision to an independent body. A formal 'policy'

143 WIK, *Main Developments in the Postal Sector (2004-2006)*.

> investigation may involve a fact gathering process — perhaps focussed on a report by NRA staff or by an independent consultant — and one or more requests for comments from affected parties and the general public.[144]

This approach has likewise failed to identify for NRAs the concept of a formal regulatory proceeding. Hence, no meaningful analysis of regulatory rate proceedings is possible.

Our survey failed to elicit meaningful data on the numbers and types of regulatory rate proceedings. This negative result appears to demonstrate an absence of a common understanding of what constitutes a 'case' or proceeding before the NRA. The Commission or NRAs may therefore wish to consider a more standardised approach to defining the notion of a regulatory proceeding in order to allow better comparison of the work of different NRAs.

144 Questionnaire, introduction to question module 301(D).

3.7.7 Terminal dues and cross border mail

Article 13 of Postal Directive requires Member States to 'encourage' their USPs to adopt terminal dues agreements that respect principles similar to those in effect for domestic mail. Specifically, terminal dues — what a USP charges another USP for delivering incoming cross-border mail — 'shall be fixed in relation to the costs' of handling and delivery and shall be transparent and non-discriminatory. Article 13 also adds that for cross-border mail 'remuneration shall be related to the quality of service achieved'.

Five NRAs States (CY, CZ, IE, MT, PT), collectively representing less than 4 percent of the EU/EEA postal market, report that they regulate terminal dues. All stated that they ensured that terminal dues are cost-based, related to quality, transparent, and non-discriminatory.

With a few notable exceptions, few NRAs have tried to implement the principles of the Postal Directive to the terminal dues applied to cross border mail even though seemingly required to do so by Article 13.

3.8 Protection of users

Article 19 of Postal Directive provides for protection of the rights of users — meaning both senders and addressees — of postal services. In the Second Postal Directive, this protection pertains primarily to users of USPs but it could be extended to users of other postal services. In the Third Postal Directive, users of all types of postal services are more clearly embraced.

3.8.1 Establishment of user protection regulation

Article 19 of the Second Postal Directive requires Member States to ensure that 'transparent, simple and inexpensive' procedures for user protection in both single provider and multi-operator environments:

> Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved).

In the Second Postal Directive, user protection was focused on the services of designated USPs. Member States were obliged to adopt user protection measures for those benefiting from universal services provided by USPs under Article 4. In addition, a Member State could extend user protection to two related groups of persons: (i) persons benefiting from postal services within the universal service area but provided by other postal operators and (ii) persons benefiting from postal services outside the universal service area but provided by designated USPs.

In the Third Postal Directive, the concept of user protection has been extended to users of all postal services. The key change is in the definition of 'user". In the Second Directive, a 'user" is a person 'benefiting from *universal service* provision as a sender or an addressee'. In the Third Directive, a 'user' is a person 'benefiting from *postal service*

provision as a sender or an addressee'.[145] Correspondingly, Article 19 is revised to refer to 'all postal service providers':

> Member States shall ensure that transparent, simple and inexpensive procedures are made available by all postal service providers for dealing with postal users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved). . . .

The current status of user protection regulation in the Member States is summarised in Table 3-45. From this table, it appears that half of the Member States (BG, CY, EE, EL, FR, HU, IE, IT, LV, MT, PT, SE, SI, UK, IS), representing just over half of the total EU/ EEA postal market, authorise both the NRA and NCPA to enforce user protections in the postal sector. Another one third of Member States (BE, CZ, DE, DK, ES, LT, PL, SK, NO) rely solely on the NRA. Only Finland relies solely on the NCPA. Three Member States (LU, NL, RO) appear to lack any mechanism to provide user protections. Most Member States (21 countries or 87 percent of the market) have extended user protection measures to all postal operators within the universal service area.

Half of the Member States authorise both the NRA and NCPA (national consumer protection authority) to enforce user protections in the postal sector, while another third rely solely on the NRA. Only Finland relies solely on the NCPA. Three Member States appear to lack any mechanism to provide user protections. Most Member States have extended user protection measures to all postal operators within the universal service area.

145 Second Postal Directive, Article 2(17); Third Postal Directive, Article 2(17).

Table 3-45 Regulation of user protection procedures

	Postal or consumer law?	Enforcement by NRA or NCPA?	Applies to non-USP(s) in US area	Applies to non-US services	USP(s) req'd to issue ann. rept	NRA issues ann. rept.	Review of operator decision ensured?	Agency reviewing operator
AT								
BE	Post law	NRA	Yes	Yes		No	Yes	Ombud
BG	Both	Both	Yes	Yes	Yes*		Yes	NRA
CY	Both	Both		Yes	Yes*	Yes		
CZ	Post law	NRA	Yes	Yes	Yes	Yes	Yes	NRA
DE		NRA	Yes	Yes	No	Yes	Yes	NRA
DK	Both	NRA	Yes	No	Yes	No	Yes	NRA
EE	Both	Both	Yes	Yes	Yes	Yes	Yes	NRA
EL	Both	Both	Yes	Yes	No	Yes	Yes	NRA
ES	Both	NRA	Yes	Yes			Yes	Multi
FI	Both	NCPA	Yes	Yes	No	No	Yes	NCPA
FR	Both	Both	Yes	Yes	Yes	No	Yes	Ombud
HU	Both	Both	Yes	Yes	Yes	Yes	Yes	NRA
IE	Both	Both	Yes	Yes	Yes	Yes	Yes	Ombud
IT	Both	Both	Yes	No	Yes	No	Yes	Min Post
LT	Post law	NRA	Yes	Yes	Yes	Yes	Yes	NRA
LU	None	Neither	??	Yes	Yes	No	Yes	NRA
LV	Both	Both	Yes	Yes	Yes*	Yes	Yes	NRA
MT	Both	Both	Yes	Yes	Yes		Yes	Multi
NL							No	None
PL	Post law	NRA		Yes	Yes	Yes	Yes	Multi
PT	Both	Both	Yes	Yes	Yes			Multi
RO		Neither	No	No	Yes	No	No	
SE	Both	Both	Yes	Yes	Yes	No	Yes	Ombud
SI	Both	Both	Yes	No	Yes	Yes	Yes	NRA
SK	Both	NRA	Yes	Yes	Yes		Yes	NRA
UK	Both	Both	Yes	No	Yes	No	Yes	Ombud
IS	Both	Both	No	Yes	No	No	Yes	NRA
NO	Post law	NRA	No	No	No		Yes	NRA

USP(s) req'd to issue ann. rept: "*" indicates report on USP's handling of complaints issued by NRA rather than USP.

Agency reviewing operator: NRA = National regulatory authority (NRA) or staff; NCPA = National consumer protection authority (NCPA); Ombud = Ombudsman or similar agency for public complaints; Min Post = Postal Minister or ministry staff; Users Grp = Postal users group sponsored by government; Multi = Multiple government agencies; Other = Other.

Case history 3-11: The Consumer Committee of ARCEP (France)

Protection of user interests in the electronic communications and postal sectors is an area of increasing concern to ARCEP. The regulator controls affordability and quality of universal service. In particular the Consumer Relations Department keeps users informed, provides consumers with clarifications on offers resulting from regulatory decisions, and assists users in dispute settlements with companies. ARCEP has held meetings with consumer and user associations on specific issues of topical interest.

To extend and formalise these meetings, on 17 December 2007, ARCEP created the Consumer Committee as a permanent working structure in order to discuss all user-related issues related to regulation of electronic communications and postal markets. ARCEP seeks to strengthen the dialogue between stakeholders, to understand consumers' points of view, to explain ARCEP's work, to identify problems, to prepare decision-making, to facilitate the flow of information between its members, and to provide associations with details on ARCEP's decisions and on market monitoring.

In addition to serving as a bridge between ARCEP and eleven consumer and user associations, the Consumer Committee coordinates with institutions responsible for direct relations with consumers in the electronic communications and postal sectors, such as the Directorate-General for Fair Trade, Consumer Affairs and Fraud Control (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes), the Ministry of Economics, Industry and Employment (Ministère de l'Économie, de l'Industrie et de l'Emploi), the National Consumer Institute (Institut National de la Consommation), and the Electronic Communications Mediator (Médiateur des Communications Électroniques). Where appropriate, representatives of companies, such as the Mediator of La Poste (Médiateur du Groupe La Poste), are also invited to attend. Other institutions occupying with consumer protection in the communications sectors, such as the National Consumer Agency (Conseil National de la Consommation), the Committee Devoted to Abusive Contractual Clauses (Commission des Clauses Abusives), the roundtables organised by the Secretary of State for Consumer Affairs, or the courts, continue to act in parallel to the Consumer Committee.

The Consumer Committee meets once a year in a plenary session to review the work of the preceding year and to set the agenda for the forthcoming one; the first plenary session occurred on 9 June 2008. Meetings covering postal market issues convene biannually, focussing on definite subjects and topics of current relevance. At the first three meetings — in March and September of 2008 and April of 2009 — the focus was mainly on general terms of sale of La Poste, quality of universal service (transparency, establishment of quality indicators, handling of lost parcels and forwarding), accessibility to mailboxes in buildings, and sending small items at the letter tariff. Specific work of the Consumer Committee is performed in groups and subgroups.

3.8.2 Remedies for users

The Second Postal Directive provides that Member States shall 'enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation'. Member States are obliged to ensure that users who do not get satisfaction from the USP can appeal to a 'competent national authority'.

Table 3-46 User protection: remedies and redress

	NRA or NCPA approves procedures?	Monetary compen-sation req'd	CEN standards req'd?	Multi-operator protection?	User groups recognised ?	Remedies by CNA?	Appeal from CNA to court?	Court can order remedies?
AT								
BE		No	No	No	Yes	None	Yes	
BG	Yes	Yes	No	No	Yes	None	Yes	Yes
CY	No	No	No					
CZ	No	Yes	No	No	Yes	S	Yes	Yes
DE	No	No	No	No	Yes	S		
DK	No	Yes	Yes	No	Yes	M+S	Yes	Yes
EE	Yes	Yes	No	Yes	Yes	None	Yes	Yes
EL	Yes	Yes		Yes	Yes	M+S	Yes	Yes
ES	Yes	Yes	No	No		M+S	Yes	Yes
FI	No	Yes	Yes	No	Yes		Yes	??
FR	Yes	Yes	No	No	Yes	None	Yes	Yes
HU	Yes	Yes	Yes	No	Yes	S	Yes	Yes
IE	Yes	Yes	Yes	No	??	M+S	No	
IT	Yes	Yes	No	No	Yes	M+S	Yes	Yes
LT	Yes	Yes	Yes	Yes	Yes	M+S	Yes	Yes
LU	Yes	Yes	No	No	Yes	None	??	
LV	Yes	Yes	No	No	Yes	None	Yes	Yes
MT	Yes	Yes	Yes		??	M	Yes	Yes
NL	No		No					
PL	Yes	Yes	No	No	Yes	M+S	Yes	Yes
PT	No	Yes		No	Yes	No Ans	Yes	Yes
RO	No	Yes	No	No			Yes	Yes
SE	Yes	Yes	Yes	No	??	Other	Yes	Yes
SI	Yes	Yes	Yes	No	Yes		Yes	Yes
SK	Yes	Yes	Yes	Yes	Yes	None	Yes	Yes
UK	Yes	Yes	??	Yes	Yes	M+S	Yes	Yes
IS	Yes	Yes	No	No	No	M	Yes	Yes
NO	Yes	Yes	Yes	No	Yes	None	Yes	Yes

Note: 'CNA' = 'competent national authority' referenced in Postal Directive, Article 19.
Remedies by CNA?: M = Monetary damages; S = Services with comply with USO; M+S = Both monetary damages and services that comply with USO; None = No remedy; Other = Other; ?? = Unknown. No information about law or practice.

In the Third Postal Directive, these provisions are continued without change. In addition, however, the Third Postal Directive provides that 'Member States shall also encourage

the development of independent out-of-court schemes for the resolution of disputes between postal service providers and users'.

In most Member States (19), the NRA or NCPA must approve user protection procedures of the USP although this is not the case in at least 8 Member States (CY, CZ, DE, DK, FI, NL, PT, RO) (see Table 3-46).

Table 3-46 summarises remedies available to users. The Postal Directive requires that USPs provide a system of reimbursement and/or compensation 'where warranted', and most Member States have done so (exceptions: BE, CY, DE).[146] Only five Member States (EE, EL, LT, SK, UK) have addressed the issue of protecting users in multi-operator environment.

Almost all Member States that have introduced user protections have appointed a 'competent national authority' to review users' complaints that have not been satisfactory resolved by the USP. In most cases, this is the NRA. In 5 Member States (BE, FR, IE, SE, UK), it is the ombudsman or a similar consumer complaint body. In four Member States (ES, MT, PL, PT), the user has more than one option for appeal. A forum for appeal does not, however, ensure the user a remedy. Only 10 Member States, (DK, EL, ES, IE, IT, LT, MT, PL, UK, IS), authorise the competent national authority to award monetary damages where justified. In 5 Member State (CZ, DE, HU, MT, IS), the competent national authority can require future changes in service to ensure fulfilment of the USO. In virtually all Member States, however, the user can take a further appeal from the competent national authority to the courts if he or she is not satisfied.

The European Committee for Standardisation (CEN) has approved a standard, EN 14012, for measurement of complaints and redress. Ten Member States (DK, FI, HU, IE, LT, MT, SE, SI, SK, NO) reportedly comply with this standard, although they represent only 11 percent of the EU/EEA market. Fifteen Member States (BE, BG, CY, CZ, DE, EE, ES, FR, IT, LU, LV, NL, PL, RO, IS), representing 63 percent of the postal market, do not comply with EN 14012.

146 The Dutch USP provides compensation only for registered items. Questionnaire 261-9.

Implementation of effective user protection procedures appears to be uneven. In about two thirds of Member States, the NRA or NCPA must approve user protection procedures of the USP. Most, but not all, Member States ensure that there is a system of reimbursement and/or compensation for users. Only five Member States have addressed the issue of protecting users in multi-operator environment. Almost all Member States have appointed a 'competent national authority' that can review the USP's handling of users complaints. In most cases, this is the NRA, but in 5 Member States it is the ombudsman or a similar consumer complaint body. In only 13 Member States can the competent national authority award monetary damages and/or require future changes in service. In virtually all Member States, the user can take a further appeal from the competent national authority to the courts. Most Member States do not comply with a CEN standard for measurement of complaints and redress.

3.8.3 Publication of user protection data

The Second Postal Directive requires USPs to publish data on the handling of user complaints. The Third Postal Directive added the possibility of requiring similar reports from other postal service providers. In the Third Postal Directive, this provision reads:

> In accordance with Article 16, Member States shall ensure that the universal service providers and, wherever appropriate, undertakings providing services within the scope of the universal service, publish, together with the annual report on the monitoring of their performance, information on the number of complaints and the manner in which they have been dealt with.

As shown in Table 3-45, in 20 Member States, the USP issues the annual report on user protection required by Article 19. In at least 5 Member States (DE, EL, FI, IS, NO), it appears that the USP does not do so. In addition, 11 NRAS (CY, CZ, DE, EE, EL, HU, IE, LT, LV, PL, SI) issue their own reports on their review of user complaints and subsequent appeals to the courts, if any.

Table 3-47 User protection by NRA, 2008

	Number of complaints to USP(s)	Complaints per 1 million letter post	Number of complaints reviewed by CNA	Percent of complaints appealed (%)	CNA agreed with complaint on review (%)
AT					
BE			12,506 *		73.0
BG	2,828 *	15.8			
CY	5	0.1	1	20.0	
CZ	23,488	24.0	540	2.3	90.0
DE			1,026		
DK	56,379	37.1	300	0.5	3.0
EE	107 *	0.9	6 *		50.0
EL			80		
ES					
FI					
FR	1,103,370	60.2	2,688 *	0.2	
HU	9,999	10.2	109	1.1	9.2
IE	31,546 *	47.4			
IT	68,604	12.0	630	0.9	75.4
LT	38	0.4			6.0
LU	410 *	2.6			
LV	1,108	9.1	16	1.4	
MT	5,953	138.3	19	0.3	63.0
NL					
PL	251,642	132.4	112	0.0	
PT	64,939	55.7			
RO					
SE	82,657	26.2			
SI	3,410	8.2	10	0.3	60.0
SK	26,665	89.1	11	0.0	54.0
UK	1,260,790	57.6			
IS					
NO					

Note: "*" indicates 2007 data. '= 'competent national authority' referenced in Postal Directive, Article 19. Letter post volume from 2007 is used for calculation of complaints per million.

Recent complaint data is set out in Table 3-47. Because quality of service, and therefore the cause for complaint, will vary from USP to USP, it is not self-evident how to interpret this table without further investigation. Nonetheless, by selecting one Member State as a plausible benchmark, it is possible to make some tentative relative judgements. For example, if one assumes that the Swedish USP is relatively capable and that the Swedish NRA has probably ensured the existence of a relatively simple and transparent complaint procedure, then 26 complaints per million letter post items could be taken a minimum indication of a simple and easy-to-use complaint procedure. Any higher rate of complaints would also be consistent with a simple and easy-to-use complaint procedure. A lower rate of complaints would suggest either that the complaint

procedure is not as simple and easy-to-use as in Sweden or that the USP is significantly more capable than the Swedish USP (or perhaps the existence of cultural factors that discourage complaints). Of course, one could select another Member State as the benchmark. Nonetheless, by such reasoning, it appears that in a number of Member States (e.g., DK, FR, IE, MT, PL, PT, SE, SK) 'transparent, simple and inexpensive procedures' have in fact been developed dealing for with users' complaints. In addition, the relatively high rate of appeals agreed by the NRAs suggests that NRAs are serving as effective appellate boards in a number of Member States (e.g., BE, CZ, IT, MT, SI, SK).

Seventeen USPs publish the annual report on handling of user complaints required by the Postal Directive. Eleven NRAs also issue their own reports on user protection procedures.

4 Application of Competition Law and State Aid Provisions in the Postal Sector

This chapter reviews the application of general competition law and state aid rules in the postal sector.

- Section 4.1 presents and discusses recent competition cases that were decided by the European Commission as well as by national competition authorities in the Member States.
- Section 4.2 in turn discusses how the European Commission has applied the state aid rules of the EC Treaty to the postal sector.

4.1 Application of antitrust to the postal sector

4.1.1 Cases decided by the European Commission

This section summarises key decisions of the European Commission relative to the application of competition law in the postal sector since 2000.[147]

147 The cut off date of the review of cases is 2000. We do not discuss explicitly the 1998 Postal Notice that aims to explain the approach of the Commission on the application of all branches of competition law (antitrust and State aids) to the postal sector. This Notice was relevant to all the cases we analyse in this section: Notice from the Commission of 1998 on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, O.J. 1998 C 39/2. Briefly, the most important pre-2000 cases were as follows: Case 41/83, Italy v. Commission, 1983 ECR 873 (first case to apply competition rules to the post office); Case C-320/91, Corbeau, [1993] ECR, I-2533 (first decision on scope of the postal monopoly; held monopoly may not include services that are not dissociable from universal service). Although the 1988 complaint of the International Courier Conference, Case IV/32.791-Remail, was ultimately dismissed by the Commission in 1995, this case precipitated both the Postal Green Paper, which led to the Postal Directive of 1997, and the Reims terminal dues agreements, discussed below. See James I. Campbell Jr., “Remail: Catalyst for Liberalizing European Postal Markets.” In Liberalisation of Postal Markets: Papers Presented at the 6th Königswinter Seminar, eds. Gabriele Kulenkampff and Hilke Smit. WIK Proceedings Vol. 7. Bad Honnef, Germany: WIK, 2002. A very important pre-2000 merger decision was Commission Decision of 26 June 1998, Case No. IV/M.1168 - DHL/Deutsche Post, which paved the way for the creation of Deustche Post A.G.

4.1.1.1 Article 81 cases (Agreements or concerted practices)

(a) REIMS II Renewal (2003)[148]

In 1999, the Commission exempted for the period between 1 April 1999 and 31 December 2001 the REIMS II agreement between 16 European postal operators (including the incumbent postal operators of all EU-15 Member States other than the Netherlands, and the PPOs of Norway and Iceland) on terminal dues, i.e. the remuneration for the costs of delivering cross-border mail in the country of destination. Historically, this remuneration did not reflect the costs of delivering such mail and caused distortions of mail traffic. The agreement aimed at introducing prices that reflect more properly the actual cost structures, in line with the principles introduced by the First Postal Directive. Given that there was not enough reliable information on the costs incurred by the parties concerned as most of them were still in the process of setting up proper cost accounting systems, the agreement has been considered indispensable for attaining the objectives pursued in the short term.[149]

In practice, the REIMS II agreement led to substantial improvements in the quality of cross-border mail services and to prices which reflected more properly the actual cost of delivering incoming cross-border mail.

In 2003, the Commission adopted a new decision granting 17 European postal operators a further five-year exemption (until the end of 2006) with respect to the system of terminal dues.[150] The decision furthermore required that new entrants on the recently liberalised markets for outgoing cross-border mail would be able to enjoy the same terms for the delivery of incoming cross border mail as the REIMS II parties.

After the expiry of the said decision, the exemption was not further renewed as the system of application of Article 81 has been fundamentally reformed in May 2004.[151] The ex-ante exemption system that could only be given by the European Commission under Article 81(3) of the EC Treaty has been replaced by an ex post analysis that could be performed by the Commission, but also the NCAs and national courts. Therefore, the postal operators should no longer request an ex ante exemption of their agreement from the Commission, but should assess themselves if the agreement is fulfilling the conditions of Article 81.3. If not, their agreement may be condemned by the Commission, the NCAs or national courts.

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148 Commission Decision of 23 October 2003, Case 38.170 *REIMS II renotification*, O.J. 2004 L56/76.
149 Commission Decision of 15 September 1999, Case 36.748 *REIMS II*, O.J. 1999 L275/17.
150 Commission Decision of 23 October 2003, Case 38.170 *REIMS II renotification*, O.J. 2004 L56/76.
151 Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, O.J. 2003 L 1/1, Arts 1 and 2.

4.1.1.2 Article 82 cases (Abuses of dominant position)[152]

(a) United Parcel Service v. Deutsche Post AG I (2001)[153]

In 1994, United Parcel Service, a private operator in the business parcel sector active in Germany lodged a complaint with the Commission, alleging that Deutsche Post was using revenues from its profitable letter-mail monopoly to finance a strategy of below-cost selling in business parcel services, which were open to competition.

In its first formal decision in the postal sector under Article 82 of the EC Treaty, the Commission condemned Deutsche Post AG (DPAG) for two separate abuses of dominant position:

(1) Predatory pricing in the market for business parcel services. For the first time in the postal sector, a Commission's decision sets forth a standard for measuring those "cross-subsidies" between the monopoly area and competitive activities that result in predatory prices in the latter: any service provided by the beneficiary of a monopoly in open competition has to cover at least the additional or incremental cost incurred in branching out into the competitive sector. The Commission considered that any cost coverage below this level is predatory pricing. In this case, the investigation revealed that DPAG, for a period of five years, did not cover the costs incremental to providing the delivery service for mail-order parcels, hence was charging a predatory price.

The reason why no fine was imposed for this abuse was that the economic cost concepts used to identify predation were not sufficiently developed at the time the abuse occurred. Furthermore, DPAG was tackling the issue in a satisfactory way as it undertook vis-à-vis the Commission to create a separate company to supply business parcel services (NewCo). This new entity was free to procure the "inputs" necessary for its services (such inputs include, e.g., sorting, transport and delivery services) either from DPAG or from third parties or produce these "inputs" itself. Should the separate entity choose to purchase the "inputs" from DPAG, the latter has to provide the entity all goods and services at market prices. In addition DPAG has undertaken that all "inputs" it supplies to the separate entity would be supplied to Newco's competitors at the same price and under the same conditions. Thus, DPAG has no incentive to charge prices below "market" prices when selling "inputs" to the separate entity.

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152 See the overview by Derenne and Stockford (2000), „Abuse of Market Power in Postal Services: Lessons from the Commission's Decisional Practice and Court of Justice" in Geradin, *The Liberalization of Postal Services in the European Union*, Kluwer, 2000, 139.

153 Commission Decision 2001/354 of 20 March 2001, Case 35.141 *Deutsche Post AG*, O.J. 2001 L125/27.

(2) Fidelity rebates granted to all major customers in the mail-order business. The Commission's investigation revealed that from 1974 through October 2000, DPAG gave substantial discounts to its large mail order customers on the condition that the customer sent its entire mail-order parcel business or at least a sizeable proportion thereof via DPAG. The fidelity rebate scheme essentially precluded any private competitor from reaching the "critical mass" (estimated at an annual turnover of 100 million parcels) to successfully enter the German mail-order delivery market. This was borne out by the fact that between 1990 through 1999 DPAG had a stable volume-based share of the mail-order parcel market exceeding 85%.

In light of the fact that fidelity rebates given by an undertaking in a dominant position have repeatedly been condemned by the Community courts and given the long duration of the scheme in the case at issue, the Commission considered that a fine of 24 million Euro was appropriate for this second abuse.

(b) British Post Office v. Deutsche Post II (2001)[154]

In 1998, the public postal operator of the UK, the British Post Office, filed a complaint with the Commission which alleged that Deutsche Post had frequently intercepted, surcharged and delayed international mail from the UK arriving in Germany. The dispute stemmed from a fundamental disagreement how to identify the sender of international mailings. On the one hand, Deutsche Post argued that any incoming international mail containing a reference to Germany usually in the form of a German reply address had to be considered as having a German sender, regardless of where the mail was produced or posted. Under the allegation that mailings of this type were in fact circumvented domestic mail (so-called A-B-A remail), Deutsche Post intercepted the mailings and refused to deliver the letters to its addressees unless the full domestic tariff applicable in Germany was paid. This refusal of Deutsche Post resulted in long delays, up to several weeks. On the other hand, Post Office argued that all outgoing mail produced and posted in the UK had to be processed like international mail, regardless of its contents.

The Commission's investigation revealed that the disputed mailings did not have German senders. The mailings were produced and posted in the UK, or alternatively, produced in Sweden or in the Netherlands and posted to Germany via the UK. The mail was thus not circumvented domestic mail and had to been treated as normal international mail when entering Germany from the UK. The Commission found that Deutsche Post abused its dominant position in the German market for the delivery of international mail in four ways.

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154 Commission Decision 2001/892 of 25 July 2001, Case 36.915 *Deutsche Post AG — Interception of cross-border mail*, O.J. 2001 L331/40.

(1) Deutsche Post *discriminated* between different customers;

(2) *refused to supply* its delivery service unless an unjustified surcharge was paid;

(3) the *price* charged for the service was *excessive;*

(4) the behaviour of Deutsche Post *limited the development* of the German market for the delivery of international mail and of the UK market for international mail bound for Germany.

During the course of the proceedings, Deutsche Post gave a commitment to no longer intercept, surcharge or delay international mail of the type concerned by this case. Deutsche Post undertook to deliver all mailings without delay even in cases where there were doubts whether the mail was actually circumvented domestic mail (i.e. genuine A-B-A remail). Surcharge claims if they were justified have to be made after the delivery of the mail.

For years, the behaviour of Deutsche Post had consistently been condoned by German courts, although in posterior judgements Deutsche Post's treatment of incoming international mail had been criticised. Furthermore, at the time when the majority of the interceptions took place there was no Community case law that concerned international mail services. The legal situation was therefore unclear. The commitment by Deutsche Post avoided further delays of mailings and facilitated the detection of further possible infringements. On that basis, the Commission imposed only a symbolic fine of € 1,000 on Deutsche Post.

(c) Hays v. La Poste Belge (2001)[155]

In April 2000, Hays plc., a private operator in postal services based in the United Kingdom, lodged a complaint with the Commission alleging that La Poste was trying to eliminate the Hays document exchange network, which it had been operating in Belgium since 1982. La Poste and Hays were competing in providing B2B services to insurance companies in Belgium. B2B mail services were offered only to a closed group of subscribers for the mutual exchange of business-related documents. B2B mail services offered overnight delivery and time-certain pick-up and delivery, and therefore differed significantly from the general letter mail services covered by the monopoly.

The Commission found that La Poste unilaterally terminated the preferential tariffs that the insurance companies enjoyed previously when sending their general letter mail

155 Commission Decision 2002/180 of 5 December 2001, Case 37.859 *De Post-La Poste*, O.J. 2002 L61/32.

within days after Hays' customers had indicated that they were not interested in the new B2B mail service offered by La Poste. Moreover, La Poste let stand the termination, notified on 30 October 1998, of the preferential tariff until the federation of insurance companies, on 27 January 2000, subscribed to the new B2B service. Following the installation of a new management team, La Poste abolished the tying practice by discontinuing the B2B mail service on 27 June 2001.

By tying the tariff reduction in the reserved area to the subscription of its non-reserved B2B service, La Poste made it impossible for Hays to compete on a level playing field because it could not offer a similar advantage. As La Poste was exploiting the financial resources of the monopoly it enjoyed in general letter mail in order to leverage its dominant position there into the separate and distinct market for B2B services, the Commission imposed a fine of € 2,5 million.

4.1.1.3 Article 86 cases (Member States measures)[156]

(a) Consorzio Risposta+1 v. Italy (2000)[157]

An Italian legislative decree of 1999 reserved to the incumbent the provision in Italy of new postal services offering added value elements, in particular a guarantee that items created electronically arrive at a predetermined date or time, thus *preventing private suppliers from offering the full range of hybrid mail services*.

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156 Note also that in Case C-340/99 TNT Traco v Poste Italiane and Others [2001] ECR I-4109, the Court of Justice held that Article 82 of the EC Treaty, read in conjunction with Article 86, precludes legislation of a Member State which grants a private-law undertaking the exclusive right to operate the universal postal service from making the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, unless it can be shown that the proceeds of such payment are necessary to enable the undertaking to operate the universal postal service in economically acceptable conditions and that the undertaking is required to pay the same dues when itself providing an express mail service not forming part of the universal service.
In Joined Cases C-147/97 and C6148/97 Deutsche Post v GZS and Citicorp [2000] ECR I-825, the Court of Justice held that in the absence of an agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail, it is not contrary to Article 86 of the EC Treaty, read in conjunction with Article 82 of the EC Treaty and Article 49 of the EC Treaty, for a body such as Deutsche Post AG to exercise the right provided for by Article 25(3) of the Universal Postal Convention, in the version adopted on 14 December 1989, to charge, in the cases referred to in the second sentence of Article 25(1) and Article 25(2) thereof, internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which that body belongs. On the other hand, the exercise of such a right is contrary to Article 86(1) of the Treaty, read in conjunction with Article 82 thereof, in so far as the result is that such a body may demand the entire internal postage applicable in the Member State to which it belongs without deducting the terminal dues corresponding to those items of mail paid by the abovementioned postal services.

157 Commission Decision 2001/176 of 21 December 2000, Case 37.721 *Provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy*, O.J. 2001 L53/69.

Delivery at a predetermined date or time was a separate market from traditional delivery services (universal service). There were therefore no grounds for reserving it for a universal service provider which did not offer that service. Furthermore, in order to offer remittance at a predetermined date or time, the incumbent operator would have to set up a completely separate sorting and distribution service. The investment entailed far outweighed any income likely to be generated by that niche market. It would have hardly had been economically viable for the incumbent operator to invest the necessary resources in order to enter a market with a minimal return. The SMEs which had created the necessary infrastructure for services of this type might have been forced to cease operating. No Member State apart from Italy had reserved the delivery phase of hybrid mail at a predetermined date or time for the incumbent operator.

The Commission adopted a decision establishing that the Italian law was incompatible with Article 86(1) of the Treaty, read in conjunction with Article 82. The decision, which was designed to create the necessary legal certainty for private operators, obliged the Italian Government to make clear that remittance at a predetermined date or time was not one of the reserved services.

In 2001, the Italian Government complied with this obligation by adopting a ministerial circular stating that all operators providing day- or time-certain deliveries as part of a new hybrid electronic mail service would be granted a general authorisation to provide these services in Italy.[158]

(b) Snelpd v. France (2001)[159]

This Decision was the result of proceedings initiated by the Commission at the end of 1998 at the request of the SNELPD, a trade association representing the majority of French mail-preparation firms. La Poste was present on the mail-preparation market alongside private firms in that it offered services to businesses itself or via some of its subsidiaries. Since the bulk of mail flows handled by mail-preparation firms were covered by the postal monopoly, they had to do business with La Poste. However, it was La Poste which defined the financial and technical conditions on which mail-preparation firms might have access to its network. It was consequently confronted with a conflict of interests, i.e. in a situation in which it was tempted to discriminate against competitors of the La Poste group by, for example, amending its tariffs at will, defining technical standards in such a way as to eliminate certain mail-preparation firms or applying them differently to different firms.

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158 IP/01/1057 of 24 July 2001.

159 Commission Decision 2002/344 of 23 October 2001, Case 37.133 *Snelpd / France*, O.J. 2002 L120/19.

The French State monitored La Poste's activities and French legislation provided for only partial scrutiny of the conditions which La Poste applied to mail-preparation firms. Moreover, this scrutiny was the responsibility of the Ministry of Finance, which was also responsible for safeguarding the State's financial interests in the public postal operator, a fact which might have affected its impartiality.

In the Commission's view, this conflict of interests encouraged La Poste to abuse its dominant position. Since *French legislation did not provide for sufficiently effective or independent monitoring to neutralise this conflict of interest*, the Commission took the view that the French State has contravened Article 86(1), read in conjunction with Article 82, of the Treaty. During the proceedings, the French authorities announced their intention to create an ombudsman responsible for the universal postal service who would have the power to issue public and reasoned opinions and to intervene in relations between La Poste and its customers and partners.

(c) BdKEP v. Germany and Deutsche Post AG (2004)[160]

The Commission ruled against certain provisions in Germany's postal regulatory framework *which barred commercial mail preparation firms from earning discounts for handing over pre-sorted letters* at Deutsche Post AG's (DPAG) sorting centres. The incriminated provisions induced DPAG to discriminate against mail preparation firms: whilst large senders were allowed to feed self-prepared mail directly into sorting centres and were granted discounts for doing so, commercial firms were barred from discounts for mail preparation.

The decision was adopted pursuant to Article 86 of the EC Treaty. The Commission found that the German government had failed to demonstrate that the discriminatory tariffs were justified on the basis of Article 86(2) and recalled that intermediaries should be able to freely choose from amongst available access points to the public postal network.

(d) Slovakian postal law (2008)

In Slovakia, the delivery of hybrid mail items was open to competition and several private companies were active on that market. However on February 2008 the Slovak Republic adopted an amendment to its postal law, *reserving the delivery of hybrid mail to the incumbent postal operator*, Slovenská Pošta. Since the entry into force of that amendment in April 2008, the delivery of hybrid mail had been re-monopolised to the

160 Commission Decision of 20 October 2004, Case 38.745, *BdKEP*.

benefit of Slovenská Pošta. Private operators were prevented from exercising their activity in this field and, as a consequence, incurred losses that endangered their viability.

The Commission decided that amendments to Slovakia's postal legislation infringed Article 86 of the EC Treaty, read in conjunction with Article 82.[161] As of December 2008, Slovakia had not yet informed the Commission of any measures taken to comply with the decision, the Commission opened an infringement proceeding by sending a letter of formal notice, which is the first step in infringement proceedings under Article 226 of the EC Treaty.[162]

4.1.1.4 Merger cases[163]

This part presents merger cases since 2000 in which remedies have been imposed.[164]

(a) The Post Office/TPG/SPPL (2001)[165]

TPO (The Post Office), TPG and SPPL were the national public postal operators (PPOs) of the UK, the Netherlands and Singapore respectively. The companies planned to set up two joint ventures named Delta (active worldwide, except in the Asian Pacific region) and NewCo (in the Asia Pacific region), which were to be active in the provision of outbound cross-border mail services and, to a limited extent, outbound cross-border parcel services.

Whilst the two joint ventures generally appeared to be pro-competitive, the Commission identified possible competition problems in the UK and the Netherlands because of the

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161 Commission Decision of 7 October 2008, Case 39.562 Slovakian postal legislation relating to hybrid mail services, O.J. 2008 C322/10.

162 IP/08/1997 of 17 December 2008.

163 For an overview of the first merger cases, see Art, „Merger Control in the Postal Sector“, in Geradin, *The Liberalization of Postal Services in the European Union*, Kluwer, 2000, 139.

164 In Case T-175/99 *UPS Europe v Commission* [2002] ECR II-1915, the Court of Justice considered that: the acquisition by Deutsche Post of 22.498% of the shares of DHL could raise problems in the light of the competition rules if the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market. In such a situation, where there are grounds for suspecting an infringement of Article 82 EC, it is necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stems from an abuse of a dominant position. However in this case, the Court considered that proof that the funds used for the acquisition were generated by abusive pricing practices of the buyer in the reserved area was not established.

165 Commission Decision of 13 March 2001, Case M.1915 pursuant Article 8(2) of Regulation 4064/89.

possible elimination of competition between the businesses being contributed to Delta and the respective parent companies, TPG in the Netherlands and TPO in the UK.

Following a Phase II investigation, the Commission concluded that the concentration did not lead to the creation or strengthening of a dominant position in the UK. While the parties had relatively high market shares in the market for outbound cross-border business mail, there were a number of other players in the market with significant shares, including consolidators[166] and third country PPOs. The Commission observed that entry barriers into the UK market were relatively low, as shown by the emergence in the 2000s of several competitors including Deutsche Post and La Poste of France. Such presence of consolidators facilitated entry because access to one consolidator provided access to the mail of many business customers. The UK market also appeared to be relatively transparent, as TPOs prices and rebates were all publicly available, which reduced the risk that TPO could have behaved in a discriminatory manner.

By contrast, the Phase II investigation confirmed the Commission's concerns in relation to the market for outbound cross-border business mail in the Netherlands. At the time of the investigation, there were fewer operators in the Dutch market than in the UK market, and they were all relatively small. With the exception of the UK Post Office (TPO), which had been able to obtain a significant part of outbound traffic destined to the UK, none of the foreign PPOs active in the Netherlands, including Deutsche Post, had achieved sizeable market shares. Because of the lack of transparency in the Dutch market, TPG could have favoured Delta, therefore further aggravating the competitive situation facing other operators. The concentration had, therefore, the effect of eliminating competition between the dominant player, TPG, and the most successful entrant into the Dutch market, TPO.

To remedy these concerns, the parties committed to divest the business that was undertaken by TNT International Mail in the Netherlands (the part of TPG in the Netherlands that was originally intended to be contributed to the Delta joint venture). The success of the remedy depended to a large extent on the characteristics of the purchaser, in particular whether it would have been able to generate sufficient volumes and have access to a cost efficient network such that it would have been able to sell its outbound cross border mail services at prices that are comparable to those which TNT International Mail Netherlands was currently able to offer. In the light of this, the parties proposed an up-front buyer solution and committed themselves not to complete the notified concentration until a binding sale and purchase agreement had been reached with a buyer approved by the Commission.

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166 Consolidators are companies which collect mail and subsequently negotiate special rates with PPOs or with local delivery companies in order to distribute the "consolidated" mail in the country of destination.

(b) Posten AB/Post Danmark AS (2009)[167]

Posten was wholly-owned by the Kingdom of Sweden. It was active in Sweden in the field of postal services (mail and parcels) and in mail preparation services (printing and enveloping) through its subsidiary Strålfors. Post Danmark (PDK) was owned by the Kingdom of Denmark and CVC (a private equity and investment advisory firm), and was mainly active in Denmark in the field of postal services (mail and parcels). Both companies decided to merge.

While the Swedish postal market has been fully liberalised since 1993, the Danish market has not yet been liberalised. The Commission therefore carefully considered the potential effects of the merger on the upcoming liberalisation of the Danish postal market, which must take place before 2011 according to the Postal Directive. The Commission's investigations showed that liberalisation of the Danish mail market was not at risk, as the proposed merger was unlikely to increase barriers to entry or expansion, or impede competition in the Danish mail market.

However, the activities of Posten and Post Danmark overlapped horizontally in the provision of parcel delivery services in Denmark, affecting a number of parcel markets. In addition, a conglomerate relationship existed in Denmark between the provision of printing and enveloping services by Strålfors, a subsidiary of Posten, and mail distribution services by Post Danmark. Thus, the Commission's market investigation showed that the proposed transaction, as initially notified, raised horizontal competition concerns with respect to the domestic standard business to business (B2B) parcel delivery services market in Denmark.

To remedy these concerns, the parties committed to divest assets and customer contracts covering their overlap in the domestic standard B2B parcel delivery services market in Denmark.

167 Commission Decision of 21 April 2009 pursuant to the Article 6(2) of Regulation 139/2004.

4.1.2 Cases by national competition authorities (NCAs)

Our survey of NCAs has requested each NCA to list the three most important competition cases decided by each NCA, or by national courts since January 2004, if any. NCAs were asked to provide a brief description of these cases. The full results of this research are presented in table 4-2 below. For some Member States where no information was available from NCAs, the table was amended by desk research.[168]

Table 4-1 Summary of national competition cases dealing with abuse of dominant positions since 2004

Type of practice	Practice condemned by NCAs in
Loyalty rebates or tying	AT, DK, ES, FR, HU, LT
Discrimination (between consolidators and bulk senders, or between different bulk senders)	DE, DK, ES, FR, IT, LV, SI
Predatory pricing or cross-subsidisation	ES, SI
Anti-competitive agreement	HU

Note: Entries in the table are based on survey responses from NCAs, and analysis of press reports. This may not represent a complete summary of national competition cases.

Table 4-1 above presents the main issues addressed by those NCA that have identified and condemned abuse of market power. We have seen four major types of abuse that NCAs have acted against in the period 2004-2009:[169]

- Some NCAs found that incumbents abused dominant positions by granting fidelity rebates to customers. Typical examples of fidelity rebates are discounts that are granted only if a customer uses the same postal operator for a long period, or rebates that are granted only if a customer sends a minimum specified share (or all) of its volume via the incumbent. Other abusive practice is to tie reserved and un-reserved services. An example for tying is a discount for dominant (or reserved) services that is granted only if the customer also purchases more competitive services (such as delivery of unaddressed items, direct mail, or magazines) from the incumbent.

- Anti-competitive, discriminatory practices were found by some NCAs. In some cases, e.g. in Denmark, these practices resulted apparently from lack of transparency in the dominant operator's pricing, and discretionary prices offered to different customers. In other cases, such as in Germany and Spain,

168 For a summary of earlier competition cases, see WIK-Consult (2006), Main developments in the European postal sector (2004-2006), Appendix A-2.

169 Where NCAs have provided information on cases decided prior to 2004, these cases are included in the table in the appendix (even though our survey had not specifically requested such information). However, these pre-2004 cases were not considered in preparing the table on this page.

incumbent operators had applied different tariffs to consolidators and bulk senders until NCAs clarified that this practice was not compliant with competition law.[170]

- In light of the significant share of common costs in postal operations, and a general lack of transparency about postal costs (see section 3.6), finding evidence of predatory prices, or cross-subsidies appears very difficult. Nevertheless, a few NCAs have determined such below-cost pricing and acted against it.

- Finally, NCAs can possibly act against anti-competitive agreements (cartels), and the Hungarian NCAs has apparently adopted a decision in this regard. However, this practice does not appear as a major area of concern in the postal sector as the relevant geographical markets have largely remained the national territories, and incumbents continue to enjoy dominant positions in these markets.

Not surprisingly, many of the cases decided by NCAs occurred in countries where entrants have actually started to compete with the incumbent operators (AT, DE, DK, ES, SE).

It should be noted that in Sweden, where postal markets were effectively liberalised as early as 1993, the competition authority and national courts had scrutinised alleged discriminatory pricing before 2004 (and these cases are thus not reported in the table above). As early as in the 1990s, a series of major cases were decided by different courts in Sweden. By the time, Sweden Post planned to introduce zonal prices such that different prices would be charged according to zones, i.e. areas where the letters are to be delivered. Competitors to Sweden Post complained that the cheapest zone was almost identical to the area where they were offering service to compete with the incumbent. The discussion was whether the zonal prices indeed reflected cost differences, or were used by Sweden Post primarily to undercut their competitors' prices in the limited areas where there was any competition. In 1998, the courts finally agreed to a revised pricing scheme, with two different zone.[171]

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170 In the German case, this discrimination between consolidators and bulk senders was not introduces by the incumbent in the first place but resulted from NRA decisions on downstream access)

171 For a detailed discussion of the Swedish case, see Wetter, Carl and Olle Rislund (1999): Geographical pricing in the postal sector. The Swedish zone price case, in: European Competition Law Review, Vol. 20, No. 4, p.240-4; and Zauner, Martin (2008): "Wettbewerbspolitische Beurteilung von Rabattsystemen im Postmarkt", WIK discussion paper no. 306. p. 39f.

Table 4-2 List of cases decided by national competition authorities (most significant cases in the postal sector since 2004)

Country	Case	NCA	Parties involved	Main subject/comments
AT	26 KT 29 (2005)	Bundeswettbewerbsbehörde (Kartellgericht)	Redmail / Österreichische Post AG	**Abuse of dominant position condemned: Loyalty rebates for** newspapers and magazines Österreichische Post AG abused its dominant position in the market for daily delivery of daily newspapers as well as in the market for the delivery of weekly and monthly newspapers by granting the lowest charges for the delivery of newspapers in the years 2002 to 2006 only to publishers which in none of these years asked for less newspaper deliveries than 90% of the deliveries they had asked for in the year 2001. The decision was **confirmed by the Supreme court of justice** in 2006. [Description prepared by WIK-Consult based on press releases.]
BE	None	Direction générale de la concurrence		
BG	None	Commission on Protection of Competition	Bulgarian Post	The only case concerned a decision, issued by the NRA, in which the authority obliged the Bulgarian Post to enter into a contract with another postal operator for mutual access to the network. The case was left without consideration by the NCA due to expiration of the time for appealing.
CY	None	Commission for the Protection of Competition		
CZ	None	Office for the Protection of Competition		
DE	B9-55/03 of 11th February 2005	Federal Cartel Office (Bundeskartellamt)	Deniz Intelligente Dienst-leistungen, Bremen; PIN intelligente Diestleistungen AG; IHK Gesellschaft für Informationsverarbeitung mbH; Bundesverband Internationaler Expess- und Kurierdienste e.V. („BIEK“) / Deutsche Post AG	**Abuse of dominant position condemned: Discrimination between consolidators and bulk senders** The complainants accused DP AG of refusing to grant consolidators feeding in postal items below the weight and price restrictions indicated in its exclusive licence access to partial services provided by DP AG and discounts for services provided by the consolidators themselves under § 28 (1) of the Postal Act (“access discounts”). Consolidators are postal service providers which collect postal items from various senders, render certain services within the letter conveyance chain themselves and then feed in these letter post items into DP AG’s distribution chain. The services provided by DP AG are classified as “access services” and account for the remaining part of the conveyance chain after the services provided by the postal service provider (consolidator). The fee charged by DP AG for its conveyance service is based on the standard postage charge for the respective letter post items minus the “access discount”. However, the discount is only granted if certain minimum mailing volumes are fed into the conveyance chain. The consolidators collect letter post items from several (smaller) senders in order to achieve the minimum volumes required for the award of a discount. In this way the consolidators can offer end customers (senders) a reduction in postage charges if they only use a proportion of the discounts to cover their costs and, where possible, keep this as profit. DP AG’s action constituted a breach of § 20 GWB (Prohibition of Discrimination) and Art. 82 EC.

Country	Case	NCA	Parties involved	Main subject/comments
				DP AG was prohibited from denying companies with a postal licence under § 51 (1) sentence 2 no. 5 of the Postal Act and which feed in consolidated and presorted post items from several senders into DP AG's sorting centres (consolidators) access to partial services under § 28 (1) of the Postal Act and discounts for the services they render themselves ("partial service discounts") for mail items below the weight and price limits indicated in its exclusive licence (§ 51 (1) sentence 1 of the Postal Act) whereas at the same time granting senders ("bulk senders") access to partial services and partial discounts irrespective of the weight and price limits stated in the exclusive licence and granting consolidators access and discounts for feeding in mail exceeding the weight and price limits of the exclusive licence.
DE	VI – Kart 3/05 (V)	Düsseldorf Higher Regional Court	Bundeskartellamt / Deutsche Post AG	**Appeal removed** DP AG appealed against the Bundeskartellamt's prohibition decision at the Düsseldorf Higher Regional Court and applied to have the suspensive effect of the objection restored. In its decision of 13 April 2005 (VI – Kart 3/05 (V)) the Düsseldorf Higher Regional Court had rejected the application for restoration of the suspensive effect of the appeal with the result that DP AG had to grant access to partial services until the decision in the main issue. For the decision to be taken in the main issue it was of great importance how § 51 (1) sentences 1 and 2 No. 5 of the Postal Act were to be interpreted in consideration of the requirements of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service and how the relevant requirements of the Directive itself were to be interpreted. At issue was the question, in particular, whether DP AG is obliged under the exclusive licence clause of § 51 (1) sentence 1 of the Postal Act to grant competitors non-discriminatory access to partial services. The Düsseldorf Higher Regional Court had suspended the proceedings in the main issue because the Cologne Administrative Court had submitted a similar question to the European Court of Justice on the interpretation of Article 234 EC in several proceedings. In its ruling of 6 March 2008 (joined cases C-287/06 to C-292/06 – "Vedat Deniz decision") the European Court of Justice decided that the Directive 97/67/EC is to interpreted such that businesses which consolidate, on a commercial basis and in their own name, postal items from various senders cannot be denied special tariffs which the national universal postal service provider grants within the scope of its exclusive licence to business customers for the deposit of minimum quantities of pre-sorted mail at its sorting offices. As a consequence, on 25 April 2008 DP AG withdrew its appeal against the Bundeskartellamt's prohibition decision. The Bundeskartellamt's decision is therefore legally valid.
DE	KVR 26/03	Federal Court of Justice	Deutsche Post AG / trans-o-flex Schnell-Lieferdienst GmBH	**Merger prohibited** The Bundeskartellamt had prohibited DP AG from acquiring a 24.8 % participation in trans-o-flex because the merger would have strengthened DP AG's dominant position. The Federal Court of Justice confirmed the Bundeskartellamt's prohibition decision because the merger would have secured DP AG's dominant position vis à vis any prospective future competition by a further competitor and would have thus strengthened the current market position of the dominant company.

Country	Case	NCA	Parties involved	Main subject/comments
DK	Various cases	Konkurrencestyrelsen	Post Danmark A/S / Forbruger-Kontakt / Bring CityMail Denmark A/S	**Abuse of dominant position condemned: Discrimination and loyalty rebates** According to press releases by the Danish NCA, the authority took at least three decisions to condemn abuse of dominant position by Post Danmark. 1) Based on a complaint by Forbruger-Kontakt, a provider of delivery services for unaddressed mail and publications in Denmark, the NCA has reviewed the pricing practice of Post Danmark in the market for unaddressed items and local weekly publications. In a decision taken in September 2004, the NCA decided that Post Danmark had violated competition law by using discriminatory prices and loyalty rebates in 2003 and 2004. This decision was upheld by the Competition Appeals Board and the High Court of Eastern Denmark and is currently pending at the Supreme Court. According to press articles, there was a fine imposed by the High Court of Eastern Denmark, but no reliable information on fines was available from the Danish NCA for this study.[172] Based on the same complaint by Forbruger-Kontakt, the NCA determined in a decision taken in November 2004 that Post Danmark had not abused its dominant position by engaging in predatory pricing in 2003 and 2004.[173] 2) Based on a different complaint by Forbruger-Kontakt, the NCA has reviewed the pricing practice of Post Danmark in the market for clearing, sorting, transport and delivery of magazine mail in Denmark. In August 2007, the NCA determined that Post Danmark had abused its dominant position, as Post Danmark's prices and rebates for magazine mail were found to be loyalty enhancing, anti-competitive and discriminating without being cost substantiated by Post Danmark. It appears that a primary concern was a lack of transparency in Post Danmark's prices as the firm had offered its customers different price lists and rebates to its customers, without a justification based on costs. Post Danmark was ordered to rearrange its pricing. No information on possible fines was available for this study. the situation. This decision was not appealed.[174] 3) Based on a complaint by Bring CityMail, the NCA has reviewed Post Danmark's rebates for direct mail. In June 2009, the NCA decided that these rebates are loyalty enhancing and anti-competitive and ordered Post Danmark to bring this infringement to an end. No information on possible fines was available for this study.[175]
EE	None	Estonian Competition Authority		

172 See Konkurrencestyrelsen press notes 2004-09-29: Post Danmark Abuse of dominant position (discriminating prices); and 2009-06-24: The Danish Competition Council's decision of 24 June 2009 on Post Danmark's Rebate System for Direct Mail.

173 See Konkurrencestyrelsen press note 2004-11-24: Post Danmark did not abuse a dominant position by predatory pricing.

174 See Konkurrencestyrelsen press notes 2007-08-30: Post Denmark has abused its dominant position in the market for magazine mail; and 2009-06-24: The Danish Competition Council's decision of 24 June 2009 on Post Danmark's Rebate System for Direct Mail.

175 See Konkurrencestyrelsen press note 2009-06-24: The Danish Competition Council's decision of 24 June 2009 on Post Danmark's Rebate System for Direct Mail.

Country	Case	NCA	Parties involved	Main subject/comments
EL	None	Hellenic Competition Commission		Information according to NRA (EETT)
ES	Nº TDC 568/03 Asempre-Corres	National Competition Commission / Decisions confirmed by Spanish Court	Asempre (Postal undertakings Association) / Correos y Telégrafos Sae (National Universal Services Provider)	**Abuse of dominant position condemned: Tying** Tying of liberalised postal services with reserved postal services, by rebates and exclusive clauses in agreements for supplying postal services between Correos and some banks. Mentioned practises were an infringement of Article 6 from the Spanish Competition Law and of Artice 82 from the CE Treaty
ES	Nº TDC 584/04 Prensa -Correos	National Competition Commission / Decisions confirmed by Spanish Court	Asociatión de Prensa Profesional (APP) / Correos y Telégrafos Sae	**Abuse of dominant position condemned: Discrimination** Discrimination between publishers made by Correos on its agreement to supply postal services. The mentioned practises were an infringement of Article 6 from the Spanish Competition Law.
ES	Nº SDC 2458/03 Correos-Asempre Commitments Decision	National Competition Commission	Asempre / Correos y Telégrafos Sae	**Abuse of dominant position: Predatory pricing** Procedure started with a complaint on predatory prices. Commitments decision dealt with Correos commitments to apply always prices above cost to its big clients.
FI	None	Finish Competition Authority		
FR	Decision no. 05-D-63, 17 November 2005	French Competition Authority	Syndicat national des entreprises de logistique de publicité directe (National Association of Direct Advertising Logistics Companies, or SNELPD) asked the Autorité to investigate; the Autorité then proceeded ex officio / La Poste	**Abuse of dominant position condemned: Discrimination** La Poste was not offering "general tariff" and "specific tariff" rates in bulk mail contracts consistently throughout France. However, the NCA found that La Poste acted negligently in responding to the problem rather than deliberately promoting a discriminatory price scheme and thus limited the fine to one million Euros.
FR	Decision no. 4-D-65, 30 Nov. 2004	French Competition Authority	Autorité / La Poste	**Abuse of dominant position condemned: Loyalty rebate** The legality of certain rebates provided by La Poste with important clients. The Autorité found that certain clients were still receiving tied loyalty rebates despite prior advice by the Autorité that these practices were illegal. The Autorité reduced the fine in accordance with the negotiated settlement procedure set forth in Art. L. 464-2 of the Commercial Code.

Country	Case	NCA	Parties involved	Main subject/comments
FR	Decision no. 09-D-09, 26 Feb. 2009	French Competition Authority	Stamper's, a private operator authorised by ARCEP to offer regional mail delivery Services / La Poste	**Abuse of dominant position: Complaint rejected** Whether La Poste's insistence that clients wishing to change service providers change their address to add a post office box constituted an abuse of its dominant position designed to drive competitors from the market The Autorité declined to apply interim measures because it found that the addition of a post office box was the only way to ensure effective operation of a collection and delivery service provided by a third party.
FR	Decision no. 05/24993, March 26, 2008	La Cour d'appel de Paris (the Paris Court of Appeals), Chambre 5, section A	15 mail routing companies / La Poste	**Abuse of dominant position: Complaint rejected** The routers engaged la Poste's civil responsibility for private damages due to la Poste's alleged abuse of its dominant position and discriminatory price practices in not granting the routers discounted commercial contracts of the nature that it provides to its bulk mail clients. The result was no abuse of a dominant position under Art. 82 ECT because 1) no discriminatory effects for consumers; 2) routers are not considered "clients" of la Poste; rather, they are intermediaries in postal operations as they have no control over demand and 3) bulk mail clients and routers are not active within the same market, and thus are not in competition.
FR	Decision no. 186227 186356, 29 Sept. 1999	Le Conseil d'Etat (France's highest administrative court)	Request made by the Association of scientific and cultural press publishers (SPCS) to the Conseil d'Etat to modify certain provisions in the Postal and Telecommunications Code that were introduced by a proposed bill.	**Anticompetitive practice: Complaint rejected** The SPCS alleged that certain provisions in the Code according postal discounts to press publishers providing news of a "general" or "political" nature were susceptible to encouraging cartels. Result: 1) the principle of equality with regard to public service does not oppose treating parties differently if said parties are in different situations; and 2) the provisions in question do not promote cartels because they don't directly place benefiting parties in a situation contrary to competition legislation.
HU	Vj-174/2005 Magyar Posta Zrt. (Hungarian Post Co. Ltd.)	Hungarian Competition Authority	A company which is in the market of producing postal items / Magyar Posta Zrt.	**Abuse of dominant position condemned: Tying and rebates** The rebate scheme of Magyar Posta (MP) was investigated, This case illustrated the complementary characters of competition law and sector specific regulation. Both NCA and NRA investigated the rebated scheme of MP without interfering. NCA and NRA consulted each other about the scopes of their investigations at the beginning, so that the NRA focussed on controlling complying with regulation (e.g. rules on the transparency of the rebate scheme), and NCA focussed on the competitive effects of the rebate scheme. The NCA defined the loyalty rebates in line with the European case law, and applied (to some extent) an effect-based approach (stating that a rebate which could be held loyalty rebate, is not necessary lawful, if the size of the rebate is very low). The NCA also stated that rebates which link competitive (producing postal items) and reserved markets (delivery of basic letters) could breach competition law (leverage of dominant position). The NCA in its decision dealt also with a rather regulatory subject (but only from competition policy point of view): the issue of providing reserved postal services by the employee leasing (due to a legal gap NRA could not properly tackle this issue then).

Country	Case	NCA	Parties involved	Main subject/comments
HU	Vj-140/2006 Restrictive agreement between the Magyar Lapterjeszto Zrt. and Magyar Posta Zrt.	Hungarian Competition Authority	Magyar Lapterjeszto Zrt / Magyar Posta Zrt.	**Anti-competitive agreement** The 2 companies agreed not to attack each others markets. The NCA established infringement on the basis of Hungarian and European competition law both. A fine of EUR 1 890 000 was imposed on each of the two undertakings.
HU	Vj-167/2001	Hungarian Competition Authority	A company which is in the market of producing postal items / Magyar Posta Zrt	**Abuse of dominant position condemned: Tying and rebates** The case focussed on the rebate which linked competitive and non competitive markets. Magyar Posta Zrt infringed the competition rules because it gave higher discount (from the postal delivery price) whenever the item to be delivered (generally invoices) was created by itself. Seem to be a similar case than above. As this decision dated back of 2001 should be mentioned above?
IE	No information	The Competition Authority		
IS	No information	Icelandic Competition Authority		
IT	N. A365, POSTA ELETTRONICA IBRIDA	Italian Competition Authority	TNT Post and others / Poste Italiane S.p.A. and its subsidiary Postel S.p.A.	**Abuse of dominant position condemned: Discrimination** Abuse of dominant position in the market for delivery of hybrid e-mail by giving preference to its subsidiary Postel, thereby foreclosing a market which had been opened to competitors that print and put mail into envelopes for large companies. The Italian Competition Authority decided that the Italian Post Office had abused its dominant position. The Authority imposed a fine of €1.6 million on Poste Italiane.
IT	N. A388 - POSTE ITALIANE-CONCESSIONARI SERVIZI POSTALI	Italian Competition Authority	Associazione Imprese Servizi Postali (AISP); Consorzio Proposte 2000; Federazione Imprese di Servizi; Associazione delle Agenzie di Recapito Espresso / Poste Italiane S.p.A.	**Abuse of dominant position condemned: Discrimination** The sub-contracting agreements stipulated with competitors were evidence of a concerted strategy to reinforce and extend its dominant position in already liberalised services and in those that are to be liberalised. The Italian Competition Authority decided to accept and render binding the commitments proposed by Poste Italiane because they remove the anticompetitive stance.
LT		Competition Council of the Republic of Lithuania	UAB BMK. / AB Lietuvos paštas	**Abuse of dominant position condemned: Tying** The AB Lietuvos paštas had a dominant position in the universal postal services market (thus it was a dominant in the invoices delivering market) and has abused it in the invoices printing and enveloping market.
LU	None	Competition Inspectorate, Ministry of Economics and Foreign Trade		

Country	Case	NCA	Parties involved	Main subject/comments
LV		Competition Council	Subscription office "Diena" / Post of Latvia	**Abuse of dominant position condemned: Discrimination** Latvia Post was obliged to stop the practice to arrange such provisions in the market of subscription and delivery of newspapers and magazines (S&D) that restrict and distort competition.
LV	No.A42428306	The Administrative District court	Post of Latvia / Competition Council of Latvia	**NCA Decision confirmed in appeal** Post of Latvia argued that the Competition Council of Latvia wrongly distinguished S&D market from retail market; disagreed with the geographic market -whole Latvia arguing that the applicant (competing company) operated only in some regions in Latvia). abusive practice - marketing campaign prior to the coming subscription year - "Subscribe cheaper in Post". The Court confirmed that the CC has rightly defined the relevant market and accordingly the dominant position of the Post in this market. The Court confirmed that the Competition Council of Latvia has rightly established abuse of dominant position by undertaking marketing campaign "Subscribe cheaper by Post" . Establishment of the economic advantage on the account of other competitors, thereby harming them, amounts to abuse of market power.
MT	None	Office of Fair Competition		
NL	5994/Koninklijke TNT Post - Cendris BSC	Netherlands Competition Authority	Koninklijke TNT Post - Cendris BSC	**Merger approved** Merger of Royal TNT/ Cendris was approved.
NL	6576/ Deutsche Post – Selekt Mail	Netherlands Competition Authority	Deutsche Post – Selekt Mail	**Merger approved** Merger of Deutsche Post / SelektMail was approved.
NL	3879 Keizer vs. TPG Post	Netherlands Competition Authority	Keizer (natural person)/ TPG Post	**Abuse of dominant position: complaint rejected** A compliant regarding tariffs of the use of P.O. Boxes was rejected: in an earlier investigation the Netherlands Competition Authority concluded that TNT does not abuse its dominant position through the tariffs of P.O. Boxes .
NO	No information	Konkurransetilsynet		
PL	No information	Office of Competition and Consumer Protection (UOKIK)		
PT	No information	Autoridade da Concorrencia		
RO	Decision no. 65 from 13.08.2008	Romanian Competition Council	SC RTC Holding BV / SC CURIERO SA	**Merger approved** Economic concentration realised by SC RTC Holding BV through achieving the sole control over SC CURIERO SA and over the undertakings controlled by the latter, respectively S.C. CURIERO EXPRESS SRL and S.C. CURIERO SPEDITION SRL

Country	Case	NCA	Parties involved	Main subject/comments
RO	Decision no. 68 from 04.09.2008	Romanian Competition Council	Deutsche Post AG / S.C. Cargus International SRL	**Merger approved** Competition Council authorises the economic concentration realised by Deutsche Post AG through S.C. Cargus Expres Curier SRL - a new local subsidiary conceived to be DPAG's vehicle for this economic concentration, through achieving the sole control over S.C. CARGUS International SRL, observing that although the notified economic concentration operation falls within the scope of the Law, there are no serious doubts as regards the compatibility with normal competitive environment.
SE	Merger between Posten AB and Strålfors AB	Swedish Competition Authority	Posten AB / Strålfors AB	**Merger approved** The Competition Authority took no action on Posten's acquisition of Strålfors. This was partly based on the voluntary undertakings made by Posten during the investigation, which were also linked to a financial penalty of SEK 100 million by Stockholm District Court.
SE	Various cases	Swedish Competition Authority	Bring CityMail / Posten	**Abuse of dominant position: Complaint rejected** Complaint by Bring CityMail that Posten AB abused its dominant position concerning zone-related pricing on bulk mail. The Competition authority rejected that complaint as it was not possible to prove abuse
SI	Decision 306-35/2005-98 of 28 May 2008 – Slovenian Post (unaddressed mail items).	UVK	Euromedia / Slovenian Post (ex officio case)	**Abuse of dominant position: Cross-subsidisation and discrimination** The complainant is a competitor to the Slovenian Post on the market for the delivery of unaddressed mail items. The investigation related to an alleged abuse of a dominant position by the Slovenian Post (also Article 82 of the EC Treaty) / cross-subsidisation of delivery of unaddressed mail from income of reserved area / Discrimination in providing services for different customers. UVK adopted commitments of Slovenian Post that are regularly (annually) monitored and assessed and which addressed main concerns identified during the procedure.
SK	None	Antimonopoly Office of the Slovak Republic		
UK	None	The Office of Fair Trading		

Unless mentioned otherwise, case descriptions in this tables are based on input received from NCAs in response to the questionnaire survey (Text edited slightly). In this survey, NCAs were asked to describe briefly the three most significant cases adopted by the NCA or a court applying EU or national competition rules to the postal sector since 1 January 2004. For a summary of earlier competition cases, see WIK-Consult (2006), Main developments in the European postal sector (2004-2006), Appendix A-2.

4.1.3 Conclusions on the application of antitrust law

This overview of the cases since 2000 shows that the application of antitrust policy to the Postal sector has been important at the European[176] and at the national level.

- Regarding anti-competitive agreements (Article 81 type of cases), there are very few decisions after 2000, the most important one being the REIMS II renewal in 2003 until 2008. Given the new system of application of Article 81(3) of the EC Treaty, the exemption has not been extended further.

- Most of the cases related to abuse of dominant position (Article 82 type of cases). In 2000, three important decisions were adopted by the European Commission against the German and the Belgian incumbents. Since the decentralisation of competition law in 2004, the NCAs have taken over by adopting several infringement decisions. In most of these cases, the incumbent postal operator relies on its monopoly or super dominant position in the traditional markets (in many countries still being reserved markets) to impede entry to markets that are progressively open to competition and slow down the liberalisation provided by the Postal Directive, or to build up its presence in the market for delivery of unaddressed items (which never was reserved in most Member States). To do so, several strategies have been used by the incumbents: tying the reserved and non-reserved services, giving loyalty rebates or charging predatory prices on non-reserved markets, or refusing to give access to their postal networks.

- Regarding Member States measures that unduly favour the incumbents (Article 86 type of cases), the Commission has acted against in several instances where national laws that extend the monopoly of the incumbent beyond reserved services, or that encourage anti-competitive discriminatory behaviours by the incumbents.

- Finally regarding merger cases, few have led to remedies, although some have led to behavioural remedies in the 1990s (equal access and limitation in time of exclusive access, separate accounts) and structural remedies (divestiture) more recently.

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176 For an analysis of the Commission cases in the literature, see Baratta, Buiges, Fehrenbach, Johansson, Lüder (2001), „The Application of EC Competition Rules in the Postal Sector“, Paper presented at the Second IDEI Conference; Geradin and Henry (2004), „Regulatory and Competition Law Remedies in the Postal Sector“, in Geradin (ed), Remedies in Network Industries, Intersentia; Geradin (2006),“Enhancing competition in the postal sector: can we do away with sector-specific regulation?“, paper presented at the 14th Conference on Postal and Delivery Economics.

With the full liberalisation of the sector in 2011/2013, we expect the application of antitrust policy to increase for at least two reasons. First, antitrust law will support and complement sector regulation to ensure that effective competition increases in the sector. Second, as more competitors are expected to enter in the sector, they will rely increasingly on antitrust provisions to ensure that their entry is not unduly impeded by the incumbents. Indeed, the experience of the liberalisation in other network industries, such as electronic communications show that liberalisation has been accompanied by an increased application of antitrust policy.[177] In some cases, regulatory issues have generated new competition law theories such as margin squeezes[178] and access to essential facilities. In other cases, competition law has been used to change the structure of a market (so-called "regulatory antitrust") and achieve regulatory purposes by correcting the inadequacy of sector-specific regulation.[179]

Therefore, it is important to reflect upon an appropriate design that ensures an efficient application of antitrust and the best relationship between competition law and sector-specific regulation.[180] Our suggestions are based on the experience in the Member States in the postal sector and on the experiences in other sectors. In principle, it is preferable to have two authorities, one in charge of competition law in general, the NCA, and one in charge of sector regulation, the NRA (possibly with concurrent power to apply competition law in the postal sector).[181] Such structure reduces the risk of regulatory capture of the public authorities by the industry for at least two reasons: first, authorities having a broad horizontal portfolio of activities, such as competition authorities, are less prone to capture by a specific industry. Second, it is more difficult and resources intensive to capture two authorities instead of one.

Two major conclusions on the efficient application of antitrust, and the best relationship between competition law and sector-specific regulation emerge from our analysis in this

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177 See de Streel (2004) "Remedies in the European Electronic Communications Sector", in Geradin (ed), *Remedies in Network Industries: EC Competition Law vs. Sector-Specific Regulation*, Intersentia, 67; Garzaniti (2009)*Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation*, 3rd edition, Sweet & Maxwell, Chapter VIII.

178 See Case 37.351 *Deutsche Telekom*, Case 38.784 *Telefonica*.

179 See for instance Case 35.337 *Atlas GlobalOne*, Case 36.559 *BiB/Open*, Case M.1439 *Telia/Telenor*, case M.2803 *Telia/Sonera*. This approach has been implicitly endorsed by the Court of First Instance in the electricity sector in Case T-87/05 *Energias de Portugal v Commission* [2005] ECR II-3745, para.91.

180 It is important to note that in European law, competition law always applies, even when sector-specific regulation has been applied. In other words, the application of sector regulation does not render competition law inapplicable: Case T-271/03, *Deutsche Telekom v Commission* [2008] E.C.R. II-477, para.113 in the electronic communications sector.

181 There is an extensive literature on the issue: International Competition Network, *Working Group on Telecommunications Services* (Report to the Fifth Annual Conference in Cape Town, 2006); OECD, *Relationship between Regulators and Competition Authorities*, (1999) DAFFE/CLP(99)8; UNCTAD, 'Best practices for defining respective competences and settling of cases, which involve joint action by competition authorities and regulatory bodies', (2006) TD/B/COM.2/CLP/44/Rev2; Barros and Hoernig, Sectoral Regulators and the Competition Authority: Which Relationship is best? (2004) CEPR Discussion Paper 4541.

section: First, competition authorities and postal regulators should cooperate with each other[182] and with the Commission. Second, forum shopping, risk of contradictory decision, delay, and additional compliance costs, should be avoided by respecting the following principles:[183]

(1) There should be clear mechanisms for case allocation and the division of tasks between the NCA and the NRA, strict deadlines for case allocation;

(2) NRAs and NCAs should be obliged to consult mutually when deciding cases that have antitrust aspects. In particular, the NCAs or the Commission should consult the NRAs deciding a antitrust case in the postal sector. This consultation may relate to market definition, competitive assessment or choice of remedies. Going further, we can imagine that, to clear a merger, the NCA or the Commission impose behavioural remedies, whose compliance would be controlled by the NRAs.[184]

(3) The should be extensive exchange of information, including confidential information, provided that both NCA and NRA respect business secrecy and that information is solely used for the purpose for which it was obtained.

(4) Common terms used either under competition law or under sector-specific regulation should be interpreted and applied uniformly.

In addition as required by Article 11 of Regulation 1/2003, the NCAs of the different Member States should cooperate among themselves and with the Commission among the European Competition Network on postal issues.

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182 This cooperation is required by Article 22(1) of the Postal Directive. At the national level, see for instance in the United-Kingdom, the MoU between Postcomm and OFT of 13 December 2004; or in the Netherlands, the OPTA/NMa Cooperation Protocol of 24 June 2004.

183 Our suggestions are based on the assumption that the independence and the expertise of the NRAs are ensured effectively.

184 This has been the case in the ICT sector in Case M.2876, *Newscorp/Telepiu*, Commission Decision of 2 April 2003, para.259.

4.2 Application of state aid rules to the postal sector

This section summarises the major state aid decisions adopted by the European Commission in the postal sector since 2000.[185] To ease the reading, we divide the cases in three categories, although they may sometimes overlap: (1) cases related to the provision of the services of general economic interest or public service, (2) cases related to the financial activities of the postal incumbents, and (3) cases related to other issues such as pension schemes.

4.2.1 Cases related to the Services of General Economic Interest

Most of the cases reviewed relate to the provision of a service of general interest. In that matter, the issue whether a compensation for public service constitutes a state aid has evolved in the case law of the Court of Justice and the practice of the Commission. Before 2003, it was considered that a funding that merely compensates for the net cost of the public service was not a state aid. The situation has changed substantially on 24 July 2003 with the *Altmark* case.[186] In this case, the Court established that a public compensation does not constitute a state aid (hence should not be notified to the Commission) when it fulfils four cumulative conditions:

(1) The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

(2) The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

(3) The compensation does not exceed the net costs (with a reasonable profit) incurred in discharging the public service obligations;

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185 We review all the cases mentioned in the current Commission state aid register (containing cases as of 1 January 2000) under the NACE code H.53 Postal and courier activities.

186 Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

(4) The level of compensation needed has been determined in a public procurement procedure, *or* on the basis of an analysis of the costs which a typical undertaking, well run.

As those conditions are restrictive, the Commission complemented such legal framework in November 2005. In the Decision 2005/842,[187] the Commission established that a compensation is a state aid but is compatible with the Treaty according to Article 86(2) EC and should not be notified to the Commission if (1) the recipient undertaking is actually required to discharge public service obligations, and (2) the compensation does not exceed the net costs (with a reasonable profit) incurred in discharging the public service obligations (by the firm in charge and not necessarily by a typical efficient firm). This regime applies only for the annual compensation of less than 30 million EUR granted to undertakings with an average annual turnover of less than 100 million EUR during the two preceding financial years in which the service of general interest is assigned.

As those ceilings are often exceeded, the Commission adopted an additional Community Framework in November 2005, which has been heavily relied upon in the recent postal decisions.[188] In this Framework, the Commission established that a compensation is a state aid that has to be notified to the Commission but that may be compatible with the Treaty according to Article 86(2) EC when (1) the recipient undertaking is actually required to discharge public service obligations, and (2) the compensation does not exceed the net costs (with a reasonable profit) incurred in discharging the public service obligations. Note that under this Community framework, it is for the Member States to define the scope of the public service which they wish to entrust to an undertaking (within the limitations of Article 86 of the Treaty). The role of the Commission is merely to check that the compensation provided for carrying out the public service task does not exceed the additional costs of providing these services.

On that basis, the Commission adopted major decisions in cases regarding Germany, Italy, Sweden, and the United Kingdom.

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187 Commission Decision 2005/842 of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, O.J. [2005] L 312/ 67.

188 Community framework of 28 November 2005 for State aid in the form of public service compensation, O.J. [2005] C 297/4, and the Commission staff Working Document of 20 November 2007, FAQs, SEC(2007) 1516.

4.2.1.1 Germany

In 2002, the European Commission decided that a compensation of € 572 million received by Deutsche Post AG (DPAG) to finance its public service mission was an illegal state aid and had been used to finance an aggressive pricing policy intended to undercut private rivals in the parcel sector between 1994 and 1998. This behaviour breached the principle according to which companies that receive State funding for services of general interest cannot use these resources to subsidise activities open to competition. In order to remedy this distortion, the Commission condemned the German authorities to recover the amount of State support used to undercut parcel competitors.[189]

On appeal by Deutsche Post, the Court of First Instance annulled the Commission Decision in July 2008 because the Commission had not shown to the requisite legal standard that the transfer payments (made by DBP Telekom) conferred an advantage on DPAG as the Commission did not check whether the transfer payments exceeded the amount of DPAG's uncontested net additional costs of the public service.[190]

In the meanwhile, private competitors filed complaints alleging that DPAG had gained significantly higher financial benefits from the public compensation received than what it had to repay according to the 2002 Decision. In addition they brought new allegations that DPAG had used the public service compensation to expand its commercial activities and to sell services too cheaply to its subsidiaries DHL and Postbank.

Thus the Commission investigates all public measures, such as transfers of public money and tariff income, which were granted since 1989 in favour of DPAG, and its predecessor DBP POSTDIENST, to determine whether DPAG was indeed overcompensated beyond the incompatible aid previously recovered. This Commission investigation therefore complements and extends its 2002 decision.[191] In this context, the Commission has sent information injunction to Germany.[192]

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189 Commission Decision of 19 June 2002, OJ 2002 L247/27.
190 Case T-266/02, *Deutsche Post v Commission* [2008] not yet reported.
191 Commission Decision of 12 September 2007, Case C36/2007 (ex NN25/2007), pursuant to the Art.4(4) of Regulation 1999/659: decision to initiate the formal investigation procedure.
192 Decision of the Commission of 30 October 2008, pursuant to the Art. 10(3) of Regulation 1999/659: information injunction.

4.2.1.2 Italy

Over the period 2000-2005 Poste Italiane received €2.4 billion compensation for discharging the universal postal service obligations entrusted to it.

As the compensation granted by the Italian authorities was not in line with the *Altmark* conditions, notably the fourth one in that Poste Italiane was not chosen pursuant to a public procurement procedure, this state intervention constituted state aid. However, Poste Italiane's net costs for delivering its universal postal service obligations exceeded the financial support granted by Italy over the period 2000-2005. Therefore, the Commission decided that the aid was compatible to the Treaty under Article 86(2), according to 2005 Community Framework.[193]

Later over the period 2006-2008 Poste Italiane received another €1.1 billion compensation for discharging the universal postal service obligations.

Again, the compensation was not in line with the *Altmark* conditions and thus constituted a state aid. However the Commission's investigation revealed that Poste Italiane's net costs for delivering the universal postal service obligations from 2006 to 2008 exceeded the financial support granted by Italy over this period. Thus, the Commission decided that the aid was compatible to the Treaty under Article 86(2), according to 2005 Community Framework.[194]

4.2.1.3 Sweden

The Swedish Government required Posten AB to supply basic payment and cash facilities services for the two years 2006-2007 throughout Sweden. In exchange, the Swedish Government compensated Posten AB for the commercially unviable parts of SKS AB's basic cashier services network, up to a maximum of SKR 400 million each year. The Commission had previously authorised a similar scheme for the period 2002-2005.

The measure constituted a state aid as it implied a transfer of state resources, granted an economic advantage to Posten AB and potentially distorted competition and intra-EU trade. However, the state compensation was designed to be limited to the net public service cost of maintaining the commercially unviable parts of the basic cashier services network and sufficient ex-ante and ex-post mechanisms were in place to prevent any overcompensation of the net cost of the service of general economic interest. Thus, the

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193 Commission Decision of 29 September 2006, Case N51/2006, pursuant to the Article 4(3) Regulation 659/1999.

194 Commission Decision of 30 April 2008, Case NN24/2008, pursuant to the Article 4(3) Regulation 659/1999.

Commission decided that the aid was compatible with Treaty state pursuant to the 2005 Community framework for state aid in the form of public service compensation.[195]

4.2.1.4 United Kingdom

Transformation Programme of the Post Office (2007)

In July 2007, the UK notified a series of measures in favour of Post Office Limited (POL) to take effect between 1 April 2008 and 31 March 2011 of £634 million. They included £150 million per year to cover the specific costs of operating the parts of the network which were inherently loss-making. Certain additional funding included in the financial year 2008/2009 reflected certain specific costs to arise that year, including costs for the closure of some post offices as part of a transformation programme. Moreover, a loan facility between the UK Government and Post Office Limited provided funding up to a limit of £1.15 billion, allowing Post Office Limited to finance the provision of basic cash services by post offices, in particular to more vulnerable groups in society. This measure was originally authorised in 2003.

As the compensation provided for carrying out the public service task did not exceed the additional costs of providing these services, the Commission authorised the funding under the 2005 Community Framework.[196]

Debt payment funding to Post Office (2007)

In December 2006, the UK notified its intention to extend by a further year a measure previously authorised by the Commission in 2003,[197] under which the losses incurred by the network of post offices in providing public services were covered by Government funds. The amount notified for the financial year beginning 1 April 2007 was £313 million.

The compensation measures were designed not to exceed the minimum necessary for Post Office Limited to continue providing the public services entrusted to it. Thus, the Commission considered that the aid was compatible with the EC Treaty pursuant to the 2005 Community framework for state aid in the form of public service compensation. [198]

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195 Commission Decision of 23 November 2006, Case N642/2005.
196 Commission Decision of 28 November 2007, Case N388/2007, pursuant to the Article 4(3) of Regulation 1999/659 : not to raise objection.
197 See infra, Commission Decision of 27 May 2003, Case N784/2002.
198 Commission Decision of 7 March 2007, Case N822/2006, pursuant to the Article 4(3) of Regulation 1999/659 decision not raise objection.

Rural Network Support (2006)

The UK Government compensated, up to maximum £150 million annually, POL for the public service costs related to the requirement of maintaining rural counters which were structurally loss-making in order to safeguard rural communities' local access to essential services.

The measure constituted a state aid as it implied a transfer of state resources, granted an economic advantage to POL, and potentially distorted competition and intra-EU trade. However, the compensation was designed not to exceed the net public service cost of maintaining structurally loss-making counters and sufficient ex-ante and ex-post mechanisms were in place to prevent any overcompensation of the net cost of the public service. Thus the Commission decided that the aid was compatible with EC Treaty rules on state aid pursuant to the 2005 Community framework.[199]

Debt repayment, rural network support and loan for working capital (2003)

The UK government notified several compensations to POL:

(1) A compensation for the net public service cost of rural counter coverage. As the Government required POL to keep open 8,600 rural post offices, it compensated POL annually for the related net public service costs and this within a £150 million ceiling. The rural network support compensation was designed not to exceed the net additional public service cost of maintaining structurally loss-making counters.

(2) Means to POL to back its debt to Royal Mail Group which had financed POL's balance-sheet deficits up to 31 March 2002, dispensing a total £726 million in this respect. In the financial year 2006/7, the Government provided payment up to £574 million to ensure that POL was able to meet its debts in full. The Government payments were the minimum necessary to keep POL going so that it could continue providing its public services. This minimum funding itself was reduced by the positive revenue contribution derived from competitive activities.

(3) A rolling working capital loan for over-the-counter cash payments. This capital loan up to a ceiling of £1,150 million in 2004/5 was meant to fund the basic postal account. A self-regulating mechanism had been designed to ensure that the rolling working capital loan was the minimum necessary to enable the provision of a basic postal account.

All those three measures complemented earlier measures that the Commission approved in 2002. On 12 March 2002, the Commission approved the funding of a basic

199 Commission Decision of 22 February 2006, Case N166/2005, pursuant to the article 4(3) of Regulation 1999/659 : decision not to raise objection.

postal account to credit social benefits and from which cash can be withdrawn at post office counters for those benefits holders who do not want to open an account with a bank.[200] On 18 September 2002, the Commission approved minimum funding necessary for POL to close 3,000 urban counters no longer required under the 2000 UK Postal Services Act.[201]

The three measures constituted a transfer of State resources, granted an advantage to POL in the form of a loan and payments and potentially distorted competition and intra-community trade. However, as long as the Government loan and payments only compensated POL for the net additional cost of the public tasks it was entrusted with, no real advantage was conferred on POL. The Commission verified that there were sufficient *a priori* and *a posteriori* mechanisms in place to prevent any overcompensation of the net additional cost of the public service. A system of "ring-fencing" prevented any double Government compensation. The UK Government had committed itself to recovering any potential overcompensation as shown by separate accounts. As the issue was decided before the *Almark* case, the Commission considered, according to the case-law and the practice at the time, that the measures did not constitute State aid.[202]

200 Commission Decision 13 February 2002, Case N514/2001, pursuant to the Art 4(3) of Regulation 1999/659: Decision not to raise objections.

201 Commission Decision of 18 September 2002, Case N252/2002, pursuant to the Art. 4(2) of Regulation 1999/659: decision does not constitute state aid.

202 Commission Decision of 27 May 2003, Case N784/2002, pursuant to the Article 4(2) of Regulation 1999/659 Decision does not constitute aid, O.J. 2009 L64/4.

4.2.2 Cases related to the financial activities of the postal incumbents

4.2.2.1 France: Creation of Banque Postale[203]

The Commission approved the transfer of the banking and financial business of the French Post Office (La Poste) to its subsidiary, Banque Postale. The Commission found that the operation as such did not confer an economic advantage on Banque Postale. The French authorities had entered into commitments ensuring this outcome.

4.2.2.2 Italy: Poste Italiane - BancoPosta

'Poste Italiane' is the universal postal service provider in Italy. It also exercises financial activities through an integrated business division named 'Bancoposta'. Poste Italiane was legally obliged to deposit the funds collected from customers' current accounts with the Italian Treasury.

The Commission's investigation revealed that the interest rates paid by the Treasury to Poste Italiane from 2005 onwards are higher than what would have been obtained from a private borrower and than what Poste Italiane would have obtained if it had been free to invest the money on the market. The Commission concluded that these higher interest rates, which did not conform to market conditions, provided an economic advantage in favour of Poste Italiane and distorted competition and trade within the Single Market. The Commission declared the aid unlawful under EC Treaty state aid rules. As Italy did not notify the scheme to the Commission before its implementation, the aid unlawfully granted had to be recovered from Poste Italiane.[204]

In 2007, the Italian budgetary law abolished the legal obligation to deposit the funds collected on postal current accounts of private customers with the Treasury and provided that these funds were invested by Poste Italiane in euro area government bonds. The interest paid for these bonds did not contain any state aid as they did not entail any selective advantage.

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203 Commission Decision of 21 December 2005, Case N 531/2005. The associated issues, not directly linked to the transfer, such as the special right to distribute the "livret A" (a tax-free savings account for which La Poste has enjoyed a special distribution right since 1881), the unlimited state guarantee granted to La Poste and the welfare schemes for La Poste employees reassigned to Banque Postale, have been examined separately.

204 Commission Decision 2009/178 of 16 July 2008, case C42/2006 (ex NN52/2006), pursuant to the Article 7(5) and 14(1) of Regulation 659/1999: negative decision with recovery, O.J. 2009 L64/4.

4.2.2.3 Italy: Poste Italiane – Postal Savings

'Poste Italiane' is remunerated for distributing postal savings products, i.e. (1) postal savings books and (2) postal bonds on behalf of 'Cassa Depositi e Prestiti', a state-controlled financial body, whose mission is to foster the development of public investment, local utility infrastructure works and major public works of national interest.

(1) The collection of postal savings through 'Poste Italiane' on behalf of 'Cassa Depositi e Prestiti' has been qualified as a Service of General Economic Interest since October 2004. This means that Poste Italiane was entitled to receive remuneration for the distribution of postal saving books as compensation for the provision of this public service obligation. This remuneration was in line with the *Altmark* conditions, in particular Poste Italiane's remuneration was equal to the one a private investor would have paid. As it also met the other 'Altmark' criteria, the remuneration for the distribution of the postal saving books since 2005 did not constitute state aid.

    Over the period 2000-2004, the collection of postal savings was not qualified as a Service of General Economic Interest. However, the remuneration paid to 'Poste Italiane' also conformed to market conditions and did not confer any economic advantage to the company. Therefore, the remuneration for the distribution of postal saving books between 2000 and 2004 did not constitute state aid either.

(2) However, the Commission was concerned that the remuneration for the distribution of postal bonds might be higher than the one a private investor would have paid (and therefore might not conform to market conditions). This higher remuneration could have conferred an economic advantage to 'Poste Italiane' and so potentially distort competition in violation of the EC Treaty's state aid rules. Therefore, the Commission opened a formal investigation.[205] After a thorough analysis and on the basis of extensive research conducted by an independent expert, the Commission concluded that remuneration for the distribution of postal bonds was in line with the respective remuneration for the distribution of comparable financial products on the markets.

    As regards the period 2004 to 2006, the Commission considered that the remuneration paid by Italy to 'Poste Italiane' for the distribution of postal bonds met the criteria established by the *Altmark* judgement. In particular, the Commission found that the benchmark of market remuneration was an appropriate estimate of the level of costs that a typical efficiently run undertaking

205 Commission Decision of 22 November 2006, Case C49/2006 (ex NN65/2006).

within the same sector would incur, taking into account receipts and a reasonable profit from discharging the obligations. The Commission therefore concluded that it did not constitute state aid.

As regards the period between 2000 and 2004, the collection of postal savings was not qualified as a Service of General Economic Interest. The Commission found that during that period the remuneration paid to 'Poste Italiane' for distributing postal bonds was market conform and conferred no economic advantage to the company. Therefore, it did not entail state aid either.

However, according to the 2005 Community framework for state aid in the form of public service compensation, where an undertaking is entrusted with the operation of public services and also operates in other markets, the undertaking must have separate accounts for the different activities so that the absence of overcompensation can be checked. As ‘Poste Italiane’ had no appropriate separation between the costs and receipts related to postal savings and those associated with other services, the Commission has reminded Italy of this obligation.[206]

206 Commission Decision of 21 October 2008, Case C49/2006, pursuant to the Article 4(2) of Regulation 659/1999: decision does not constitute aid.

4.2.3 Cases related to other issues

4.2.3.1 Belgium: Capital injection

In 2003, the Commission examined six measures linked to the performance of public service tasks entrusted to the Belgian Post Office that could have involved state aid:

Three measures did not constitute aid since either no advantage had been conferred or no transfer of state resources had taken place: (1) Exemption from corporate tax stemming from the fact that La Poste/De Post was an independent public enterprise and a limited company governed by public law since 2000. However, this exemption did not lead to any transfer of state resources since the Post Office had registered accumulated losses over the period under consideration. (2) Government guarantee to back its loans, which was not automatically activated. However the guarantee did not confer any advantage since no loan had been issued. (3) A provision for pensions was cancelled for rights acquired between 1972 and 1992. This placed La Poste/De Post in a similar position to that of a normal commercial enterprise.

However, three measures could have constituted a State aid: (1) Exemption from property tax on its real-estate assets used in the public service; (2) Overcompensation for its public service tasks during the first management agreement; (3) Two non-notified capital injections made in 1997.

These overcompensations were then compared with the undercompensations for the net additional cost of the public service over the period 1992-2002 that resulted from the non-reimbursement of the net additional costs of public financial services and the limitation of the compensation for the provision of other public services. This revealed that the net present value of the additional cost of the public service was greater than the notified capital injection. No advantage had therefore been conferred on the Belgian Post Office, hence according to the case-law before *Altmark*, the Commission considered in July 2003, that none of these measures involved state aid.[207]

On appeal from Deutsche Post and DHL International, competitors from La Poste, the Court of First Instance annulled the Commission Decision in February 2009.[208] The Court concluded that there existed a body of objective and consistent evidence – deriving from the excessive length of the preliminary examination procedure (more than 7 months), from the documents which reveal the scope and complexity of the examination to be carried out and from the partially incomplete and insufficient content

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207 Commission Decision of 23 July 2003, Case N763/2002, pursuant Art.4(2) of Regulation 659/1999: decision does not constitute aid.

208 Case T-388/03, *Deutsche Post and DHL v Commission* [2009] not yet reported.

of the contested decision – which showed that the Commission adopted the decision not to raise objections in spite of the existence of serious difficulties. Instead the Commission should have opened a formal investigation.

Complying with this judgement, the Commission opened a formal investigation in July 2009.[209]

4.2.3.2 France: Unlimited State guarantee for La Poste

Following on from the Commission's decision of December 2005 on the transfer of the banking and financial business of La Poste to its subsidiary, La Banque Postale, the Commission examined the unlimited guarantee enjoyed by La Poste. This guarantee allowed La Poste to obtain finance on more favourable terms, giving it an advantage over its competitors and thus distorting competition on a market which was in the process of being liberalised. The guarantee was unlimited in terms of duration and amount and was provided free of charge. Moreover, it covered both universal service activities and commercial activities. It meant that La Poste was not subject to the insolvency and bankruptcy procedures provided for under ordinary law. In addition, in the event of financial failure of the post office, the state could be held responsible in last resort for its rights and obligations. This guarantee stemmed from its status as a legal entity governed by public law.

As the aid was incompatible with the Treaty, the Commission sent France a recommendation that it should end the unlimited guarantee.[210] As the subsequent negotiations with France did not convince the Commission that the French proposals amounted to terminating La Poste's guarantee, the Commission opened the formal investigation procedure against France.[211]

4.2.3.3 France: Reform of the retirement pensions

Under a 1990 law, La Poste was to finance in full the pensions paid by the State to its civil servants by way of a repayment to the State of the amounts paid out. This method of financing was a departure from the ordinary arrangement. Unlike an ordinary employer in a pay-as-you-go system, La Poste did not pay the levy that releases employers from any additional commitment for retirement pensions, but it had to ensure that the pension scheme for its civil servants was in balance.

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209 Commission Decision of 13 July 2009, Case C20/2009 (ex N763/2002) pursuant to the Article 4(4) of Regulation 659/1999: decision to initiate the formal investigation.
210 Commission Decision of 4 October 2006, Case E15/2005.
211 Commission Decision of 29 November 2007, Case C56/2007 (ex C49/2007) pursuant to the Article 4(4) of Regulation 659: decision to initiate the formal investigation procedure

By 1998, the balancing payment borne by La Poste had reached the ceiling of La Poste's "employer's" contribution for 1997. The proportion of the pensions paid by the State and not covered either by La Poste's "employer's" contribution or by the pension contributions paid by the civil servants still had to be borne by the State.

The 2006 reform, finalising La Poste's transition to the status of an ordinary competitor, provided for the operator to pay an "employer's" contribution at a competitive rate, releasing it from all other payment obligations. The contribution was calculated in such a way as to make the level of social security contributions and tax payable on salaries paid by La Poste the same as that borne by other companies in the transport (mail/parcels) and banking sectors under the ordinary social security arrangements.

The Commission came to the conclusion that the 1998 ceiling and the 2006 reform constituted state aid. However, the measures did not go beyond what was strictly necessary to establish a level playing field in respect of social security contributions and tax. They were important steps in adapting the enterprise to the gradual liberalisation that started in 1998, with a view to full liberalisation. Moreover, the measures brought to an end a distortion of competition that was unfair to La Poste. The Commission's investigation accordingly concluded that the 1998 ceiling and the 2006 reform were compatible with the common market. The Commission authorised the aid subject to conditions to ensure that La Poste and its competitors were placed on an equal footing as regards social security contributions and tax. **212**

4.2.3.4 Poland: Unlimited State guarantee

In Poland, Poczta Polska enjoyed an unlimited state guarantee that stemmed from its legal status, exempting it from the insolvency and bankruptcy procedures provided for under ordinary law. In addition, in the event of a financial failure of Poczta Polska, the state could have been held responsible in the last resort for its rights and obligations.

This situation was tantamount to a state guarantee that was unlimited in amount and in duration and covered all of Poczta Polska's liabilities. The unlimited guarantee enabled Poczta Polska to obtain finance under more favourable conditions than its competitors and therefore distorted competition in a market which is in the process of being liberalised.

The Commission indicated to Poland that the unlimited guarantee for Poczta Polska resulting from its legal statute constituted state aid, which was incompatible with the EC

212 Commission Decision of 10 October 2007, Case C43/2006 (ex N410/2006), pursuant to the Art. 7(4) Regulation 1999/659: Conditional Decision.

Treaty state aid rules. Consequently, Poland accepted to abolish this guarantee by 30 June 2008.[213]

4.2.3.5 United Kingdom: Reform of the retirement pensions and other issues

The Commission's investigation found that three loan measures granted in 2001, 2003 (extended in 2007) and 2007, totalling £1.7 billion were free of state aid because they were granted on commercial terms.

However, the Commission could not reach the same conclusion concerning a fourth measure, under which the UK Government released £850 million from reserves of Royal Mail which were under specific state control for the creation of an escrow account in favour of its pension scheme, extending the period over which it could address its large pensions deficit. However, in view of the size of the historic pensions liabilities of Royal Mail, some of which were built up when the business had a letters monopoly, the Commission concluded that any aid contained in the pension measure was compatible with Article 87(3)(c) of the EC Treaty.

The reasoning followed by the Commission to authorise the pensions measure had some parallels with a decision approving aid granted by France to "La Poste" in respect of its pensions liabilities, although there were also important differences, arising from the different pensions systems which apply more generally in the two Member States.[214]

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213 Commission Decision of 24 April 2007, Case E12/2005, pursuant to the Art.18 of Regulation 1999/659: proposal of appropriate measure.

214 Commission Decision of 8 April 2009, Case C7/2007 (ex NN82/2006), pursuant to the Art.7(3) of Regulation 1999/659: positive decision.

4.2.4 Conclusions on the application of state aid law

With the overview of the cases, we see that the application of European state aid rules has been extensive in the postal sector recently. The majority of the cases relate to the compensation for the provision of services of general interest, and most of these have been authorised by the Commission solely after a preliminary examination. However, that does not mean that the state aid rules are not important or that they are so lax that they are nearly always respected. In several cases, the Member States had to change their scheme to get the aid approved.

Regarding the cases related to the compensation for the provision of services of general interest, the legal framework is sufficiently clear since the *Altmark* case of 2003 and the Commission Decision and Community Framework of 2005. However, we see that its implementation, which involves complex calculation of the cost for the provision of the public service, is difficult.

In the future, the nature of the control on the compensation for public service will change radically going from a Commission State aid control towards a NRA net cost calculation. Hence the past case-law may have little relevance for the future implementation of the Postal Directive.

(1) The first difference between the past and the future is that the previous State aid control applied to traditional postal operators that were not all modernised and efficiently run, whereas the future universal service cost calculation will apply to modernised, and hopefully efficient, postal operators.

(2) The second difference is that State aid was applied exclusively by the Commission with little interaction with the NRAs, whereas the universal service cost calculation will be applied by the NRAs according to the guidance given in Annex I of the Postal Directive. Thus, it may be expected that the main controllers of over-compensation in postal public service will now be the NRAs.

However if the net cost of universal service is compensated and does not meet the four *Altmark* criteria, such compensation is a State aid that should be notified to the Commission (unless the conditions of the 2005 Decision on public service compensation are met). The fact that an NRA endorses a net cost calculation does not immune the public compensation from a Commission control. If the NRA has been mistaken and allows an overcompensation to the universal serve provider, the Commission may declare the aid illegal under the Treaty State aid rules (that prevails over the Postal Directive according to the hierarchy in EU law). The Commission may also open a infringement proceedings against the Member State whose NRA has allowed for over-compensation.

Therefore, we suggest that the NRAs cooperate closely with the Commission when performing the net cost calculation under Article 7 of the Postal Directive. Reciprocally, the Commission should cooperate closely with the NRAs (provided their expertise and independence are sufficiently guaranteed) when performing its state aid control. We also suggest that the NRAs notify systematically to the Commission the calculation of the cost of the universal service.[215]

Finally as discussed in section 7.3 of this report, we suggest that NRAs exchange among themselves best practices on the application of the guidance on calculating the net cost of the universal service, and in particular on the application of the principles of transparency, non-discrimination, proportionality, but also efficiency.

215 As it is the case in electronic communications, see Universal Service Directive 2002/22, Art.12 and Liberalisation Directive 2002/77, Art.7(2).

5 Preparations for the Third Postal Directive

This chapter reviews how the Member States are preparing to implement the Third Postal Directive, that is, the Second Postal Directive as further amended by the Directive 2008/6/EC. Elements of the Third Postal Directive which were essentially clarifications of the Second Postal Directive were considered in chapter 3. This chapter addresses regulatory issues that were revised or especially emphasised in the Third Postal Directive:

- new flexibility for Member States in ensuring universal service;
- repeal of the reserved area and other steps needed to ensure full market opening;
- regulation of a multi-operator environment;
- revised relationship between postal regulation and competition regulation; and
- the appropriate national definition of the universal service obligation in light of revisions in the directive's provisions for ensuring and financing the universal service and changing market conditions.

In some cases, Member States have already addressed these issues. In most cases, they still need to do so. The chapter begins by surveying the current state of transposition of the Third Postal Directive.

5.1 Transposition of the Third Postal Directive

For most Member States, the deadline for adopting national legislation to implement the Third Postal Directive is 31 December 2010. For 11 Member States (CZ, CY, EL, HU, LT, LV, LU, MT, PL, RO, SK) the deadline is 31 December 2012. As noted in section 2.1, above, for the 3 Member States of the EEA (IS, LI, NO), the deadline for transposition of the Third Postal Directive is 31 December 2010. Any amendment, including a longer implementation period, would require a decision by the EEA Joint Committee.

As this report was being prepared, two Member States, Estonia, and the Netherlands, reported that they had completed transposition of the Third Postal Directive into national law, with an effective date of 1 April 2009. Eighteen Member States report plans to transpose the directive before 1 January 2011.[216] No plans have been reported for several Member States. Table 5-1 provides an overview of current plans for transposition of the Third Postal Directive.

Table 5-1 Plans for transposition of Directive 2008/6

Time period	Percent	Count	Countries
Transposition complete	5.7%	2	EE, NL
2009 - second half	25.0%	4	AT, LV*, SI, UK
2010 - first half	42.9%	4	DE, FR, SE
2010 - second half	21.3%	10	BE, BG, DK, ES, FI, IE, IT, PT, RO*, IS**
2011 or later	4.2%	6	CY*, CZ*, HU*, LT*, LU*, PL*
No information	1.0%	4	EL*, MT*, SK*, LI**, NO**

Note: SK is planning major new postal legislation in 2009, but it will not transpose Directive 2008/6 at this occasion.
* Deadline for transposition is 31 December 2012.
** In principle, the deadline for transposition of the Third Postal Directive by the 3 Member States of the EEA (IS, LI, NO) is 31 December 2010. Any amendment, including a longer implementation period, would require a decision by the EEA Joint Committee.

Two Member States, Estonia and the Netherlands, report that they have transposed the Third Postal Directive into national law. Fourteen of the remaining Member States report current plans to transpose the directive before 2011.

216 As this report is being finished, legislative projects are reportedly underway or just completed in several countries, including Austria, Belgium, France, Latvia, and Slovenia. Details of these projects were unavailable as of the writing of this report. As a practical matter, information in this report is current to 1 March 2009, although we have included references to later information where possible (e.g., the Dutch postal law effective 1 April 2009 and the decision of the European Court of Justice in the *TNT Post UK* case on 23 April 2009).

5.2 Ensuring universal service

5.2.1 Three options for ensuring universal service

The Third Postal Directive expands the options for ensuring universal service. In the original Postal Directive (and maintained by the Second Postal Directive), the sole regulatory instrument for ensuring universal service was a universal service provider designated under Article 4. Under the Third Postal Directive, the Member State will ensure universal service by relying upon one or a combination of three regulatory mechanisms: reliance on market forces, designation of one or more universal service providers (USPs), and public procurement of postal services.

Recital 23 of Directive 2008/6/EC summarises this three-pronged approach for ensuring universal service as follows:

> Directive 97/67/EC established a preference for the provision of the universal service through the designation of universal service providers. Member States may require that the universal service be provided throughout the whole of the national territory. Greater competition and choice means that *Member States should be given further flexibility to determine the most efficient and appropriate mechanism* to guarantee the availability of the universal service, while respecting the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market. *Member States may apply one or a combination of the following: the provision of the universal service by market forces, the designation of one or several undertakings to provide different elements of the universal service or to cover different parts of the territory and public procurement of services*. [emphasis added]

Recital 23 also indicates that Member States are to determine the 'most efficient and appropriate' mechanism or combination of mechanisms for ensuring universal service. The recital declares that Member States must respect '*the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market*'. Recital 23 thus requires Member States to follow precisely the same regulatory principles in ensuring universal postal service as prescribed in the 'Competition Directive' for ensuring universal electronic communications service.[217]

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217 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L249, 17 Sep 2002, p. 21 ('Any national scheme pursuant

Table 5-2 summarises how Member States are preparing to approach the options for ensuring universal service set out in the Third Postal Directive.

To ensure fidelity to the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion, it appears necessary for Member States to make a reasoned choice among these three mechanisms for ensuring universal service. In particular, the principles of proportionality and least market distortion require a Member State to refrain from introducing regulatory constraints greater than necessary to achieve the public objectives sought. Since reliance upon market forces requires the least regulatory intervention, the Third Postal Directive strongly implies that Member States should not secure universal service by designation or public procurement unless market forces cannot be reasonably relied upon.

Given the emphasis on the options available for ensuring universal service in the Third Postal Directive, we asked governments if they had prepared a study which 'identifies which approach . . . will most appropriately guarantee the availability of the universal service'. Two NRAs (EL, NL) reported that they had prepared such a study, while 26 NRAs replied that they had not done so. The Greek study, however, was apparently a market analysis of the national postal market.[218] The Dutch analysis was undertaken by parliament in the course of adopting a new postal law. The new Dutch law seemingly directs the Minister to ensure universal service by designation of one or more USP(s).[219] It is unknown whether the Dutch legislator seriously considered reliance on market forces or public procurement to ensure any or all of the universal service. Eight NRAs (BG, CY, ES, HU, IT, LT, LV, IS) report plans to study the options for ensuring universal service.

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to Directive 2002/22/EC, serving to share the net cost of the provision of universal service obligations shall be based on objective, transparent and non-discriminatory criteria and shall be consistent with the principle of proportionality and of least market distortion').

218 PriceWaterhouseCoopers, 'Market Analysis Of The Greek Market And 4 European Postal Markets' (May 2008).

219 Netherlands, Post Law 2009. Article 15(1) states, 'On the basis of a transparent selection procedure, Our Minister shall appoint a Postal Conveyance Company to operate the Universal Postal Service or part thereof for an indefinite period of time'. Article 14(4) states, '4. The appointment shall not be withdrawn before a Postal Conveyance Company has been appointed to provide the Universal Postal Service or the specific part that is to be withdrawn to which the appointment relates'. Article 18(1), states, '1. A Universal Postal Service Provider shall operate the Universal Postal Service within the Netherlands and from or to areas outside the Netherlands'.

Table 5-2 Analysis of alternative approaches for ensuring USO

	Study on how to ensure US done	Study on how to ensure US planned?	Study expected?	Market failures identified?	% of US items at risk in market?	% of US ensured by market?	Procurem't procedures adopted?	Procurem't procedures expected?
AT								
BE	No	No		No			No	
BG	No	Yes	2010H1	No			No	2011+
CY	No	Yes					No	
CZ	No			No		5		
DE	No			No		100	Yes	
DK	No	No		No			No	2010H2
EE	No	No		No			No	
EL	Yes			No			No	
ES	No	Yes		No			No	
FI	No			No			No	
FR	No	No		No			No	
HU	No	Yes	2010H2	No		0	No	
IE	No	No		No	0	0		
IT	No	Yes	2009H2	No		1.5	No	
LT	No	Yes	2011+	No			No	
LU	No	No		No			No	
LV	No	Yes	2011+	No			No	
MT	No			No			No	
NL	Yes	No		No				
PL	No			No			No	2011+
PT	No			No		0	No	
RO	No	??		No			No	2011+
SE	No	No		No		0	Yes	
SI	No			No	0	0		
SK	No	No		No		0	No	
UK	No	??					No	2009H2
IS	No	Yes	2010H1	No			No	2011+
NO	No			No			No	

Similarly, we asked NRAs whether their government had prepared a study that identifies potential 'services at risk', that is, elements of universal service and groups of users that for which there is a 'significant risk that a minimum level of universal services will not be provided by market forces'. Such a study would at least reveal what portions of the market could be safely left to market forces, although it would not permit a reasoned choice between designation of one or more USPs and public procurement. Virtually all NRAs reported positively that no such study had been undertaken.[220]

220 Questionnaire 123-6.

Overall, then, Member States and their NRAs do not appear to have focused clearly and analytically on how to select among the three mechanisms for ensuring universal service set out in the Third Postal Directive.[221]

Since the manner of effectively ensuring universal service is a critical issue under the Third Postal Directive, we probed these issues further by questioning NRAs about actual practice and current views. When asked whether their Member States in fact relied upon market forces to ensure any of the universal service, 3 NRAs responded affirmatively. Two reported relying upon market forces to secure a minor portion of the universal service: the Czech Republic (5 percent) and Italy (1.5 percent). Germany stated it relied upon market forces to ensure 100 percent of the universal service.

When asked whether, based on current knowledge, NRAs could identify elements of universal service that would likely *not* be provided by market forces to the extent required by the USO, NRAs usually pointed to very limited portions of the market.[222]The following answers were typical of the 22 NRAs who suggested that elements of the universal service would likely not be provided by market forces.

- BE: The administrative registered items, some sort of packets; regions with low density population.
- DK: Small islands with few inhabitants.
- ES: Unprofitable areas, in particular, areas with low population density, e.g. in rural areas.
- HU: We suppose that the market forces shall not provide [universal services] in the territories, where the density of the population is very low.
- IT: Elements of universal service: letters and parcels single piece; parts of national territory: remote areas.
- PL: In rural areas postal items might be delivered less that 5 times a week; also, the number of post offices in those areas would probably decrease.

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221 For example, the Swedish NRA notes, “The Swedish postal market was liberalised 15 years ago and the Swedish government chose to ensure the US through designating Posten AB as a USP (former monopolist)’. Questionnaire 123-6.

222 Questionnaire 123-11 asked, ‘Based upon your current knowledge of the postal market, please describe briefly for which elements of universal service and/or PARTS of the national territory, if any, it appears likely that a minimum level of universal services will NOT be provided by market forces?’. Questionnaire 123-12 asked, ‘Approximately what percent of all postal items transmitted in the universal service are included in this portion of the postal market?’.

- NO: Mail distribution and collection in rural areas (at an affordable price). Norway Post states that 5 percent of the households will have mail service just 3 days a week, 15 percent will have a service just 5 days a week.

Only two NRAs (CY, RO) suggested that little or none of the universal service can be ensured by reliance on market forces. In contrast, three NRAs (DE, IE, LU) suggested that there were no elements of universal service, or parts of the national territories, that would likely receive inadequate service by reliance on market forces.[223] Some NRAs, including the NRAs of France and the United Kingdom, offered no opinion on the scope of service that might be provided by market forces.

We also asked whether there were users or groups of users who would face a significant risk of unsatisfactory service by market forces.[224] In response, NRAs generally noted again the possibility that residents of rural or remote areas might not receive minimum universal service. The Belgian NRA specifically identified consumers living in rural areas who are sending mail to other consumers in rural areas. The Swedish NRA pointed to a small number of elder persons who live in rural areas. They currently receive 'extended postal delivery' which the Swedish government purchases through public procurement procedures.

Because of the possibility of overlap between 'elements of universal service' at risk if served by market forces and 'users or groups' at risk, we asked NRAs to estimate what percent of all postal items in the universal service would be at risk of inadequate universal service if served by market forces. NRAs were generally unable to provide such estimates, however.[225]

The outstanding exception to this overall pattern is Germany. The German postal law of 1997 conforms well to the three-pronged approach set out in Recital 23 of the Directive 2008/6. The German law provides, in essence, that universal service will be ensured by market forces unless the NRA determines that it is 'not being appropriately or adequately provided or where there is reason to believe that such will be the case'.[226] Where market forces appear to be inadequate, the German NRA is obliged to ensure universal service either by designating a postal operator to provide the necessary service or by arranging for such services through public procurement. Where a postal

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223 The German NRA stated, 'All elements/parts are provided by market-forces'. The Irish NRA stated, 'None. As the current designated USP provides services in excess of the minimum required'.

224 Questionnaire 123-13 asked, 'Based upon your current knowledge of the postal market, please describe briefly for which users or groups of users, if any, there appears to be a significant risk that a minimum level of universal services will NOT be provided by market forces?'. Questionnaire 123-14 asked, 'Approximately what percent of all postal items transmitted in the universal service are affected by this risk?'.

225 Questionnaire 123-15. Exceptionally, the Irish and Slovenian NRAs estimated that 0 percent of postal items were subject to a significant risk of inadequate service by market forces.

226 German Post Law (1997), Article 13(1). See also Articles 14 and 15.

operator has been designated to provide universal service, it is entitled to compensation of net costs, if any, from the NRA. The German procedures thus ensure that universal service will be provided by making a reasoned choice from among the three approaches set out in the Third Postal Directive. To date, the German NRA has not ensured any universal service by designation or procurement. The German NRA therefore declares that 100 percent of the universal service is currently ensured by market forces.

Member States and their NRAs do not appear to have focused clearly and analytically on the three mechanisms for ensuring universal service set out in the Third Postal Directive: market forces, designation of one or more universal service providers, and public procurement of services. With the exception of the German NRA, most NRAs either declared that their Member States do not rely on market forces to ensure universal service for a significant portion of the universal service or failed to address the possibility of relying upon market forces. On the other hand, when asked to identify portions of the universal service for which there was a significant risk of inadequate service by the market forces, most NRAs identified (qualitatively, not quantitatively) only limited portions of the market that appeared to be at risk, usually services in remote or sparsely populated areas. Some large NRAs, including France and the United Kingdom, offered no opinion. Based on this impressionistic and incomplete response, it appears that reliance upon market forces to ensure universal service may potentially be a viable option for ensuring the universal service in many Member States. A notable exception to this pattern is Germany. Its postal law provides procedures for ensuring universal service that closely follow the options set out in the Third Postal Directive. Hence, the German NRA can state definitively that Germany currently relies on market forces for ensuring 100 percent of the universal service.

5.2.2 Designation of USP(s)

Where a Member State chooses to rely in whole or in part on designation of one or more USPs, the Third Postal Directive requires a more objective and transparent procedure than required by the Second Postal Directive. Revised Article 4 states that:

> Member States may designate one or more undertakings as universal service providers in order that the whole of the national territory can be covered. *Member States may designate different undertakings to provide different elements of universal service and/or to cover different parts of the national territory*. When they do so, they shall determine in accordance with Community law the obligations and rights assigned to them and shall publish these obligations and rights. In particular, *Member States shall take measures to ensure that the conditions under which universal services are entrusted are based on the principles of transparency, non-discrimination and proportionality*, thereby guaranteeing the continuity of the universal service provision, by taking into account the important role it plays in social and territorial cohesion. [emphasis added]

Recital 23 of Directive 2008/6/EC reiterates and clarifies the need for a transparent and non-discriminatory designation procedure:

> In the event that a Member State decides to designate one or more undertakings for the provision of the universal service, or for the provision of the various components of the universal service, *it must be ensured that quality requirements pertaining to the universal service are imposed in a transparent and proportionate manner on the universal service providers*. Where a Member State designates more than one undertaking, it should ensure that there is no overlap in the universal service obligations. [emphasis added]

Thus, under the Third Postal Directive Member States may designate different undertakings to provide different elements of universal service and/or to cover different parts of the national territory', but they must make such designations based upon 'principles of transparency, non-discrimination and proportionality'. Before designating universal service providers, NRAs will need to consider whether designation of a USP for a portion or all of the national territory is a necessary or 'proportionate' step in ensuring universal service and whether one postal operator is better suited to this task than another.

Table 5-3 summarises the readiness of Member States to apply the designation procedures of the Third Postal Directive.

Table 5-3 Designation of USP(s) and the standards of the Third Directive

	3d Dir procedures for designation of USPs	3d Dir procedures expected?	Multiple designated USP(s) possible?	USP(s) fully funded for USO?	Designated w/o evidence of market failure?	Public procure-ment considered ?	% of US ensured by designation	Number of USP(s)
AT								
BE	Yes	Yes	No	Yes	?	No		1
BG	No	Yes	No	?	No		100	1
CY	No	?	?	?	?	?		1
CZ	Yes		No	Yes	No	No	100	1
DE	Yes		Yes		No	Yes	0	0
DK	No	Yes					100	1
EE	Yes		No	No	No	No		1
EL	No	?				No	99	1
ES	No							
FI	No	Yes						
FR	Yes		No	Yes	No	No	100	1
HU	No	?				?	100	1
IE								
IT	No	Yes						
LT		Yes						
LU	No	??						
LV	No	Yes						
MT	No	Yes					100	1
NL	Yes		Yes	Yes	No	No	100	1
PL	No	Yes						1
PT	No						99.1	
RO	Yes		Yes	Yes	Yes			1
SE	Yes		Yes	No	Yes	No	90	1
SI	No	Yes						
SK	No	Yes						
UK								
IS	No	Yes						
NO	No	?						

As the first column of this table indicates, 8 Member States (BE, CZ, DE, EE, FR, NL, RO, SE), accounting for just over half of the EU/EEA letter post market, report that they have adopted designation procedures that comply with the Third Postal Directive. Some of these assessments may be open to question, however. For example, the Belgian NRA reports that Belgian law complies with the designation procedures of the Third Postal Directive, yet designation of the Belgian public postal operator as the USP was by legislation, not by an impartial administrative process. Although the Belgian NRA estimates that market forces would provide adequate universal service for up to 85 percent of postal items[227] the Belgian legislator has designated the public postal

227 Questionnaire 123-12.

operator as the universal service for the entire national territory. Moreover, Belgian law does not allow the possibility of designating more than postal operator as USP. Similarly, the French postal law states unequivocally that, 'La Poste shall provide the universal postal service'.[228] Such designation procedures do not appear to be 'based on the principles of transparency, non-discrimination and proportionality'. These examples illustrate Member States may not fully appreciate the revisions in Article 4 introduced by the Third Postal Directive.

The additional requirements of Article 4 in the Third Postal Directive do not appear to be satisfied by any designation procedure that (i) relies on a legislative determination, (ii) precludes multiple designations, or (iii) includes within the scope of the designation services which can be adequately ensured by market forces. In view of the full market opening introduced by the Third Postal Directive, designation cannot be assigned in an indiscriminate or objectively disproportional manner because designation confers rights and obligations which distort competition. The recent *TNT Post UK* case offers one example of a competitively significant benefit conferred by designation (exemption from VAT).[229] Under the Third Postal Directive, therefore, it appears that designation procedures will have to be employed in a manner that is non-discriminatory and proportional to objective need. Current German postal law appears to offer one example of how the revised version of Article 4 can be implemented.

The objective justification for designating a single universal service provider for the entire national territory is a particularly interesting issue. As noted above, most NRAs (with a few exceptions) believe that only a relatively minor portion of the national territory is unlikely to receive adequate universal service by market forces. No Member State has prepared an analysis that identifies which portions of the national territory are under significant risk of losing service under market forces. Two Member States (RO, SE) agreed that current procedures provide for designation of a USP in portions of the national territory for which there is 'no significant risk that market forces will fail to provide' universal service. Under the revised version of Article 4 in the Third Postal Directive, it appears that designation of a postal service provider as the USP for the entire national territory will require a more transparent and objective basis.

Another issue presented by designation is the possibility that designation may distort a liberalised postal market by imposing an unfair burden on the designated USP. We therefore asked whether designation procedures ensure that a postal operator is fully compensated if it has been designated to provide universal services and incurs a net cost in doing so. Five NRAs (BE, CZ, FR, NL, RO) declared that their designation

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228 France, Code Des Postes et Des Communications Electroniques, Article L2 ('La Poste est le prestataire du service universel postal').

229 TNT Post UK Ltd v. The Commissioners for Her Majesty's Revenue and Customs, Case C-357/07 (23 Apr 2009).

procedures provided full compensation for designated USPs.[230] However, since none of these NRAs appear to have calculated the net cost of the USO,[231] these declarations may be interpreted as statements of principle rather than as specific financial commitments. As noted above, one NRA, the Norwegian NRA, has calculated a substantial net cost for the USO, 9 percent of the cost of universal service, and done so in a manner that appears consistent with the Third Postal Directive. Yet the Norwegian designation procedure may not ensure that the USP is fully compensated for the net cost of the USO.[232] Where a designation imposes a significant burden on the USP, the principle of non-discrimination would seem to imply appropriate compensation for the net cost of the obligation imposed.[233] Otherwise, the designated postal operator may be disadvantaged in comparison with other postal operators.

Most Member States do not appear to have fully analysed how to implement revisions in the designation procedures of Article 4 introduced by the Third Postal Directive. Revised Article 4 requires that the designation of USP(s) must be 'based on the principles of transparency, non-discrimination and proportionality'. These requirements may require a significant modification of current designation procedures.

5.2.3 Public procurement

As noted, the Third Postal Directive introduces the possibility of ensuring universal service by public procurement. So far, Member States have little experience with public procurement of universal services. Two NRAs (DE, SE) have the authority to use public procurement procedures. The German NRA has not had occasion to do so. The Swedish NRA uses public procurement for extended postal delivery service and free

230 Questionnaire 123-21. The Swedish NRA indicated that it assumed that there is no significant net cost incurred in the provision of universal service.
231 Questionnaire 121-23.
232 See section 3.3.5, above.
233 Questionnaire 123-20.

delivery and dispatch of items in braille.[234] Six NRAs (BG, DK, MT, RO, UK, IS) indicated that their Member States would introduce the possibility of public procurement procedures in the future.[235]

With the exception of Sweden, Member States have no experience with the public procurement of universal postal services. Several Member States, however, plan to introduce the possibility of public procurement in the foreseeable future.

234 Sweden, Förordning (2007:951) med instruktion för Post- och Telestyrelsen, (Ordinance on instructions for The Swedish Postal and Telecom Agency). Available: http://www.riksdagen.se/Webbnav/ index.aspx? nid=3911&bet=2007:951.

235 Questionnaire 123-42

Case history 5-1: Public procurement of universal services in Germany

At present, Germany is the only Member State where postal legislation relies on market forces to provide universal service and introduces public procurement as a mechanism to ensure universal service where the market fails to deliver. This case history outlines how the German postal act ensures universal service.

Until 1998 German NRA (BNetzA) was authorised by the German postal act to take measures to ensure the universal service, if not provided voluntarily by postal service operators. Between 2002 and 2008, following a change in government, the universal service obligation was solely imposed on Deutsche Post by the German Postal Act. Since full opening of the postal market on 1 January 2008, there is no obligation on any postal service operator. At present, the incumbent Deutsche Post provides universal service voluntarily. Any dominant operators (at present: Deutsche Post) that intends to discontinue provision of universal service or to provide such services on less favourable terms than specified in the postal act, must notify BNetzA six month prior to cutting down universal service.

If the universal service is not being adequately provided or if there is reason to believe that such will be the case, BNetzA, as a first step, has to publish a statement in its Official Gazette,. As a second step, dominant postal service operators can be obliged by BNetzA within one month to provide the specified universal service gap, provided that no postal operator volunteers to provide the gap without compensation. If a postal operator that is to be obliged to provide the universal service gap provides sufficient evidence that it would suffer financially losses as a result of this obligation, this operator could require compensation. In this case, BNetzA shall call for tenders to provide the universal service gap as a third step. However, BNetzA may abstain from public procurement if it does not appear appropriate. In a public procurement, the most efficient and reliable bidder that requests the least financial compensation should be selected. This mechanism to ensure universal service appears consistent with the requirements of the Third Postal Directive. The procurement procedure must be based on the principles of transparency, non-discrimination and proportionality, thereby guaranteeing the continuity of the universal service provision.

5.3 Phasing out the reserved area and other special rights

5.3.1 Reserved area

The Third Postal Directive requires 10 Member States (AT, BE, BG, DK, ES, FR, IE, IT, PT, SI) with a reserved area to terminate the reserved area by 31 December 2010. This deadline is extended by two years for 11 Member States (CY, CZ, EL, HU, LT, LU, LV, MT, PL, RO, SK).[236] To date, most countries in and out of the EU which have repealed their postal monopoly laws have phased out the reserved area in stages extending over several years.[237] The Postal Directive itself has required a phased reduction in the scope of the reserved area since 1998. In adopting Directive 2008/6/EC, the Parliament and Council delayed termination of the reserved area beyond what was contemplated in Directive 2002/39/EC so that 'Member States could avail themselves of the opportunity offered by the transposition period, and the substantial time necessary for the introduction of effective competition, in order to proceed with further modernisation and restructuring of the universal service providers as necessary'.[238]

The two- to four-year delay in terminating the reserved area raises the question whether Member States have taken advantage of the extra time to phase out the reserved area in a manner calculated to help the incumbent universal service provider make the transition to a liberalised environment. There are several ways this could be accomplished. The price and weight limits of the reserved area could be reduced further. The monopoly over cross border mail and direct mail could be eliminated in advance of the monopoly over domestic letters. Specialised services, such as same day service, could be exempted from the reserved area (as in Germany) or bulk mail services (as in the United Kingdom).

Despite the availability of examples of phasing out strategies from other Member States, none of 24 Member States with a reserved area seems to have developed 'a sound strategy for phasing out of the reserved area in a manner that prepares the USP(s) for competition while ensuring universal service'. At this stage (mid 2009), such a plan only seems feasible for the 11 Member States that have until the end of 2012 to end the reserved area. In these Member States, 4 NRAs (BG, CY, EL, LV) indicate that a study identifying an orderly phase-out strategy either has been done or is being planned. For the most part, however, it appears that Member States will likely terminate the existing reserved area abruptly when required to do so by the Third Postal Directive.

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236 The deadline for the 3 EEA Member States (LI, IS, NO) will determined by the EEA Joint Committee. See section 2.1, above.

237 The most notable exception to the rule is Sweden, which abolished the postal monopoly in single step in 1993.

238 Directive 2008/6/EC, Recital 12.

No Member State with a reserved area has adopted an orderly phase-out schedule for the reserved area, but 4 of the 11 Member States which can retain the reserved area until the end of 2012 indicated plans for identifying a phase-out strategy.

5.3.2 Other special rights

The fundamental objective of the Third Postal Directive is not to terminate the reserved area in a merely formal sense but to facilitate a '*complete market-opening [that] will help to expand the overall size of the postal markets [and] contribute to maintaining sustainable and quality employment within universal service providers as well as facilitate the creation of new jobs in other operators, new entrants and associated economic sectors*'.[239] This broad objective implies that, in planning for full market opening, Member States need to reexamine non-postal laws which may create barriers to entry in postal market by granting the universal service provider special legal rights compared to the rights of other postal operators. In the past four areas have raised particular concerns:

- value-added taxes which include tax exemptions for products of the USP;[240]
- customs laws which provide special treatment for products of the USP;[241]
- terminal dues, IMPCs, and other international postal regulations;[242]
- regulations which give the universal service provider special rights with respect to the location of public collection boxes and special privileges with respect to the operation of vehicles.[243]

A similar, more recent concern is sector-specific labour laws for the postal sector which appear designed to impair new entrants by imposing on the entire sector the inflexible

239 Directive 2008/6/EC, Recital 16.
240 See section 3.4.2, above.
241 See section 3.4.3, above.
242 See section 3.4.4, above.
243 See section 3.4.5, above.

working conditions adopted by public postal operators. Of course, all postal operators must comply with general labour regulations applicable in their Member States including regulations governing employment conditions, working conditions, relationships between employers and employees, and must respect minimum wages (in those Member States where minimum wage laws exist). However, a sector-specific law that applies only to a narrow class of employees is different from a general labour law. For example, a law that applies only to employees who provide postal services for letter post items effectively determines the conditions of competition for a single company since, by virtue of the state's intervention in the market, the vast majority of such employees are the employees of the national USP. Hence, a Member State must be especially vigilant to ensure that sector-specific labour laws relating to the postal services market do not have the intent or effect of restraining competition.[244]

Overall, Member States do not appear to have focused on the need to adjust non-postal laws to accomplish the market-opening objectives of the Third Postal Directive. Only one Member State (CZ) reported that it is planning legislation to equalise the application of VAT to all postal operators. Only 2 Member States (EL, ES) indicated that they were planning to revise the rules with respect to international postal services, placement of collection boxes, or vehicular regulation.[245] A notable exception is the UK NRA, Postcomm. In series of public inquiries between 2004 and 2007, Postcomm comprehensively surveyed the legal privileges of Royal Mail and recommended appropriate changes to government.[246]

With the exception of Postcomm in the UK, few Member States or NRAs appear to have addressed — or to be planning to address — the potential barriers to entry posed by non-postal laws or the extent to which such laws may be inconsistent with the objectives of the Third Postal Directive.

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244 The Postal Directive does not affect labour law generally. See Directive 2008/6/EC, Recital 53. For a discussion of the misuse of sector-specific minimum wage laws in Germany, see Dieke, Alex and Ralf Wojtek, 'Competition, Wages and Politics in the Delivery Sector: The Case of Postal Minimum Wages in Germany', in M.A. Crew, P.R. Kleindorfer, and J.I. Campbell Jr., eds., *Handbook of Worldwide Postal Reform* (Cheltenham, UK: Edward Elgar, 2008).

245 Questionnaire 122-25 and 122-26 (VAT) and 122-35 to 122-37 (international postal services, collection boxes, vehicular registration). Note that this survey was substantially completed prior to the decision of the European Court of Justice in the TNT Post UK case. TNT Post UK Ltd v. The Commissioners for Her Majesty's Revenue and Customs, Case C-357/07 (23 Apr 2009). This decision may prompt further changes in national VAT laws.

246 See Postcomm, 'Competitive Market Review: Tackling Barriers To Entry In Postal Services, Final Decisions And Recommendations' (Apr. 2006).

Case history 5-2: Postcomm study of special rights

In January 2004 Postcomm published a consultation document, 'A Review of Royal Mail's Special Privileges', which outlined ten privileges granted Royal Mail.

At the course of its consultation, Postcomm concluded that the most significant privilege was Royal Mail's exemption from VAT. Postcomm considered this privilege to be a clear distortion of competition in postal services and unnecessary for the provision of universal services.

Postcomm also concluded that certain historical privileges were inappropriate and should be abolished. These privileges were: (1) Royal Mail's authority to require the owner or operator of a ship or aircraft to carry mail-bags; (2) legislative prohibition against harbour authorities obstructing universal service mail carried by Royal Mail to collect harbour duties; and (3) Royal Mail's authority to purchase by power of eminent domain (i.e., for compel owners to sell) any property required for provision of a universal service.

Postcomm's preliminary view was that there were some convincing reasons to retain some privileges which are needed to provide universal services and do not distort competition. These privileges were: (1) customs clearance procedural exemptions; (2) immunity from prosecution; (3) placing of public collection boxes; and (4) classification of Royal Mail as a private carrier.

The final privilege of Royal Mail considered was the exemption from traffic regulations. Postcomm concluded that these should be modified to minimise distortion of competition.

5.4 Regulations for a multi-operator market

Repeal of the reserved area will permit — or in some Member States has permitted — development of a multi-operator postal market. In an open postal market, governments and NRAs need to consider the extent to which regulation should foster cooperation and interoperability among postal operators. Under the Third Postal Directive, a Member State may choose to rely upon market forces, designation of universal service providers, public procurement, or a combination of these mechanisms, to ensure universal service. A Member State could consider several, or many, postal operators to be universal service providers.[247] In a multi-operator environment, fairness and efficiency imply that regulation should treat all postal operators similarly in objectively similar circumstances.

5.4.1 Access to postal infrastructure

Article 11a, added by the Third Postal Directive, requires Member States to give all postal operators access to 'elements of postal infrastructure', that is, facilities and information resources used in providing postal services. Article 11a states:

> Whenever necessary to protect the interest of users and/or to promote effective competition, and in the light of national conditions and national legislation, Member States shall ensure that transparent, nondiscriminatory access conditions are available to elements of postal infrastructure or services provided within the scope of the universal service, such as postcode system, address database, post office boxes, delivery boxes, information on change of address, re-direction service and return to sender service. This provision shall be without prejudice to the right of Member States to adopt measures to ensure access to the postal network under transparent, proportional and non-discriminatory conditions

247 See section 2.5, above, for a discussion of the term 'universal service provider'.

Six elements of postal infrastructure are listed as examples: postcodes, address database, post office boxes, delivery boxes, change of address database, and redirection and return services.

Table 5-4 Access to postal infrastructure ensured by Member States

Type of access	Member States	Number	% EU/EEA market
Access to post codes	BG, CZ, EE, FR, HU, LT, MT, NL, SE, UK	10	51.4%
Access to address database	DE, DK, EE, FR, MT, SE, UK	7	64.8%
Access to post office boxes	DE, EE, FR, HU, IT, LT, MT, SE	8	48.1%
Access to delivery boxes	BE, BG, DK, EE, ES, FR, HU, IE, IT, LT, MT, PL, PT, SE, SK, UK, IS	17	65.5%
Access to change of address database	DE, EE, FR, SE	4	41.3%
Access to USP return services	BG, DE, EE, FR, LT	5	38.4%
Require downstream access to USP	BE, DE, DK, EE, ES, HU, SI, UK	8	53.9%
Equalise downstream access for all	DK, IT, LT, NL, PL, UK	6	36.8%

Table 5-4 summarises the current state of various types of access to the postal infrastructure. The first six categories of access are those listed in Article 11a. The last two lines in this table indicate whether the NRA has authority to compel two other types of access: access to downstream facilities of the USP and equalisation of access to downstream facilities. The difference is that, in the first case, the NRA may require the USP to grant access even though the USP has not provided similar access to any other party. Mandatory access might be necessary where, for example, a postal operator serves a limited area and needs to access a USP for delivery of postal items out of his service area. In the second case, the NRA would merely require the USP to provide equal access to all parties if the USP has granted downstream access to one party. For example, the NRA might require a USP to give other postal operators the same downstream access conditions already provided favoured customers. Authority to equalise downstream access is required by the Second Postal Directive;[248] authority to mandate downstream access is not.

248 In addition to this sector-specific rule included in Article 12 of the Postal Directive, this obligation to equalise downstream access may as well be required under competition law as downstream access is typically provided by dominant operators. Indeed, non-discriminatory downstream access was enforced in Germany by a decision of the national competition authority in 2005 and later confirmed by the European Court of Justice. See Bundeskartellamt, decision B 9-55/03 of 11 February 2005, and Judgement of the European Court of Justice (First Chamber) of 6 March 2008 in joined cases C-287/06 to C-292/06 ('Vedat Deniz decision').

Table 5-4 shows that most Member States will need to take significant steps to open access to the postal infrastructure in implementing the Third Postal Directive. With respect to most elements of the postal infrastructure, only 4 to 17 Member States provide the access that Article 11a requires where necessary. Only 6 Member States (DE, EE, FR, LT, MT, SE) provide access to four or more of the six elements of postal infrastructure mentioned in Article 11a.

NRAs also have limited authority over downstream access. Only 12 NRAs can require the USP to equalise downstream access even though equal access is required by the Second Postal Directive.[249] Eight NRAs can compel an unwilling USP to provide downstream access under some conditions. In a seemingly reasonable limitation of such authority, the German NRA's authority to equalise or require downstream access is limited to market dominant postal operators.[250]

Most Member States will need to take significant steps to open access to the postal infrastructure in implementing the Third Postal Directive, where necessary. With respect to most elements of the postal infrastructure, only 4 to 17 Member States provide the access required by Article 11a. Only 6 Member States provide access to four or more of the six elements of postal infrastructure mentioned in Article 11a. Only about half of the NRAs have authority to require dominant postal operators to provide downstream access to consolidators and private operators on the same terms as offered to large customers, even though such authority is required by the Second Postal Directive.

249 In Table 5-4 above, the option 'require downstream access to USP' logically includes the next option, "equalise downstream access for all', since a NRA that can mandate downstream access can presumably mandate access on equal terms. In sum, 12 NRAs have authority to equalise downstream access, and 8 of these can also mandate access.

250 It is unclear whether small postal operators need or desire access to the USP on terms other than those provided by the public tariffs. In Germany, for example, where there are many small local competitors to Deutsche Post, it appears that access via the public tariff is sufficient for the purposes of those local operators. Downstream access is used primarily by specialised consolidators, not by delivery firms.

5.4.2 Interoperability and the multi-operator environment

'Interoperability' refers to the ability of multiple postal operators to work together to provide a universal service that is, if not completely 'seamless', at least workable and convenient from the perspective of both senders and recipients of postal items. The original Postal Directive emphasised the importance of interoperability between national USPs,

> Whereas progress in the interconnection of postal networks and the interests of users require that technical standardisation be encouraged; whereas technical standardisation is indispensable for the promotion of *interoperability between national networks* and for an efficient Community universal service.[251]

The Third Postal Directive further highlights the importance of interoperability among postal operators at the national level in a liberalised multi-operator environment.

> In an environment where several postal undertakings provide services within the universal service area, it is appropriate to require all Member States to assess whether some elements of the postal infrastructure or certain services generally provided by universal service providers should be made accessible to other operators providing similar services, in order to promote effective competition, and/or protect all users by ensuring the overall quality of the postal service. Where several universal service providers with regional postal networks exist, *Member States should also assess and, where necessary, ensure their interoperability in order to prevent impediments to the prompt transport of postal items*.[252]

For more than a century, public postal operators have dealt with cross border interoperability issues in the Universal Postal Union. The Third Postal Directive, however, presents additional challenges which will require supervision by NRAs. NRAs should require postal operators within a single Member State to cooperate by, for example, marking postal items in a specified manner so that the addressee knows who to contact in case of delay or damage. New issues are implied at the Community level, as well. If, for example, a Frenchman receives a letter or parcel from a German woman in the future, he will not be able to assume that the items was dispatched from Germany using the Deutsche Post. Indeed, the Third Postal Directive raises the possibility of postal operators providing universal services in several Member States. Hence, NRAs may need to adopt a harmonised approach towards interoperability in order to facilitate a smoothly functioning universal service by multi-state operators.

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251 Directive 97/67/EC, Recital 36 (emphasis added).
252 Directive 2008/6/EC, Recital 34 (emphasis added).

Table 5-5 Interoperability in a multi-operator environment

Type of provision	Member States	Number	Percent of LP market
Exchange of US items	DE, SE, UK	3	44.7%
Identification of postal carriers	DK, FR, LT, MT, UK	5	41.9%
Complaint procedures	DK, FR, LT, LV, UK	5	42.0%
User inquiries	LT	1	0.1%
Return to sender	DK, ES, SE, UK	4	32.7%

To date, relatively few Member States have considered the problems of interoperability, although there are several notable exceptions. The UK NRA, Postcomm, has reviewed the problems of interoperability carefully and developed two sets of operating procedures that must be followed by all postal operators in order to protect the integrity of postal items and facilitate the handling of misdirected mail in a multi-operator environment.[253] Germany and Sweden, among others, have also considered many of the issues posed by interoperability. Several other NRAs (CY, DK, IT, LV, MT, IS, NO) are reportedly working on or planning studies on the issues posed by interoperability.

Table 5-5 summarises the extent to which NRAs currently address issues of interoperability. Three NRAs (DE, SE, UK) have developed procedures to ensure that postal operators will exchange postal items seamlessly throughout the national territory. Five NRAs (DK, FR, LT, MT, UK) have adopted procedures that ensure the addressee of a postal item can identify all of the postal operators that handled the item. Five NRAs (DK, FR, LT, LV, UK) ensure that the addressee of a postal item can clearly identify to whom complaints should be addressed. The Latvian NRA requires the postal operators to cooperate in handling customer inquiries. At least four NRAs (DK, ES, SE, UK) ensure that postal items that cannot be delivered to an addressee can be returned to the sender promptly and without undue burden on any postal operator.

By the same token, a multi-operator environment implies that the NRA should not impose legal obligations on postal service providers — such as access and delivery requirements, quality of service and price regulation, and accounting controls — in a manner distorts competition among operators. To do so, it may be necessary to restate the universal service obligation in a manner that is less related to the operations of a specific USP. Similarly, where the NRA imposes a financial burden on a postal service provider, it must fully compensate that operator for the net cost of that burden, on the one hand, and take care not to overcompensate the postal service provider, on the other. To date, however, it appears that few NRAs have considered the implications of

253 See Postcomm, 'Postal Code of Practice for Common Operational Procedures: A Decision Document' (Aug. 2005); 'Protecting the Integrity of Mail – A Code of Practice: A Decision Document ' (Aug. 2005).

multi-operator environment for the manner in which the universal service obligation is specified or financed.[254]

Relatively few Member States have fully considered the implications of interoperability and a multi-operator environment. However, several NRAs (notably, FR DE, SE, and UK) have made important strides, especially in issues related to interoperability. Several other NRAs are reportedly working on or planning studies on issues posed by interoperability and the multi-operator environment.

254 Questionnaire 231-35 asked, 'Has the NRA or government considered carefully the legal and practical problems presented by the application of the elements of postal regulation — including access and delivery requirements, quality of service and price regulation, and accounting controls — in an market in which multiple postal operators are considered as "providers of universal services" due to multiple designations, public procurement, and/or reliance on market forces?'. No NRA was able to cite a study that truly deals with these issues, and only 3 or 4 NRAs (CY, DK, IS, and perhaps NO) indicated that such studies were being planned.

5.5 Revised relationship between postal and competition regulation

In the original Postal Directive, the requirement to establish NRAs was motivated in part by a determination 'to ensure undistorted competition in the non-reserved sector'.[255] The directive declared that Member States could vest NRAs with authority to enforce the competition rules in the postal sector. The Second Postal Directive explicitly required NRAs to restrain 'cross-subsidisation of universal services outside the reserved sector out of revenues from services in the reserved sector' except in limited circumstances.

The Third Postal Directive modifies the relationship between postal regulation and competition regulation. In the revised directive, competition and market forces play a larger role in governing the postal sector. Successful implementation of the Third Postal Directive, therefore, depends in part on ensuring fair and effective competition in the postal market where feasible. Accordingly, Article 22(1) of the Third Postal Directive includes a new requirement for 'consultation and cooperation' between the NRA and the national competition authority (NCA). The Third Postal Directive also eliminated the requirement that NRAs monitor anti-competitive cross subsidy, and instead left to Member States to decide how to assign this responsibility.[256]

255 Directive 97/67/EC, Recital 19.

256 Directive 2008/6/EC, Recital 40, declares, 'In view of the national specificities involved in the regulation of the conditions under which the incumbent universal service provider must operate in a fully competitive environment, it is appropriate to leave Member States the freedom to decide how best to monitor cross-subsidies'.

5.5.1 Consultation and coordination between NRA and NCA

In order to ascertain the current allocation of enforcement authority over the competition rules and the current level of cooperation between the NRA and NCA, this survey asked each authority four questions:

- Which agency has primary authority for ensuring that postal operators comply with the competition rules?
- Are the agencies obliged to share information about their respective activities?
- Do the two agencies consult regularly?
- Has the NCA been consulted about the transition to full market opening?

The contrasting answers of NRAs and NCAs are presented in Table 5-6. For example, the first column reports the NRA's answer to the threshold question of whether the NRA is the primary authority for enforcement of the competition rules in the postal sector. The second column reports the NCA's responses to the same question.

In this table, answers in each pair of columns should match if the NRA and NCA have been cooperating with one another. In addition, one would expect that the answers in columns 3 through 6 would be 'yes'; that is, both the NRA and the NCA should indicate that there is obligation to share information about postal cases that raise competitive issues and that there is regular consultation between the two agencies. The last two columns may reflect a level of cooperation that exceeds this basic minimum. Given the competitive issues raised during liberalisation of some Member States (notably Sweden in the 1990s), it seems reasonable to expect that NRAs and NCAs should consult about potential barriers to entry and how to ameliorate them well in advance of the full market opening required by the Third Postal Directive.

Overall, it appears that the NCA bears primary responsibility for enforcing the competition rules in the postal sector. Twenty-one NRAs, representing 77 percent of the EU/EEA postal market, take this position. In three of the four Member States in which the NRA claimed to have lead authority to enforce the competition rules, the NCA declared that, on the contrary, it was the primary enforcer of the competition rules (DE, LU PL).[257] In one country (LT), each of the two authorities reported that the other would be responsible. In at least two Member States (EE, SK), the NRA and NCA both take

257 In Spain, the fourth country mentioned above, the NRA also claimed primary authority to enforce competition law in the postal sector. There is no response from the Spanish NCA in the table, but given the fact that the Spanish competition authority has taken several decisions in postal cases, it seems likely that the NCA's view in Spain, too, would clash with the NRA's perception of having primary authority for applying competition law.

the lead in enforcing the competition rules.[258] In 10 Member States (BE, CY, DE, FI, HU, LT, PT, SK, UK, IS) the NRA indicated that it retained secondary authority to enforce the competition rules.[259] In total, it appears that the NRA has a lead or secondary role in enforcing the competition rules in 14 Member States (BE, CY, DE, EE, EL, FI, HU, LT, LV, PL, PT, SK, UK, IS) representing 53 percent of the EU/EEA postal market.

Table 5-6 Coordination between NRAs and NCAs

	NRA: primary enforcer?	NCA: primary enforcer?	NRA: obliged to share info?	NCA: obliged to share info?	NRA: regular consults?	NCA: regular consults?	NRA: NCA consulted on FMO?	NCA: NCA consulted on FMO?
AT	NCA		No		No		No	
BE	NCA	NCA	Yes	No	Yes	Yes		No
BG	NCA	Other		Yes		Yes		Yes
CY	NCA	NCA	Yes	No	Yes	Yes	Yes	No
CZ	NCA	Both		No	No	No	No	No
DE	NRA	NCA	Yes	Yes	Yes	Yes		Yes
DK	NCA	NCA	No	No	No	No	Yes	??
EE	Both		Yes					
EL	NRA		Yes		Yes			
ES	NCA	NCA		Yes				No
FI	NCA	NCA	No	No	No	No	No	No
FR	NCA	NCA	Yes	Yes	Yes	Yes	Yes	
HU	NCA	NCA	Yes	Yes	No	No	No	Yes
IE	NCA	NCA	Yes	No	Yes	Yes	Yes	No
IT	NCA	NCA	No	Yes	No	Yes	No	No
LT	NCA	NRA	Yes	??	Yes	No	Yes	??
LU	NRA	NCA	No	Yes	No	No	??	No
LV	Both	NCA	No	No	No	No		No
MT	Other	Other	Yes	Yes	Yes	Yes		No
NL	NCA	NCA	Yes	Yes	Yes	Yes	No	No
PL	NRA	NCA	Yes	Yes	No	No	No	Yes
PT	NCA		Yes		No		No	
RO	NCA	Both	Yes	Yes	Yes	No	No	No
SE	NCA	NCA	No	No	Yes	No		No
SI	NCA	NCA	Yes	Yes	No	Yes	No	Yes
SK	Both	Other	No	No	No	No	No	Yes
UK	NCA	NCA	Yes			Yes		
IS	NCA	NCA	Yes	Yes	Yes	No	Yes	No
NO	NCA		Yes		Yes		Yes	

Note 'FMO' refers to the full market opening required by Directive 2008/6/EC.

258 In Estonia, the NCA also acts as the NRA for the postal and other sectors, i.e. NRA and NCA are the same institution.

259 Questionnaire 201-67.

NRAs and NCAs seem to share information and consult to a fair degree. In some Member States (DK, FI, LV, SE, SK), however, it appears that there is no obligation for these agencies to share information, while the situation in others is unclear (AT, BE, CY, CZ, IE, IT, LU). Regular consultations appear to occur in about one-half of Member States although in only 11 Member States (BE, CY, DE, FR, IE, MT, NL, PL, RO, SI, IS) is there a definite affirmation of regular consultation from both the NRA and NCA.

We further asked both the NRA and the NCA to describe briefly the types of expertise gained from cooperation with the other agency.[260] Agencies were rarely able to identify specific expertise that NRAs required from NCAs. An exception was the Hungarian NRA which referred to the NCA's expertise in defining relevant markets and analysing levels of competition. Similarly, the Latvian NRA noted that the NCA proposed measures for compliance with the competition rules. The French NCA noted that it was specifically consulted by the NRA in a case involving discounts for bulk mail clients. It must be noted, as well, that special circumstances may limit the need for NRAs to rely upon NCA expertise. For example, the Irish NRA pointed out that it had little need for NCA expertise because its staff included former staff of the NCA. Looking at the possible flow of expertise in the other direction, both agencies recognised that NCAs may usefully draw upon NRAs for information about the postal markets and accounts.

We also asked NCAs whether, in their view, it would be feasible to rely upon enforcement of the competition rules alone to protect the public interest in the postal sector. Most of the NCAs who answered this question declared that sector regulation was needed in addition to enforcement of the competition rules, citing, for example, the market dominance of the incumbent (ES, IE, SE, IS), the need to protect universal service (BE, HU, IT, LU, MT), or the existence of remaining barriers to entry (FI). On the other hand, the German NCA observed that the NCA would be sufficient to protect the public interest 'if the regulatory regime has established functioning markets'. [261]

Currently, NRAs and NCAs share information and consult to a moderate degree. In many Member States, however, it appears that there is no obligation for these agencies to consult or coordinate their activities. Regular consultations appear to occur in about one-third to one-half of Member States. Most NCAs declared that sector regulation is needed in addition to enforcement of the competition rules, citing, for example, the market dominance of the incumbent and the need to protect universal service.

260 Questionnaire 201-71, 201-72, 401-13, 401-14.
261 Questionnaire 401-68, 401-69.

Case history 5-3: Cooperation between OPTA and NMa (Netherlands)

In the Netherlands, both the independent Post and Telecommunications Authority (OPTA) and the Dutch competition authority (Nederlandse Mededingingsautoriteit, NMa) bear responsibility for ensuring workable competition in the electronic communications and postal sector. OPTA is in charge of the implementation of legislation and regulation as laid down in the Telecommunications Act, the Postal Act or in European law. NMa is authorised to implement and enforce general competition law.

In order to structure the exercise of concurrent powers of decision-making and establish consistent policy rules for cases, OPTA and NMa concluded a Cooperation Protocol signed on 19 December 2000. The Protocol determines allocation and referral of tasks, processing in case of concurrent powers, urgent measures, interpretation and application of terms, advice on the applicability of competition law, exchange of information, and granting of mutual support.

The most relevant provisions pertain to the allocation of tasks and the right to take action against the abuse of a dominant market position. In case an application for action is solely submitted to one authority, the other authority is notified. If an application would be better processed by the other authority because of the effectiveness of its legal instruments and/or efficiency considerations, the application must be referred to that authority. The authority addressed first has to discontinue the proceeding. The same procedure applies if one authority lacks competence. Where an application is submitted to both OPTA and NMa, the authorities must consult each other and coordinate proceedings.

If action by OPTA ensures that abuse of a dominant market position is brought to an end, it has the right of pre-emption. In case OPTA takes action and agrees on the application of competition terms (written consent; compliance with guidelines, previous decisions or court rulings), NMa is not entitled to apply relevant provisions of the Competition Act. But if OPTA abstains from taking action or its powers turn out to be insufficient, NMa can apply these provisions while OPTA has the right to raise objections. Furthermore, cases of major mutual importance can be prepared together by a joint processing team.

Resort to urgent measures requires prior consultation of the other authority. Consultation or agreement on general guidelines is also envisioned with respect to the interpretation of legal terms. OPTA can request the advice of NMa on the applicability of competition law as well. The authorities provide each other with all necessary information about companies, important matters and developments, and conduct pointing at an abuse of a dominant market position. On request, OPTA and NMa are obliged to support each other in all affairs. In addition, the Chairman of the Commission of OPTA and the Director General of NMa meet at least quarterly.

According to OPTA and NMa, intensive cooperation has evolved in the electronic communications sector and works encouragingly. With regard to postal markets, assessment is difficult as opportunities for cooperation have been rare so far. However, officials of the two authorities reported to meet and discuss the situation of the postal market regularly.

Case history 5-4: Allocation of competences between NRAs and NCAs in the electronic communications sector

In theory, there are three possible models for the respective roles of the antitrust and sectoral authorities in the electronic communications sector:[262]

In Model 1, the NCA is the sole authority in charge of the application of competition law and sector-specific regulation in the electronic communications sector and there is no NRA (for economic regulation). This model is adopted in New Zealand and Australia for several reasons: the predominance of the culture of antitrust, the possibilities of economies of scope and coordination of instruments and the advantages of a 'one-stop shop'. However, this model does not eliminate the risk of incoherence between antitrust and regulatory decisions as the coordination between the departments in charge of the antitrust and sector-specific regulation is often weak. Moreover, there is a risk that the other non-economic objectives are set aside in regulatory decisions, or conversely, that competition law is diluted by such objectives.

In Model 2, the NRA applies sector-specific regulation, and concurrently with the NCA, competition law in the electronic communications sector.[263] This model is applied in the United Kingdom[264] and in Greece. The advantages of this model are: (i) allowing for more flexible and cohesive regulation as the NRA may apply sector-specific regulation or competition law; (ii) efficiencies and reduction in time delays; (iii) facilitating the transition from sector-specific regulation to competition law; and (iv) increasing the bargaining power of the NRA. The disadvantages may include: (i) risk of the development of a sector specific antitrust that would not be consistent with the antitrust law applied in the other sector of the economy; (ii) risk of regulatory capture of the NRA; (iii) lack of expertise to apply antitrust law; and (iv) risk that either sector-specific rules should be applied instead of competition rules or vice versa.

In Model 3, the NCA is exclusively in charge of antitrust law and the NRA is exclusively in charge of the sector-specific regulation. This model is applied in most of the EU Member States. The advantages of this approach are that: (i) each agency works within its area of expertise and the provision of incentives within government agencies is often facilitated by focused missions; (ii) each agency has certain powers, which may provide certain benefits depending on the case at hand (e.g. competition authorities tend to have broader powers to gather information than do sector-specific regulators); and (iii) checks and balances as well as benchmarking between the two agencies may mitigate both the risks and costs of regulatory mistakes and regulatory capture. However, there may be disadvantages: the greater are the number and specialisation of regulatory agencies, the greater is the potential for regulatory complexity, duplication of procedures, conflicting decisions, and encouragement of forum shopping, which would increase regulatory costs and delays.

Each of the models has advantages and drawbacks and the optimal choice depends on economic circumstances (e.g. the current level of competition) and the pre-existing legal framework within the respective countries. In practice, it is important that: the competences of the NRA and the NCA are clearly defined; a priority rule is established when there are overlapping competences (such as a priority in favour of the sectoral regulator); and that any conflict between NCA and NRA should be directly settled by an appeal Court (which should be the same for the NRA and the NCA).

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262 On the matter, see different reports of international bodies: International Competition Network (2004), Working Group on Antitrust Enforcement in Regulated Sectors, Report to the Third Annual Conference in Seoul, International Competition Network (2005), Working Group on Antitrust Enforcement in Regulated Sectors, Report to the Fourth Annual Conference in Bonn, International Competition Network (2006), Working Group on Telecommunications Services, Report to the Fifth Annual Conference in Cape Town, available at: http://www.internationalcompetitionnetwork.org/index.php/en/library, OECD (1999), Relationship between Regulators and Competition Authorities, DAFFE/CLP(99)8; UNCTAD (2006), 'Best practices for defining respective competences and settling

Case history 5-5: Coordination between NRAs and NCAs in the electronic communications sector

Appropriate coordination between NRAs and NCAs is required because overlapping jurisdictions may lead to inter-agency turf battles, regulatory duplication, inefficient use of resources and increased costs, additional requirements and complexities due to both multiple and different standards of review being imposed on firms, potential delay in closing the transaction, potential lack of transparency, risk of inconsistent decisions, risk of regulatory gaming by market participants, and overall uncertainty in the market.[265]

In the electronic communications sector, such coordination is required by EU law.

First, the principles of *effet utile* and proportionality requires that electronic communications regulation is applied efficiently and in a manner that does not go beyond what is necessary to achieve the objectives of the regulation.

Second, Article 3(5) of the Framework Directive 2002/21 provides generally that '*(…) Member States shall ensure, where appropriate, consultation and cooperation between (National regulatory) authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest (…)*'. More specifically regarding the market analysis required to determine whether one or more operators has significant market power (in effect a dominant position) susceptible to ex ante regulation, Article 16(1) of the Framework Directive states that '*national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the (Commission) guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities*'.

This coordination may be achieved by agreements and protocols between NRA and NCA, which are of three categories:[266] First, delimitation of jurisdiction mechanisms such as case

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of cases, which involve joint action by competition authorities and regulatory bodies', TD/B/COM.2 /CLP/44/Rev.2. See also in the academic literature: Barros P.P. and Hoernig S.H. (2004), Sectoral Regulators and the Competition Authority: Which Relationship is best?, CEPR Discussion Paper 4541; Choné Ph. (2006), 'Droit de la concurrence et régulation sectorielle. Entre ex ante et ex post', in Frison-Roche M.A. (ed.), Droit et économie de la regulation: Vol. 4: Les engagements dans les systèmes de régulation, Presses de Sciences Po et Dalloz, 49-73 ; Larouche P. (2005), 'Co-ordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects', in Geradin D., Munoz R., Petit N. (eds), Regulatory Authorities in the EC: A New Paradigm for European Governance, E. Elgar, 164-179 ; Petit N. (2005), 'The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion', in Geradin D., Munoz R., Petit N. (eds), Regulatory Authorities in the EC: A New Paradigm for European Governance, E. Elgar, 180-212.

263 A variant of this model is when the NCA is exclusively in charge of antitrust law, and the NRA and the NCA apply concurrently the sector-specific regulation. This model is followed in Belgium where part of the sector-specific regulation (the SMP regime) is applied by the Belgian Institute for Post and Telecommunications, whereas other part of the sector-specific regulation (dispute resolution) is applied by the Competition Council.

264 See Ofcom Guidelines of July 2004 for handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives. See also the Office of Fair Trading Guidelines of December 2004 on Concurrent application to regulated industries.

265 However, Barros and Hoernig (2004) show that it is more efficient that both authorities decide a case independently than jointly for three reasons. First, with independent decisions, the probability that cases are solved is highest, even though each authority may give less attention to the case than it was alone. Second, independent decisions are less vulnerable to lobbying. Third, it is also less likely that no authority feels responsible for a given case.

266 Those categories are taken from (ICN:2006:28).

allocation, or division of task (for instance the NCA deals with market definition and dominance assessment and the NRA deals with remedies). Second, organised cooperation mechanisms such as request of binding or non binding opinion by the authority in charge of the case to the other authority (as it is the case in France).[267] Third, informal and soft techniques of cooperation such as exchange of information. In most of the Member States, the NCAs are now systematically consulted on market analysis (as required by the electronic communications framework).

5.5.2 Model for relations between postal and competition regulation

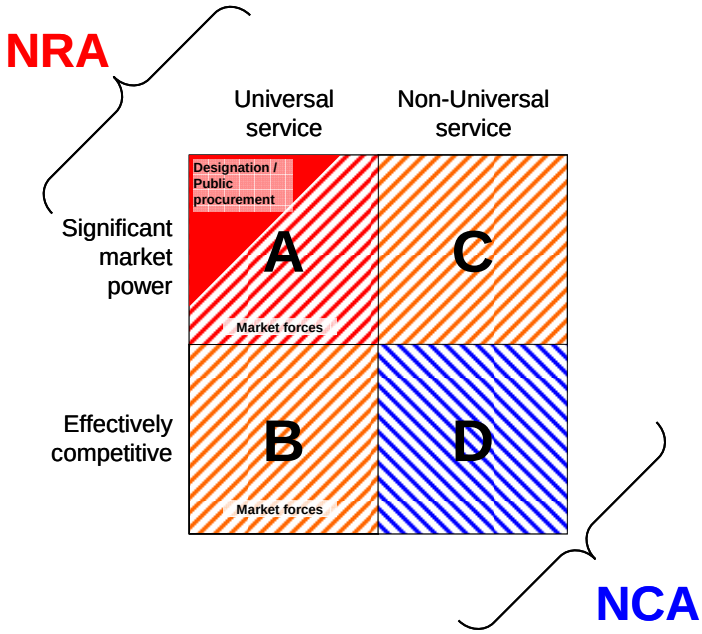
The section proposes a diagrammatic model for considering relations between postal regulation and competition regulation under the Third Postal Directive. Figure 5-1 relies on two key regulatory concepts, one drawn from the Postal Directive and the other from the competition rules: the scope of the universal service obligation and the presence or absence of postal operators with significant market power. In this figure, the postal sector is divided into four quadrants. Quadrants A and B represent postal services ensured and regulated as universal services in accordance with the national universal service obligation. Quadrants C and D represent other, non-universal postal services. Services in Quadrants A and C are provided by postal operator with significant market power, mostly likely, but not necessarily, the public postal operator or its successor. Quadrants B and D are provided under conditions of effective competition.

Quadrant A is divided into two parts. The solid red (dark) triangle represents universal services which are ensured by means of designation of one or more USPs and/or by public procurement of postal services. In the diagram, the red triangle covers only a portion of quadrant A and none of quadrant B because, in chapter 6, we suggest that the best practice in implementing the Third Postal Directive will be to rely upon market forces as much as possible.[268] In the (red) striped portion of quadrant A, the universal service is ensured by reliance on market forces, that is, by relying on the commercial

267 See also OPTA/NMa Cooperation Protocol of 24 June 2004.
268 See section 6.3.3., below.

self-interest of the postal service providers. Note that it is not necessary to have effective competition — i.e., to be in quadrant B — to rely upon market forces. A Member State may rely on market forces to ensure universal service even if the postal service provider has significant market power.[269]

Figure 5-1 Model of postal/competition regulation of postal markets



The proper size of the solid red triangle — the scope of services ensured by designation or public procurement — is one of the key policy issues posed by the Third Postal Directive. In principle, the size of the red triangle could vary substantially depending on the legal framework adopted by the Member State and specific market conditions in the Member State. The size of the red triangle may be reduced to zero (complete reliance on market forces) or expanded to include all of quadrants A and B (complete reliance on designation and/or public procurement to ensure the entire universal service).

The diagram also implies a general relationship between the roles of the NRA and the NCA. Quadrant A is shown in red to suggest that, in principle, the NRA should have primary jurisdiction over universal services provided by a postal operator with significant market power. Quadrant D is shown in blue to suggest that, again in principle, the NCA should have primary jurisdiction over postal services with are outside the scope of the

269 The German NRA currently relies upon market forces to ensure universal service even though Deutsche Post has a market dominant position in much of the universal services market. See section 5.2.1, above.

USO and produced under conditions of effective competition. Quadrants B and C are cross hatched in red and blue to suggest that roles of the NRA and NCA may overlap. The Third Postal Directive allows Member States discretion in specifying the relationship between the NRA and NCA in quadrants B and C. The NCA could take the lead in enforcing the competition rules or even have exclusive authority to do so in one or both quadrants. Alternatively, the NRA could be the primary enforcer in one or both quadrants.

We propose that relationships between postal regulation and competition regulation may be clarified by focusing on the overlapping sets of postal services defined by (i) the universal service obligation or lack of a USO, (ii) existence of significant market power or effective competition, and (iii) the use or non-use of designation or public procurement to ensure universal service.

5.6 Definition of the universal service obligation

In the Third Postal Directive, the Community definition of the universal service obligation is unchanged from the Second Postal Directive. Nonetheless, the Third Postal Directive modifies the commercial and financial context of the universal service obligation by introducing full market opening, giving Member States greater flexibility in determining the efficient and appropriate mechanism for ensuring universal service, and revising the means for financing the net cost of universal service, if any. Moreover, the commercial context for the universal service obligation has been altered by dramatic changes in postal markets since the original Postal Directive was adopted in 1997. Under Article 5 of Postal Directive Member States are required to ensure that the definition of universal service evolves in response to 'the technical, economic and social environment and to the needs of users'. Taking these circumstances into account, Member States may consider it appropriate to reexamine the requirements of the universal service obligation in the course of transposing Directive 2008/6/EC.

As described in preceding chapters, the Postal Directive allows Member States discretion in defining the universal service obligation. The range of services ensured as universal services must include basic letter post and basic parcel post, but does not necessarily require inclusion of more specialised services such as bulk letters, direct mail, periodicals (e.g., newspapers and magazines), non-priority letter post, and bulk parcels.[270] Once the range of universal service is defined, Member States have relatively less discretion over the manner in which universal services are regulated. For each universal service, a Member State is obliged to ensure certain regulatory standards are maintained such as service to each address five days per week, reasonable access, cost-oriented prices, quality of service standards, etc.[271]

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270 NRAs do not agree on which services the Postal Directive requires Member States to ensure as postal services, and there is, in fact, a substantial variation among Member States. See section 2.3, above.

271 See sections 3.3 and 3.7, above.

5.6.1 Demand for universal postal service in the future

Since Article 5 requires Member States to ensure that the universal service obligation evolves in response to the needs of users, our survey posed the following question: 'Has the NRA or government prepared a study or report on the needs of senders and addressees for specific types and levels of universal postal services that takes into account expected changes in technology, the effects of full market opening, and other future considerations?' Eleven NRAs (BE, DE, EL, FR, HU, IE, LT, MT, PT, SE, UK) representing an impressive 70 percent of the EU/EEA letter post market, reported that they have carried out studies of the needs of users in the last two years. In most cases (DE, FR, HU, IE, MT, PT, SE, UK), views of users were specifically solicited. Two NRAs (SE, UK) conduct annual surveys of the needs of users. On the other hand, almost all of the remaining NRAs (16) stated that no survey of users' needs had been conducted.[272]

Eleven NRAs (BE, DK, HU, IT, LT, LV, PL, SI, SK, IS, NO) reported that their Member States are considering new legislation on the scope of the USO. It may be seen, however, there is almost no overlap between this list of countries and those which have systematically studied users' needs. Moreover, the changes in the definition of the USO foreseen by these Member States seem to be relatively minor.[273]

Eleven NRAs, accounting for 70 percent of the EU/EEA letter post market, appear to be actively seeking to identify the needs of users, a necessary step in a reasoned review of the need for universal services in the future. Other NRAs do not, however, appear to have plans for doing so. Member States that are considering changes in the definition of the universal service obligation do not seem to be relying upon analyses of the needs of users.

272 Questionnaire 121-1 to 121-4. The Italian NRA is preparing a public consultation on implementation of the Third Postal Directive but did not indicate the extent to which this consultation will analyse the future needs of users.

273 Questionnaire 131-11 to 131-13. Several NRAs indicated, however, that they did not know what changes in the USO might be forthcoming so the text may understate future revisions.

5.6.2 Effects of uniform rate requirements

The uniform rate requirement has been central to postal policy in many Member States. A 'uniform rate requirement' is a legal measure that requires that a universal service to be provided at rates that do not vary with the distance a postal item is transported. Uniform rate requirements were widely cited by opponents of liberalisation as creating opportunities for 'cream skimming' that would threaten the financial viability of USPs in a liberalised market. The original Postal Directive permitted, but did not require, Member States to adopt uniform rate requirements for universal services. While several Member States do not require uniform rates for any universal services, most do so for at least some services.[274]

The Third Postal Directive limits use of uniform rate requirements. In general, uniform rates are limited to single-piece items and certain services specially related to the general public interest. Recital 38 of the Directive 2008/6/EC explained the new rule and its rationale as follows:

> In a fully competitive environment, it is important, both for the financial equilibrium of the universal service as well as for limiting market distortions, that the principle that prices reflect normal commercial conditions and costs is only departed from in order to protect public interests. This objective should be achieved by continuing to allow Member States to maintain uniform tariffs for single piece tariff mail, the service most frequently used by consumers, including small and medium-sized enterprises. Member States may also maintain uniform tariffs for some other mail items, such as, for example, newspapers and books, to protect general public interests, such as access to culture, ensuring participation in a democratic society (freedom of press) or regional and social cohesion.

It appears that Member States with uniform rate requirements will need to reconsider their scope in transposing the Third Postal Directive. In Member States that currently maintain uniform rate requirements for bulk mail products, an abrupt end to these requirements might disrupt existing service patterns. For the future, if a Member State plans to continue uniform rate obligations with respect to single-piece postal items or other public service mail, it may be prudent to analyse the effects on the universal service provider. A uniform rate requirement could make it difficult for a universal service provider to respond to prices of new entrants after full market opening.

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274 See section 3.7.3, above.

Table 5-7 Analysis of costs and benefits of uniform rate policies

	Letter post: uniform rate req'd?	LP: delivery as % of total costs	LP: study of varying delivery costs?	LP: single piece w/o reg?	Parcels: uniform rate req'd?	Parcels: transport & delivery % total costs?	Parcels: study of varying delivery costs?	Parcels: single piece w/o reg?
AT								
BE	Yes		No		Yes			
BG	Yes				Yes			No
CY	Yes		No					
CZ	No				No			
DE	No				No			
DK	Yes		No		Yes		No	
EE	Yes		No	No	Yes		No	
EL	Yes		No		Yes			
ES	Yes	56.20	Yes	No	Yes	66.08	No	No
FI	Yes	100	No		No		No	
FR	Yes	#	Yes	No	Yes	#	Yes	
HU	No	47.5	No		No		No	
IE	No				No			
IT	Yes	40	Yes		Yes	50	No	
LT	Yes	47	No		Yes		No	Yes
LU	Yes		No		Yes		No	
LV	Yes		No		Yes		No	
MT	Yes		No	No	Yes			
NL								
PL	Yes		No		Yes		No	
PT	Yes	36	No			55.6		
RO	Yes	39.80	No		Yes	56.74	No	
SE	Yes	#	#		Yes	#		
SI	Yes	30	No		Yes	40		
SK	No	45	No		No	48	No	
UK	Yes	45	Yes		Yes	50	Yes	
IS	Yes				No			
NO	Yes		No		No			

Note: "#" indicates confidential data.

To estimate the economic effects of a uniform rate requirement, it is necessary to know the costs of delivery and transportation for different postal items. The distortion caused by a uniform rate requirement, if any, is due to the fact that the USP is required to charge a uniform rate for services whose underlying costs vary by so much that the USP would normally charge different rates if it could do so. For the USP, charging different rates to different mailers — especially retail customers — is also costly, so the USP will not charge different rates for small variations in cost or for customers with high transaction costs. To evaluate the effect of a uniform rate requirement, the NRA needs to analyse the relevant cost differences and estimate the schedule of rates that the UPS

would likely charge if unconstrained by the uniform rate requirement. What the USP looses, on a net basis, by being forced to maintain the uniform rate is the net cost of the uniform rate requirement.

Table 5-7 summarises the current state of analysis of uniform rate policies in the Member States. Twenty-two Member States require uniform rates for letter post items. In those Member States which require a uniform rate, 11 NRAs (ES, FR, HU, IT, LT, PT, RO, SE, SI, SK, UK), accounting for almost 60 percent of the EU/EEA market, appear able to estimate the cost of delivery as a percentage of the total cost of universal services.[275] More significantly, however, only 4 NRAs (ES, FR, IT, UK) have studied, or are studying, how the cost of delivery per postal item varies in different areas of the nation.[276] No NRA appears able to estimate whether uniform rates for single-piece letter post would persist without a uniform rate requirement. No NRA in a Member State with a reserved area is able to predict how much pressure the end of the reserved area will put on the uniform rate requirement.[277] On the other hand, it should be noted that at least five Member States (CZ, DE, HU, IE, SK) do not require a uniform rate for letter post. For such Member States, the effects of the Third Postal Directive will likely be muted, although an increase in competition will nonetheless put additional pressure on the incumbent's rate schedule.

Seventeen Member States require uniform rates for single piece parcel services.[278] In Member States which require a uniform rate for single-piece parcels, 7 NRAs are able to estimate the cost of transportation and delivery as a percentage of the total cost of service. Only two NRAs (FR, UK) have analysed how the cost of transportation and delivery vary according to length of transport and specific delivery costs in different areas. No NRA can project the retail parcel prices that would likely result without the uniform rate requirement.[279] Again, however, it should be noted that at least 8 Member States (CZ, DE, FI, HU, IE, SK, IS, NO) do not require uniform rates for single-piece parcels.

For Member States which have, or plan to have, uniform rate requirements, the Third Postal Directive will require elimination of the uniform rate requirements for most bulk mail and subject the uniform rate requirements for single-piece letters and parcels and

275 Not counting Finland, whose estimate of 100 percent appears improbable.
276 Total does not include data requested to be kept confidential.
277 Questionnaire 121-8 asked, 'For letter post services for which a uniform rate is required by law, if any, has the government (or NRA) determined the retail price level or levels that would likely arise in a competitive market in the absence of a requirement to maintain uniform rates -- i.e., after considering such factors as variations in the cost of delivery, administrative costs, public acceptance, etc.?' Only the NRA in the UK, whether is no reserved, reported that it could estimate the effects of removing the uniform rate requirement.
278 Three Member States (BE, EE, ES) appear to require uniform rates for bulk parcel services as well. Questionnaire 211-76.
279 Questionnaire 121-14.

certain public interest items to the pressures of competition. Only the largest NRAs, notably in France and the UK, seem to be developing the analytical tools necessary to evaluate the implications of maintaining uniform rate requirements in a liberalised, multi-operator environment. On the other hand, several Member States have no uniform rate requirement for either letter post or parcel post. It thus appears that most Member States with uniform rate requirements may need to consider more carefully the implications of the Third Postal Directive for these provisions.

5.6.3 Elements of universal service and/or groups at risk (if any)

Under the Second Postal Directive, Member States typically sidestepped any need to identify specific elements of universal service that would not be provided in the absence of a universal service obligation. Instead, Member States designated a single postal operator — the public postal operator or its successor — as the sole universal service provider for the entire national territory and established a reserved area to benefit the USP. They assumed, without quantitative analysis,[280] that monopoly rents from the reserved area compensated the USP for the net cost of providing universal service.

Under the Third Postal Directive, a more analytical approach will be required. The Third Postal Directive does not permit continuation of a reserved area. Instead it authorises two alternative mechanisms for supporting universal service if necessary. A Member State may designate a postal operator as a universal service provider and provide compensation for the net cost, if any, of the universal service obligation imposed. Alternatively, the Member State may contract with a postal operator to provide a universal service using public procurement procedures. If the Member State makes use of a designated USP, Annex 1 of the new directive requires that, before providing financial support for universal services, the NRA must identify elements of universal service and/or groups of users that may lack universal service in the absence of regulatory intervention. A similar analysis would seem necessary in advance of public procurement since the terms of a contract would require such data. In either case,

280 See section 3.4.1, above.

therefore, it will be necessary for the NRA to identify the specific universal services, if any, for which payment is being provided.

In setting out how compensation for a designated USP is to be calculated, Annex 1 says, inter alia,

> The net cost of universal service obligations is to be calculated, as *the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without the universal service obligations*. . . .
>
> Due attention is to be given to correctly assessing *the costs that any designated universal service provider would have chosen to avoid, had there been no universal service obligation*. . . .

The calculation is to be based upon the costs attributable to:

> (i) *elements of the identified services* which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards. . . .;
>
> (ii) *specific users or groups of users* who, taking into account the cost of providing the specified service, the revenue generated and any uniform prices imposed by the Member State, can only be served at a loss or under cost conditions falling outside normal commercial standards.
>
> This category includes those users or groups of users that would not be served by a commercial operator that did not have an obligation to provide universal service. [emphasis added]

In essence, Annex 1 requires a NRA to undertake a 'what if' analysis. If there were no universal service obligation — i.e., no government guarantee that a specified minimum level of postal service will be provided — then what elements of the identified services or groups of users would not be adequately served if the designated USP could choose for itself what services to offer?

To assess whether NRAs are prepared for a 'what if' analysis, the survey asked, 'Has the NRA studied the market sufficiently to have a considered view on how this service would be provided without regulatory controls?'[281] In this question, 'this service' referred to each of seven main categories of universal service used in this study: basic letter post, bulk letters, direct mail, periodicals (newspapers, etc.), non-priority letter

281 Questionnaire 211-10, 211-22, 211-34, 211-46, 211-58, 211-70, 211-82.

post, basic parcel post, and bulk parcels.[282] Six NRAs (BE, IE, IT, PL, NO, UK), representing about one-third percent of the total EU/EEA letter post market, indicated they could offer a 'considered view' with respect to at least one service category. The best informed NRAs were those of Belgium and Norway, which could offer a considered view for 6 of the 7 postal service markets. The NRAs of Ireland, Poland, and the UK felt they could offer a considered view with respect to four markets each; while the Italian NRA declared it could address 3 markets.

We then asked two questions to try to clarify the NRA's understanding of the changes that would occur without a USO. First, would the overall service level go up or down? That is, would the market prefer faster postal service at higher prices or slower service at reduced prices? Second, how much variation in services and prices would develop across the national territory? Would some areas receive significantly diminished service or higher prices? How big would these areas be compared to the entire market? It should be kept in mind that NRAs were referring to relaxing the USO in effect in their Member States and not necessarily the minimum USO required by the Postal Directive. As noted above, it may be argued that the Postal Directive does not require Member States to include bulk mail services within the scope of their national USOs.[283]

Only two NRAs (IE, NO) addressed these questions generally. With respect to overall price/quality trade off, NRAs in Belgium, Ireland, and Norway thought that mailers of bulk letters and direct mail (BE, IE only) would prefer a slower service for a reduced price. The Norwegian NRA also thought that a slower, cheaper basic letter post service would be preferred by mailers. Both the Irish and Norwegian NRAs thought that basic parcel post would remain about the same. Neither foresaw a significant increase in the variation of prices or services offered in different areas nor changes in other categories of service. The Italian NRA did not provide specific estimates of changes in service level or variability but noted generally that 'universal service affordability couldn't be assured' and there could be 'reduced quality level and lower accessibility to universal service in the remote areas'.

A few other NRAs offered observations although unwilling to commit to a 'considered view'. The Swedish NRA thought that basic letter post prices might increase. The French NRA observed that, while there is a demand for fast, uniformly priced letter post service throughout the national territory, publishers of newspapers and magazines could have difficulty paying higher postage rates. The Icelandic NRA reported that less than 5 percent of addresses could experience significantly less or no delivery. The Spanish NRA believed that between 15 and 25 percent of addresses could experience significantly less or no delivery.

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282 See section 2.2, above.
283 See section 2.3, above.

Most NRAs do not have well-developed views on which services the USP would choose to avoid in the absence of a USO. However, those few NRAs that have considered the effects of the USO seem to believe that mailers of bulk letters and direct mail, at least, would prefer a somewhat less expensive and less rapid service. With the exception of Spain, no NRA believes that elimination of the USO would result in large variations in prices or services.

5.6.4 Evaluation of net cost of universal service (if any)

The net cost of universal service depends on the extent to which government guarantees a supply of postal services that is either more extensive or higher quality than would be voluntarily provided by postal operators stimulated by market forces. If postal operators willingly provide the minimum range of services of specified quality defined by the national universal service obligation, then the net cost of universal service is zero. The net cost of universal service could be more than zero in either of two cases:

1. the minimum level of universal service required by the Postal Directive is more extensive or higher quality than would be voluntarily provided by postal operators (a 'Postal Directive-driven USO net cost'); or

2. the Member State establishes a universal service obligation that is more extensive or higher quality than required by the Postal Directive and more extensive or higher quality that would be voluntarily provided by postal operators (a 'Member State-driven USO net cost').

Whether or not it is appropriate for a Member State government to analyse the net cost of universal service in advance of transposing the Postal Directive seems to depend how its definition of the USO fits into this categorisation. If a Member State government believes that its national USO will entail little or no net cost, then there seems little need to analyse the cost of universal service in advance of an actual lapse of universal

service or demand for compensation by a postal operator.[284] If a Member State government has set the USO at the minimum level permitted by the Postal Directive but believes that this will still require a substantial net cost, then it may be prudent for government to estimate how much its future liabilities will be. Finally, if a government wishes to set its USO substantially above the minimum level required by the Postal Directive, then it would seem desirable for the Member State to investigate the net cost of universal service. If a proposed national USO then appears excessively expensive, government may wish to adjust the definition of the USO accordingly.[285]

Two NRAs (EE, ES) report that studies of the net cost of the universal service are planned for later in 2009. Three NRAs (BG, FR, IT) plan studies in 2010; 3 more NRAs (LT, LU, PL) foresee studies in 2011 or later.

Annex 1 of the Third Postal Directive prescribes how the net cost of a specific USO definition is to be calculated. To date, 5 NRAs (BE, ES, SE, UK, NO), accounting for about one third of the EU/EEA postal market, report that they have prepared an estimate of the net cost of universal service.[286] Only two of these NRAs provided estimates of the net cost of universal service as a percentage of the total cost of providing universal service: Spain, 17 percent (in 2006) and Norway, 9 percent.[287] Two NRAs (UK, NO) confirmed that their calculations were consistent with Annex 1. The Spanish NRA, however, noted that its analysis did not identify costs that a designated USP would have chosen to avoid had there been no USO.[288] Since this is the essence of the what-if analysis required by the Third Postal Directive, the meaning of the Spanish figure is uncertain. The British and Swedish NRAs appear to believe that there would be no net cost of the USO, although the British NRA's conclusion may depend upon Royal Mail becoming more efficient.[289]

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284 At least one NRA, the German NRA, would seem to have a solid basis for assuming the net cost of universal service is close to zero. Germany has a liberalised market and relies upon market forces for the supply of universal services. No postal operator is compelled by law to provide universal services involuntarily, and they are presumably not doing so at a loss (taking all factors into account).

285 Public policy considerations will not demand the same level of detail as calculation of the compensation due to a universal service provider for specific services rendered. Nonetheless, policy makers cannot disregard costs entirely. They will need some estimate of the costs implied by alternative definition of the universal service obligation.

286 Questionnaire 121-17.

287 Questionnaire 121-23.

288 Questionnaire 121-19.

289 See Postcomm, 'Second Submission by Postcomm, the Industry Regulator' (May 15, 2008) at 27. Postcomm declares, 'Postcomm considers that the only way that Royal Mail can deliver an internally financed universal service is through a significant transformation which would result in radically reduced costs and increased efficiency and innovation'. Postcomm did not answer this portion of survey, and it is unclear whether Postcomm's conclusion is based on the same criteria for net cost as set out in Annex 1 of the Third Postal Directive. See also, Postcomm, Letter from Nigel Stapleton, Chairman, Postcomm, to Richard Hooper, Chair, Independent Review of the Postal Service Sector, dated 15 May 2009, Annex, Answer to Q27. Mr. Stapleton wrote, 'It is very difficult to identify elements of the universal service that would not be provided by the market because they are "economically unviable". For example, the reason that a universal service product currently makes a "loss" may be

Only a handful of NRAs have yet considered the net cost of the universal service obligation for their Member States. While the appropriateness of estimating the net cost of the USO varies from Member State to Member State, it would appear prudent for at least some Member States (those with 'high quality' or extensive USO definitions) to consider more carefully the cost of universal service before finalizing their USO definitions under the Third Postal Directive.

due to Royal Mail's inefficiency in providing that product(s) or poor marketing of the product'. In answer to Questionnaire 123-21, the Swedish NRA indicated that it assumed there is no significant net cost resulting from the universal service obligation.

6 Best Regulatory Practices

What is 'best practice' in the regulation of postal markets? In this study, best practices are considered to be practices that will provide a sound basis for the evolution of postal regulation and ensure effective opening of postal markets. ’Best practice’ is a forward-looking concept, not an evaluation of current implementation. From this perspective, this chapter seeks to identify a set of best practices that is derived from the preceding survey of postal regulation in the Member States and supplemented by consideration of postal regulation outside the Community and the regulation of other sectors in the Community. This chapter addresses the following topics:

- an objective definition of ‘best practice’;
- best practices in the establishment and operation of NRAs;
- best practices in striking the balance between the universal service obligation and full market opening;
- best practices related to ensuring universal service;
- best practices related to ensuring full market opening; and
- best practices related to user protection.

6.1 Definition of 'best practice'

6.1.1 Compliance with the Third Postal Directive

In seeking a reasonably objective approach towards defining ‘best practice’, we begin with the premise that best practice must be consistent with the letter and spirit of the Third Postal Directive. While some observers might argue that the Third Postal Directive could be improved in one way or another, one person's improvement often is another's setback. The Third Postal Directive is, in effect, the Community's overall determination of what is best practice for postal regulation for the foreseeable future. Where substantive provisions of the directive are clear and consistent, therefore, identification of best practice is straightforward.

Where the directive allows discretion in interpretation or implementation, we have tried to identify practices which are most likely to accomplish the objectives of the directive. In our view, there are three main policy objectives that may be gleaned from the Third Postal Directive. Two overarching objectives are to ensure provision of a sustainable universal postal service and to open markets for postal services to fair and undistorted competition. The third objective is to ensure appropriate protections for users of all postal services, a response to the shift from a single government service provider to a full range of public, quasi-public, and private service providers. These three objectives animate almost all of the provisions of the Third Postal Directive.[290]

Since these objectives pull in different directions to some degree, none can be considered absolute. Each must be interpreted in light of the others. For example, the market opening required by the directive cannot be read to override the need to ensure the minimum levels of universal service required by the directive. Similarly, the universal service obligation required by the directive cannot be implemented in a manner that effectively thwarts market opening. User protection must inform implementation of both. The Postal Directive is necessarily a document that combines and reflects the views of many parties. No fragment can be read in isolation and interpreted to override the broad purposes of the whole.[291]

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290 To these three, one could reasonably add collection of market statistics as a fourth independent objective. Article 22a(1)(b), added in the Third Postal Directive, specifically obliges all postal service providers to provide the NRA with appropriate statistics. Collection of statistics is not otherwise mentioned in the Third Postal Directive, however. In the following discussion we shall assume a consensus that the NRA should collect appropriate market statistics without singling out collection of statistics as fourth objective of the Third Postal Directive.

291 As a further aide in interpreting the directive, we have consulted the preparatory documents of the Commission, the Council, and the Parliament.

6.1.2 Other factors relevant to best practice

Where consistent with the text and objectives of the Third Postal Directive, our approach towards best practices has been influenced by three other considerations: (i) continuing changes in the marketplace for postal services; (ii) economic analysis of postal markets; and (iii) Community norms with respect to appropriate administrative procedure.

First, we believe that an assessment of best practice should take into account the fundamental changes in postal markets that have taken place over the last few years and that will surely continue into the foreseeable future.[292] The volume of letters transmitted by post — what the Postal Green Paper called 'the fundamental imperative' of universal postal service[293] — has recently declined substantially in several Member States. In the most economically developed Member States, it appears inevitable that the volume of letters will continue to decline as invoices and statements of account are increasingly committed to electronic communications, including Internet sites, email, and text messaging. In these Member States, daily newspapers are also in decline as broadband access spreads and television stations multiply. Direct mail has a brighter future, but only relatively so. Direct mail will be heavily affected by the Internet. Catalogues, for example, will be employed less as comprehensive lists of products and more as inducements to check the seller's Internet site. Overall, it is possible that in the most economically developed Member States total postal volume will fall significantly over the next ten years and virtually certain that direct mail will become a larger percentage of total mail volume. In other Member States, the progress of postal markets will vary. Nonetheless, it seems unlikely that postal markets in other parts of the Community will ever develop into the voluminous universal postal systems that characterised the most economically developed Member States in the 1980s.

This is not to suggest that postal services will be less than vital to the economic and social cohesion of the Community of the future, only that the role of postal services will be different. Direct mail — both addressed and unaddressed — plays an important role in a modern economy and will likely continue to do so for the foreseeable future. With improved data processing, advertising campaigns by mail are becoming more targeted and effective. Technological advances have led to an increase in the economic and social role of parcel and express services over the last two decades, and this trend seems likely continue.

Second, an evaluation of best practice should take into account the extensive economic analysis of postal markets that has been developed over the last two decades. While

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292 As Directive 2008/6/EC, Recital 14 notes, “There are a number of drivers of change within the postal sector, notably demand and changing user needs, organisational change, automation and the introduction of new technologies, substitution by electronic means of communication and the opening of the market’.

293 Postal Green Paper, p. 186.

some of this analysis remains controversial, a consensus has emerged on numerous points (e.g., analysis of the costs of production, segmentation and trends in demand, implications of public policies such as uniform national tariffs). Today we benefit from a better understanding of postal economics than was available when the original Postal Directive was drafted. Best practice should not ignore this scholarship.

Third, best practice should conform to Community norms with respect to good administrative procedure. These norms may be found in such documents as European Ombudsman, *The European Code of Good Administrative Behaviour* (2001) (based on a resolution of the European Parliament); the Final Report of the Mandelkern Group on Better Regulation (2001) (study on good administrative procedure in response to the Lisbon Strategy); and the OECD 'Reference Checklist for Regulatory Decision-making' (1995) (widely accepted summary of good administrative practice). While the Third Postal Directive itself repeatedly requires procedures that are transparent, non-discriminatory, or proportional, general Community norms also provide a broader context for 'best' practice with respect to implementing all aspects of the Directive.[294]

Finally, it should be noted that the following discussion of best practices refers to the manner in which postal markets are regulated in the Member States and not only to the activities of the designated 'national regulatory authority'. In many cases, regulatory policy is determined by institutions other than the NRA.

294 For a discussion of sound regulatory principles and how they could be better applied in the regulation of postal markets, see WIK-Consult, *The Evolution of the Regulatory Model for European Postal Services* (2005) (a study prepared for DG Internal Market of the European Commission).

6.2 Establishment and operation of postal NRAs

6.2.1 Allocation of regulatory authority

Best practice: Primary regulatory authority should be appropriately allocated among four separate institutions: (1) a ministry that determines public policy for the postal sector; (2) a ministry or agency that exercises the ownership rights of the government in the public postal operator, if any; (3) an independent regulator of the postal sector; and (4) a national competition authority. In particular, the NRA should be entrusted with all tasks which, according to the directive or good administrative practice, should be discharged transparently, non-discriminatorily, objectively, and proportionately

Explanation of best practice: In the original Postal Directive, Article 22 required Member States to establish an independent NRA that is 'legally separate from and operationally independent of' postal operators. The Third Postal Directive further provides that the functions of the NRA 'shall have as particular task ensuring compliance with the obligations arising from this Directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service'. What the directive intends, clearly, is that certain types of regulatory decisions should be committed to an agency which is organised in a way that fosters independence, impartiality, and technical expertise.

But which regulatory decisions? In implementing the Postal Directive, all Member States have drawn a distinction between 'ensuring compliance' — the task of the NRA — and defining the public policies that govern the postal sector. Defining basic public policy is the function of the legislator, and the legislator may, in turn, delegate authority to define specific policies to the Council of Ministers or to a minister whose portfolio includes the postal sector, i.e., the 'postal minister'.[295]

While the dividing line between defining public policy and the tasks which should be entrusted to the NRA is necessarily fuzzy, the institutional independence which the Postal Directive requires for the NRA implies that the NRA should be entrusted with tasks which, according to the directive or good administrative practice, should be discharged transparently, non-discriminatorily, objectively, and proportionately. Under the Third Postal Directive, these tasks appear to include, inter alia, application of authorisation procedures, identification of elements of universal service and/or groups of users which would not be appropriately served by market forces, administration of designation and/or procurement procedures where needed to sustain universal service, calculation of the net cost of universal service (if any), supervision of the accounts of

295 See section 3.1.3, above.

universal service providers, regulation of prices of universal services, and setting and monitoring quality of service standards. Best practice should therefore allocate authority between the NRA and other governmental agencies or the legislator accordingly.[296]

Where a Member State retains ownership or control of a public postal operator, the Third Postal Directive further requires 'effective structural separation of the regulatory functions from activities associated with ownership or control'. This provision mandates separation between those who make the rules which govern the postal market and those who control one of the main actors in the market. Otherwise, the impartiality of the regulatory framework will be cast in doubt, and markets may become distorted. Accordingly, a Member State must provide structural separation between the ministry or agency that exercises ownership rights in the public postal operator and all of those that exercise regulatory functions over the postal sector, including the postal ministry no less than the national regulatory authority.

Finally, by embracing full market opening, the Third Postal Directive places greater reliance on enforcement of the competition rules. While the Third Postal Directive provides that the NRA may be charged with responsibility for enforcing the competition rules, this survey suggests that the NCA (national competition authority) has an important role to play. The consensus in the Community is that the NCA and NRA have different strengths and that they should be charged with working together to ensure application of the competition rules in portions of the postal sector. NRAs are better equipped to gather and analyse information about operations and trends in the postal sector. NCAs, however, are likely to have a better appreciation of the policies underlying the competition rules and how those rules can be most effectively applied to markets generally. While best practice thus supports active cooperation between NRAs and NCAs, this survey does not indicate any obvious preference between vesting primary authority for enforcing the competition rules in the NRA, the NCA, or both concurrently.

Several Member States have allocated authority between the postal ministry and the NRA in a manner that allows the NRA to address most tasks which should be discharged transparently, non-discriminatorily, objectively, and proportionately. The leading example is the United Kingdom. U.K. postal law establishes definite policy objectives ranked by priority — an unusually legislative clarification — and vests the

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296 Almost all Member States have committed the functions of the postal NRA to an independent agency with jurisdiction over several network industries, usually including electronic communications. See section 3.2.1, above. While perhaps not implied by the Postal Directive, we believe that this is a sound practice in light of rapid change in the postal sector. The regulator of the postal sector should have a broad understanding of the technological changes affecting the postal sector and the regulatory techniques being developed to cope with technological change in other, related sectors. Moreover, the future of the postal regulator is no clearer than the future of the postal sector itself. The postal NRA should not become so specialised that it develops a vested interest in continuation of a particular pattern of postal services.

NRA, Postcomm, with ample authority to accomplish these objectives in an impartial and objective manner. As a result, where the Postal Directive presents issues which are best implemented by an expert and impartial body, authority to address these issues in the UK has generally been allocated to Postcomm. These issues include an evaluation of the scope of the reserved area necessary to sustain universal service, establishing the level of prices justified by costs, determining the appropriate level and detail of quality of service standards, development of fair authorisation procedures, and identifying the steps necessary to promote interoperability and multi-operator environment. Other Member States which have delegated to the NRA substantial authority to resolve key elements of postal regulation objectively and impartially include Cyprus, Romania, and Sweden.[297]

With respect to separation of regulatory and ownership authority, the ideal solution is privatisation of ownership. In this respect, the best practice is the complete privatisation exemplified by the Netherlands and Malta. Substantial privatisation — as in Denmark, Germany, and Italy — must likewise be considered good practice because government must then take into account the interests of private owners as well as its own. For Member States which are unwilling to divest ownership of their public postal operators, the Hungarian approach of creating a special authority for the management of government enterprises merits serious consideration. The Hungarian law is conceptually similar to the approach used with success in New Zealand to manage 'state owned enterprises'.[298]

Finally, with respect to implementation of the competition rules, the best practice seems to be to retain specific roles for both the NRA and NCA. Each agency approaches the need for application of the competition rules in the postal sector from a different perspective. By having 'two pairs of eyes' watching for potentially anti-competitive activities, risks to effective competition would appear to be diminished. As noted above, the NRA has a lead or secondary role in enforcing the competition rules in 13 Member States (BE, CY, DE, EL, FI, HU, LT, LV, PL, PT, SK, UK, IS).[299] On the other hand, in 11 Member States (AT, CZ, DK, ES, FR, IE, MT, NL, RO, SE, NO), it appears that the NRA has no formal role in applying the competition rules in the postal sector.[300] In 6 of these Member States, however, NRAs have a role in practice as both authorities are obliged to share information, and report that they effectively consult each other (FR, IE, MT, NL, RO, NO).

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297 See section 3.1.3, above.
298 See section 3.1.4, above.
299 EE has not been added to this list. In Estonia, the NCA and the NRA are the same institution.
300 See section 5.5.1, above. Best practices with respect to the respective roles of the NRA and NCA and coordination between the agencies are addressed in section 6.2.7, below.

Examples of best practice:

(i) Allocation of regulatory authority to NRA: United Kingdom, Cyprus, Romania.

(ii) Separation of policy making and ownership: Netherlands, Malta, Hungary, New Zealand.

(iii) Allocation of authority to enforce competition rules between NRA and NCA: the 13 Member States (named above) that have vested appropriate authority in both agencies.

Practices of concern:

(i) Allocation of regulatory authority to NRA: Member States which have failed to establish a truly independent NRA present the most serious concerns (see next section). Even where an independent NRA has been established, Member States may delegate so much authority to political agencies that there is a significant risk of substantial political influence in the implementation of postal policy. See, for example, the delegation of administrative authority to the postal ministry in the Netherlands or the delegation of substantial policy authority to the council of ministers (e.g., DE, ES, HU, LV) or to a single minister (e.g., EL, ES, FR, IT, NO).

(ii) Separation of policy making and ownership: Member States where the postal minister both determines postal policy and exercises substantial proprietary control over a government-owned postal operator such as by appointing the board of directors (IE, LT, PL, RO, SE, SK, UK, IS, NO).

(iii) Allocation of authority to enforce competition rules between NRA and NCA: Member States which have not given the NRA any role, even a secondary role, in implementing the competition rules in the postal sector, or ensured consultation among the two authorities (AT, CZ, DK, ES, SE) may not be implementing the competition rules as effectively as possible.

6.2.2 Independence of NRA

Best practice: The NRA should be a structurally independent and impartial agency with jurisdiction over multiple network industries.

Explanation of best practice: Directive 2008/6/EC emphasised that the independence of the NRA must be sufficient to ensure the impartiality of its decisions.[301] While true impartiality of judgement depends upon the integrity of the judges, institutional arrangements which can foster independence are well known since independence is also required for other state agencies such as courts. Chapter 3 reviewed a number of features of institutional independence, such as the establishment of a multi-person committee to head the NRA, appointment of NRA heads by an agency wholly independent of the USP, fixed terms for NRA heads who cannot be dismissed except for misconduct or incapacity, qualifications for NRA heads and restrictions on post-NRA employment with regulated entities, freedom from review or reversal by the postal minister, financing of the NRA that is independent from the postal ministry, and so forth.[302] Institutional arrangements promoting the independence of the French ARCEP appear to be especially strong. Institutional arrangements in several other Member States appear well considered (AT, BG, CY, CZ, HU, IE, LU, LV, PL, PT, RO, SI, UK). The organisation and procedures of the NRA in the United States also deserve consideration.

Examples of best practice: France (with good practices in several other Member States).

Practices of concern: Italy and Spain have not yet established an independent regulator. Relative to other Member States, Sweden and Norway have not introduced the same level of institutional protections for the independence of the NRA. Most Member States can improve the institutional independence of the NRA in some respects.

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301 Directive 2008/6, Recital 47 ('In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions').

302 See section 3.2.2, above.

6.2.3 Resources of the NRA

Best practice: The NRA requires adequate resources to perform the tasks assigned to it in a competent and efficient manner. For a NRA in a medium-sized national or smaller postal market, the average minimum level of resources needed for the basic tasks of postal regulation appears to be about 9 to 10 full-time persons, including regulators (heads of NRA), qualified legal and economic professionals, and support staff. In addition, for such NRAs, effective regulation will very likely require (1) a reasonable budget for studies by outside consultants and (2) efficient application of analytical techniques developed by the largest NRAs. NRAs in larger postal markets or with broader responsibilities (e.g., enforcement of competition rules or review of user complaints) will require appropriately greater resources.

Explanation of best practice: The level of resources required to perform adequately the basic regulatory tasks required of the NRA — accounting controls, price regulation, quality of service monitoring, administration of authorisations, oversight of access to and delivery of universal services, ensuring fair access to the postal infrastructure, collection of statistics — will depend upon several factors. Are the regulated postal service providers expert in regulatory tasks and cooperative? Is the universal service obligation defined broadly or narrowly? To what extent can the postal staff of the NRA draw upon the expertise of other staff within the NRA, the work of other NRAs (through a cooperative mechanism[303]), or the work of outside consultants? Are there particular obstacles to market opening that must be addressed? Moreover, additional resources will be required if the NRA is expected to do additional tasks such as adjudication of user complaints, enforcement of the competition rules, or development of basic policies.

While accepting that appropriate levels of resources will vary by Member State, chapter 3 developed rough estimates for average level of resources per NRA that appeared necessary to sustain effective regulation of the postal services markets.[304] This discussion highlighted the importance of a reasonable expenditure per employee as well as the total level of expenditure. For all except the six largest national postal markets, the minimum annual budget needed for postal regulation was estimated to be, on average, about €1.2 million for a staff of about 9 to 10 persons (including appropriate economic and legal experts) and reasonable allowance for consultants. This estimate was derived from the level of resources — both total budget and budget per employee — expended by a range of seemingly effective NRAs and the conclusion that all national postal markets except the very largest present a fairly similar range of regulatory issues. For the six largest national postal markets (DE, ES, FR, IT, NL, UK), the minimum annual budget was estimated to be, on average, about €6.7 million for a

303 See chapter 7, below.
304 See section 3.2.1, above.

staff of about 40 persons (including appropriate economic and legal experts) and reasonable allowance for consultants. This estimate was based on an average of the resources expended by the British and French regulators.

In sum, these estimates imply that the Member States need to increase expenditures for postal regulation by about 75 percent overall. It should be emphasised that these figures represent order-of-magnitude estimates and that the specific level of resources provided a NRA does not necessarily guarantee, or preclude, effective regulation. Nonetheless, the bottom line is that almost all Member States need to review the level of resources provided the NRA .

Examples of best practice: Large national postal markets: United Kingdom. Other Member States: Greece, Hungary, Ireland, Portugal, Sweden.

Practices of concern: Several NRAs (DE, ES, NL, AT, EE, FI, RO, CY, LT, LV) did not provide figures for the budget and staff devoted to postal regulation. This lack of internal regulatory accounting may indicate insufficient focus on the issue of appropriate resources. Based on available data (taking into account both total resources and resources per employee), the resources available to the following NRAs seem to raise questions of adequacy. In the largest national postal markets: Italy and the Netherlands. In the other Member States, in particular: Austria, Czech Republic, Denmark, Estonia, Poland, and Iceland.

6.2.4 NRA authority to gather information and enforce its orders

Best practice: The NRA should be authorised to collect from postal service providers such information as it considers necessary to ensure conformity with the Postal Directive and should be granted adequate means to enforce its orders, including authority to impose substantial fines, if necessary.

Explanation of best practice: In order to ensure compliance with the obligations of the Postal Directive, the NRA needs access to necessary information and authority to enforce its decisions.[305] As Article 22a of the Third Postal Directive makes clear, necessary information includes the information necessary to ensure compliance with the Postal Directive, in a form and to the level of detail required by the NRA, and data for clearly defined statistical purposes. Adequate means of enforcement would appear to include authority to levy significant fines (say, at least €100,000) both for corrective and penal purposes. Additional means of enforcement, such as authority to seek judicial orders, may be useful as well but do not appear sufficient standing alone.

Based upon this survey, it appears that several Member States (e.g., CY, DE, EL, PT, SK, UK) equip their NRAs with substantial information gathering and enforcement authority, but that the majority of Member States may need to reconsider the sufficiency of such authority.

Examples of best practice: Cyprus, Germany, Greece, Portugal, Slovakia, and United Kingdom.

Practices of concern: Some NRAs (AT, CZ, FR, IT, NL) indicated that they lacked adequate information to ensure compliance with Postal Directive. Two NRAs (AT, LU) specifically stated that they could not establish the level of detail required in information requests and deadlines for submission, while other NRAs failed to confirm that they had such authority.

305 See section 6.2.3, above.

6.2.5 Procedures of the NRA

Best practices: In judicial-type proceedings, the NRA should comply with Community norms of good administrative practice such as found in the European Code of Good Administrative Behaviour.

Explanation of best practice: The norms of good administrative procedure are well known. For example, regulators should give affected parties an opportunity to comment on proposed actions; treat all parties equally and non-discriminatorily; provide parties with access to information necessary to make informed comments; restrict the rights of citizens as little as possible; provide a written justification for any decision taken; post laws and decisions on the Internet; and prepare an annual report on regulatory steps taken.

Best practice requires a formal and transparent commitment to good administrative procedures and actual practice in abiding by them. Member States should ensure that NRAs should have adequate authority to implement good administrative practices and do so in fact. Almost two-thirds of NRAs report substantial compliance with norms of good administrative behaviour (including, in particular, BE, CY, CZ, EL, FI, FR, HU, IE, LT, MT, NL, PL, PT, UK, NO).[306]

Examples of best practice: NRAs in numerous Member States appear to comply with basic standards of good administrative behaviour.

Practices of concern: It appears several NRAs do not give affected parties an opportunity to comment on proposed actions (CZ, EE, IT, LU, LV, IS); do not ensure that parties in a legal proceeding have access to information and documents necessary to effective participation (BE, IE, IT, LU, LV, RO, SI, IS); or are not required to provide a written justification for decisions that indicates the relevant facts and legal basis (IT, LU, RO, IS).

306 See section 3.2.5, above.

6.2.6 Public consultation by the NRA

Best practice: In policy-type proceedings, the NRA should use open public consultations to thoroughly investigate and evaluate the effects of major proposed regulatory actions on affected parties, including postal operators, employees, users, and the general public.

Explanation of best practice: The three postal directives repeatedly refer to the need to align postal policy with the actual needs of operators, employees, and users. For example, Recital 12 of Directive 97/67/EC emphasises that universal service must remain 'adaptable to the needs of users'. Similarly, Recital 16 of Directive 2008/6/EC requires that 'social considerations should be taken into due account when preparing the opening up of the postal market'.

Public consultations on major regulatory actions can and should go beyond basic procedural fairness to affected parties. NRAs need to consult affected parties at the earliest stages of a proposed change in policy and thereafter at appropriate stages in the decision making process. During this procedure, NRAs need to present clearly the options under consideration and their consequences. The public record should be supplemented by expert reports and public surveys where appropriate. The views of all parties should be posted on the Internet so that all parties have an opportunity to comment on the information presented. To the extent consistent with protection of sensitive commercial information or personal privacy, the entire process of decision making should be transparent.

The UK NRA, Postcomm, deserves particular mention for its efforts to solicit input from affect parties at an early stage of decision making and its frequent retention of outside consultants to present comprehensive discussions of issues under review. Two additional Member States which have especially effective records of public consultation are Ireland (e.g. public consultation on complaints and dispute resolution guidelines) and France (e.g. public consultation of rules for cost allocation).

Examples of best practices: United Kingdom, Ireland, France.

Practices of concern: NRAs that fail to keep the public informed about postal regulation by posting on the Internet copies of postal laws and regulations (LU, NL), decisions taken by the NRA (AT, DE, DK, EE, EL, PL, SI, SK), or annual reports of regulatory activities (DK, ES, FI, HU, IT, LU, LV, NO).

6.2.7 Consultation between NRA and NCA

Best practice: The NRA and NCA should consult on a regular basis, and each agency should require a written opinion of the other before acting in a matter that affects the application of competition rules to the postal sector. NRAs should provide NCAs with detailed sector information to facilitate enforcement of the competition rules.

Explanation of best practice: Consultation and cooperation between the NRA and NCA is specifically required by Article 22 of the Third Postal Directive. Member States have approached this task with varying degrees of formality.[307] In France and Germany, in particular, cooperation and consultation appear to be regular and active.

Examples of best practices: France and Germany.

Practices of concern: Member States where there is no obligation for the NRA and NCA to share information (e.g., DK, FI, LV, SE, SK) or where there are no regular consultations between the two agencies (about two-thirds of Member States).

307 See section 5.5.1, above.

6.3 Striking a balance between the universal service obligation and full market opening

This section seeks to define standards for best practice with respect to issues that necessarily strike a balance between the two primary objectives of ensuring a basic standard of universal service, on the one hand, and facilitating full market opening, on the other. This section includes standards for basic accounting regulation, which should be applied in a consistent manner to advance both of the primary objectives of the Third Postal Directive.

6.3.1 Range of services within the USO

Best practice: The range of services included within the universal service obligation (USO) should be limited to the minimum range that is (i) demonstrably required to protect the general public interest and (ii) consistent with the minimum level of universal service required by the Postal Directive.

Explanation of best practice: Recital 11 of the original Postal Directive emphasised that its objective was 'to guarantee at Community level a universal postal service encompassing a *minimum range of services* of specified quality'.[308] In its proposal for what became Directive 2008/6/EC, the Commission examined the possibility of amending the directive to limit the range of services included in the USO.[309] The Commission recognised that some Member States had already limited the USO to '*a basic, regulated affordable postal service for non-bulk mail users (typically consumers and SMEs)*'[310] and noted that such an approach is '*compatible with the concept of least*

308 Directive 97/67/EC, Recital 11 (emphasis added).
309 See European Commission, 'Impact Assessment', COM(2006) 594, SEC(2006) 1291, pp. 6-7, 11-12, 24-25, 35-36, 40-41.
310 Ibid., p. 12.

market distortion'.[311] The Commission further observed that limiting the range of services included within the USO would result in

> 'Progressively reduced cross subsidy between businesses and households — users of products and services would increasingly pay for the products and services they use on to more efficient provision of bulk mail. Reduced likelihood of requiring alternate financing mechanisms'.

In contrast, the Commission noted that by allowing Member States to adopt a broader definition of the USO, the Second Postal Directive risked 'over specified price and service obligations [which] could result in inefficient market intervention and the need for complex supervision/regulation at the Member State level'.[312] In this manner, the Commission has identified the palpable public benefits of a 'plain vanilla' definition of the USO.

In the end, however, the Commission decided not to propose a revision of the Postal Directive that would limit the range of products that may be included in the USO. The Commission explained its reasons as follows:

> although a more focussed universal scope of universal service for consumers and SMEs (a 'consumer/SME safety net' concept) has an intuitive 'better regulation' attractiveness in the longer term, and would result in regulation in submarkets only where it is most obviously still required, because competition is likely to develop at different rates across the EU, such an approach cannot be proposed now to apply to all EU Member States. *Member States already retain the flexibility to apply this approach – subject to the basic minimum service scope as currently defined in the Directive*.[313]

Although the Commission did not support a change in the USO definition for the Community as a whole, its analysis points the way to best practice in defining the range of services to be included within the USO. While the Third Postal Directive continues to give Member States broad discretion in defining the USO, the best practice is clearly to limit the range of services to the minimum range of services that is demonstrably required to protect the general public interest in universal services, while still respecting the minimum USO mandated by the Directive.

In addition to the multiple benefits cited by the Commission — least market distortion, increased efficiency, reduced cross subsidy, lower financial burden on government,

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311 Ibid. p. 13.
312 Ibid., p. 35.
313 Ibid., pp. 40-41 (emphasis added)

reduced need for detailed regulatory controls — another major benefit is maximum commercial flexibility for the national universal service provider. To survive in a period of rapidly changing market conditions, national USPs will need to adjust their commercial operations quickly and continually. Under the Postal Directive, a Member State is obliged to impose a series of regulatory controls on each postal service that is ensured and regulated as a 'universal service'.[314] To allow national USPs maximum flexibility to adjust to changing circumstances, restraints associated with inclusion within the USO should be limited to as few postal services as possible, consistent with the Directive and public need.[315]

Under this approach, it is apparent that, where appropriate, an explicit limitation of the USO to basic letter post and basic parcel post services constitutes 'best practice'. The Netherlands has adopted such a definition of the USO.[316] At the same time, however, our suggested standard of best practice does not rule out extending the USO to include some bulk or non-priority services where demonstrably required to serve the general public interest. A good example of such an extension is provided by the carefully reasoned decision of the British NRA to include limited bulk mail services in its USO.[317]

Examples of best practice: Netherlands, United Kingdom.

Practices of concern: Extending the universal service obligation to markets that are effectively competitive creates a substantial risk of distorting competition. This issue appears to arise in at least some Member States where the NRA the reports effective competition in a significant portion of the national territory for a postal service that within the USO such as direct mail (IT, IS), periodicals (DE, EE, FR), basic parcel post (CZ, DE, DK, FI, IE, LT, IS), and bulk parcels (DK).[318]

314 See section 2.3, above.
315 Exclusion of some or all bulk mail services from the universal service does not imply that these services should not be regulated at all, however. See section 2.5, above.
316 See section 2.3, above.
317 UK Postcomm, 'The Universal Service for Bulk Mailers: A Decision Document' (June 2005). In 2008, Postcomm indicated that it considers that from 2010 it may be appropriate for the remaining bulk mail products to be removed from the scope of the universal service. Postcomm, *The Independent Review of the Postal Services Sector: Second Submission by Postcomm* (May 2008), p. 72.
318 Questionnaire 122-19, 122-31, 122-43, 122-79.

6.3.2 Uniform rate requirements

Best practice: In general, Member States should not require uniform tariffs for universal services unless they are (i) clearly consistent with the Third Postal Directive and (ii) required by a demonstrated and substantial need to protect general public interests.

Explanation of best practice: The Third Postal Directive permits Member States to impose uniform tariff requirements on 'services provided at single piece tariff and to other postal items'. Recital 38 of Directive 2008/6/EC indicates that Member States may impose uniform tariffs 'to protect general public interests, such as access to culture, ensuring participation in a democratic society (freedom of press) or regional and social cohesion'.[319]

In light of the overall objectives of the Third Directive and changing market conditions, we believe that the best practice is for Member States to introduce uniform tariff requirements sparingly and only when truly required by a clearly demonstrated general public interest. At the outset, it should be recognised that a uniform tariff requirement for single-piece letter post items and small parcels is likely unnecessary. Experience suggests that universal service providers will maintain uniform national tariffs even if not required to do so (e.g., in Germany and Ireland). At the same time, if a universal service provider has a sound commercial reason for introducing a lower tariff — for example, to meet the prices of a new entrant — prohibiting such a competitive response could be damaging to the postal service provider. A uniform tariff requirement is not easily reconciled with full market opening and the financial equilibrium of the incumbent.[320]

At the same time, potential environment issues posed by a uniform tariff requirement should be given increased weight in light of heightened climatic concerns. Postal operators should not be required to provide long distance transportation for postal items without charge when unnecessary transportation is not only inefficient but injurious to the environment. With modern technology, many types of publications and other documents can be printed in locations near addressees rather than physically transported. Parcels can be stockpiled in distribution centres rather than transported one by one. Only if tariffs for postal services include appropriate costs for transportation will mailers receive the correct pricing signals so that they can avoid unnecessary use of transportation services.

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319 See sections 3.7.3 and 5.6.2, above.

320 A uniform tariff requirement cannot be imposed on an effectively competitive market because profit-seeking postal operators will limit their services to areas where the uniform tariff covers costs and not serve the other areas.

Then, too, the social benefits of uniform tariff requirements have declined as telephone and email communications have improved. The risk of ‘communications isolation’ is far less than in the days before ubiquitous mobile phones and email.

In sum, the balance of public interests supporting the uniform tariff requirement is shifting. In light of this changing balance of interests, the best practice appears to be avoid uniform tariff requirements for universal services unless they are clearly required by a demonstrated and substantial need to protect general public interests. In this respect, Germany, Hungary, Ireland, and Slovakia must be considered as best practice because they do not require uniform tariffs for any postal services.

Examples of best practice: Germany, Hungary, Ireland, and Slovakia.

Practices of concern: Member States which require uniform rates for unreserved bulk commercial postal services such as bulk letters (BE, DK, EL, ES, FR, LT, LU, PT, RO, SI, IS), direct mail (BE, CY, DK, EL, ES, FR, IT, MT, PT, IS), and bulk parcels (BE, EE, ES, UK).

6.3.3 Reliance on market forces to ensure universal service where feasible

Best practice: Universal service should be ensured by relying upon market forces where the Member State may, with a high degree of confidence, rely upon postal operators motivated by normal commercial considerations to provide universal services which will meet or exceed the USO set by the Member State.

Explanation of best practice: Pursuant to the principles of proportionality and least market distortion, a Member State should not introduce regulatory constraints greater than necessary to ensure a specific universal service obligation.[321] While the Third Postal Directive offers three mechanisms for ensuring universal service — market forces, designation of USPs, and public procurement — reliance upon market forces involves the least regulatory intervention. Therefore, in implementing the Third Postal Directive, the best practice would be to ensure universal service by reliance on market forces except where market forces cannot be reasonably relied upon.

It should be noted that reliance on market forces is not the same as reliance on effectively competitive markets. Even in markets served by a postal operator with a market dominant position, a Member State may be justified in relying upon the postal operator's commercial interests to ensure provision of universal services. The scope of universal services which may be potentially ensured by reliance on market forces seems similar to the scope of services which are described in Annex I as services which a postal service provider would choose to provide voluntarily.[322] In both circumstances, the essential question is: What services will the postal service provider supply motivated by its own self-interest?

Reliance on market forces does not imply a surrender of public policy objectives to the uncertainties of market operations. The NRA could, for example, add a condition to authorisations that requires all postal service providers to give the NRA six months notice before reducing service below the minimum level of service required by the USO in any neighbourhood.[323]

The German postal law offers an especially clear example of how to ensure universal service by reliance upon market forces. In Germany, the NRA is not authorised to take steps to ensure universal service unless universal service is 'not being appropriately or adequately provided or where there is reason to believe that such will be the case'.[324] If

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321 Directive 2008/6/EC, Recital 23. See the discussion of this recital and its implications for ensuring universal service in section 4.3.1, above.

322 That is, in the words of Annex I of the Third Postal Directive, postal services which are not services that 'any designated universal service provider would have chosen to avoid, had there been no universal service obligation'. Third Postal Directive, Annex I, Part B.

323 The German Post Law § 56 requires six-months notice by Deutsche Post before beginning less-than-USO level services.

324 German Post Law § 12(1).

such circumstances arise, the German NRA is obliged to ensure universal service by designating a postal operator to provide the additional service needed in the unserved or underserved area. If the designated postal service provider incurs a net cost of such service, it can recover the net costs from the NRA. If the NRA considers the designated postal service provider to be inefficient, the NRA may contract with another postal service provider to provide the service.

The German postal law exemplifies one approach towards ensuring universal service in a manner consistent with the Third Postal Directive. As an alternative to the German approach, one could imagine a systematic effort by the NRA to identify elements of universal service and/or groups of users for which there it is a significant risk that the minimum level of USO services will not be provided.

Example of best practice: Germany.

Practices of concern: In a Member State in which only a small portion of the population faces a significant risk of a lack of universal service by the operation of market forces,[325] it seems inconsistent with the objectives of the Third Postal Directive to designate one operator to provide all universal services. Instead, the USO should be entrusted to market forces as far as feasible, and designations should be used only for such areas or elements of universal service that would not be served otherwise. Preliminarily, only two NRAs (CY, RO) stated that none of the national territory could be provided universal services by relying on market forces.

325 Section 5.2.1, above, recounts NRAs' estimates of the scope of services that would not be provided by market forces in the absence of the universal service obligation.

6.3.4 Designation and public procurement to ensure universal service

Best practice: Where necessary to ensure provision of universal services meeting the requirements of the national USO, designation and public procurement procedures should be introduced and administered by the NRA in a manner that is transparent, non-discriminatory, fairly compensatory (where appropriate), and consistent with the principles of proportionality and least market distortion.

Explanation of best practice: Guidelines for the implementation of designation and public procurement procedures are set out in Recital 23 of Directive 2008/6/EC.[326]

Best practice in the use of designation procedures is amplified in Article 4 of the Third Postal Directive. Article 4 requires Member States to entrust designations based upon on the principles of transparency, non-discrimination and proportionality.[327] Article 7(3) permits Member States to compensate designated USPs for the net cost of the universal services required by designation if the net cost constitutes an 'unfair financial burden'. Annex I prescribes how the net cost of universal service, if any, is to be calculated. Although Article 7(3) does not *require* Member States to compensate a designated USP for an unfair financial burden, the principle of non-discrimination suggests that best practice should include fair compensation.

Best practice in the use of public procurement procedures to ensure universal service is, as set out in Article 7(2), established in the 'Utilities Directive'. That directive requires the Member State to treat all economic operators equally and transparently.[328] Fairness is implicit in the voluntary nature of the arrangement. While proportionality and least market distortion may not be inherent in public procurement procedures, best practice (as well the principles regulating state aid) would seem to imply that a Member State should not contract for unnecessary services or for services that would be provided under normal market conditions.

In both procedures, best practice would seem to imply that the Member State should strike a principled balance between the scope of procured or designated services and the capabilities of the potential providers of universal services. If there are several postal operators in area A and only one postal operator in area B, then best practice

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326 See section 5.2.1, above.

327 See section 5.2.2, above. See also, e.g., Mandelkern Group on Better Regulation, *Final Report* (2001), p. 9 ('Any regulation must strike a balance between the advantages that it provides and the constraints it imposes. The various instruments of regulation (primary and secondary regulation, framework Directives, co-regulation etc.) enable the public authorities to take action in different ways, depending on the aims they wish to achieve. It is the responsibility of the Member States and the Commission, when selecting from the regulatory instruments available to them, to identify those which are most proportionate to the aims they wish to achieve').

328 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L34, 30 Apr 2004, p. 1 (as amended), Article 10.

would support two separate procurement and/or designation procedures, provided that the difficulties of ensuring universal service between areas A and B do not overcome the benefits to two procedures. Smaller, more targeted contracts and designations tend to support the objective of full market opening while more comprehensive contracts and designations tend to simplify and homogenise the resulting universal service. A reasoned consideration of such factors would seem inherent in the principle of proportionality.

All Member States except Germany appear to use the nationwide designation procedure implicitly encouraged by Article 4 of the Second Postal Directive. As noted in the previous section, the German postal law automatically provides for proportionate use of procurement or designation procedures, even though the German NRA has not considered it necessary to use these procedures to date. Sweden offers an example of limited use of procurement procedures to ensure certain universal services.

Example of best practice: Germany.

Practices of concern: Appointment by designation of a single postal operator as the USP for the entire national territory by a procedure that is not transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion.[329] Except for Germany few, if any, Member States have adopted appropriate procedures for the designation of USPs.[330]

329 The longer the period of designation, the greater the distortion in market opening. For example, in France a draft postal law to transpose the Third Postal Directive reportedly proposes to designate La Poste as the sole USP for a period of 15 years.

330 See section 5.2.2, above.

6.3.5 Separation of designation and authorisation procedures

Best practice: If specific obligations to ensure universal service are imposed on universal service providers designated under Article 4, they should be imposed in designation procedures and not as conditions attached to authorisations.

Explanation of best practice: As described in chapter 3, Article 9(2) of the Third Postal Directive effectively provides that an authorisation to provide postal services within the universal service area — whether in the form of either an individual licence or a general authorisation — may be potentially subject to one of two sets of conditions. One set of conditions is applicable to all authorisations. Another, more restrictive, set of conditions may be applied only to authorisations granted to postal service providers that have been designated as universal service providers pursuant to Article 4.[331] The procedures required to grant an authorisation encumbered by restrictive USO-related obligations are therefore likely to be more elaborate and time-consuming than the procedures required to grant normal authorisations that are not so encumbered.

At the same time, Article 4(2) of the Third Postal Directive implies the need for some type of 'designation procedure'. Specifically, Article 4(2) requires that Member States entrust the designation in a manner that is transparent, non-discriminatory, and proportionate and that takes into account certain social and policy factors.[332] To implement these provisions, NRAs will need to consider each designation on its merits.

The simplest, least restrictive approach to these two procedures would seem to be to combine the procedures for designating a postal service provider as a universal service provider with the procedures for obliging the same postal service provider to abide by specific USO-related conditions which are inapplicable to other authorised postal service providers. In short, designation procedures should be separated from authorisation procedures. Designation should be treated in much the same way as a public procurement contract, with specific consideration of the particular needs that must be met and the conditions that must be imposed on a specific postal service provider. At the same time, authorisation procedures for all postal service providers who are not designated USPs may be kept very simple.

The suggested approach reflects the fact that authorisation and designation (or public procurement) address different issues. Authorisation defines the conditions under which postal operators should be permitted to provide postal services. Designation (or public

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331 See section 3.5.1, above.

332 Third Postal Directive, Article 4(2) requires that 'Member States shall take measures to ensure that the conditions under which universal services are entrusted are based on the principles of transparency, non-discrimination and proportionality, thereby guaranteeing the continuity of the universal service provision, by taking into account the important role it plays in social and territorial cohesion'.

procurement) defines which postal operators, if any, should be required to provide universal services (and compensated for doing so, if necessary). Using authorisation procedures to impose a USO likely requires that all postal operators comply with the rigors of a regime of individual licences.[333] This introduces an unnecessary risk that time-consuming and complex licensing procedures will hinder entry.

Separation of designation and authorisation is already provided in some Member States. After first adopting standards for authorising postal operators, the Romanian NRA has initiated a second proceeding to determine which authorised postal operators should be designated as universal service provider(s). In Germany, the licensing procedure is so simple as to be almost equivalent to a general authorisation, and the NRA exercises separate, so far unused, authority to oblige a postal operator to provide universal service by means of designation or public procurement. Similarly, in New Zealand, authorisation and assignment of USO responsibilities are separate.[334]

In implementing the Third Postal Directive, the best practice would seem to be to separate authorisation and designation procedures. There is no apparent reason why authorisation and designation should be combined and good reasons why they should not be.

Examples of best practice: Germany and Romania. See also New Zealand.

Practices of concern: Authorisation procedures which also impose universal service obligations (e.g., BE, EE, FI, HU, LT, SE, UK) create the risk of unnecessary complexity and delay in the authorisation of postal service providers who do not incur universal service obligations.

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333 By definition, an authorisation which 'subjects that undertaking's operations to specific obligations' is an 'individual licence'. Third Postal Directive, Article 2(14). As a result of the individual scrutiny associated with individual licences, a postal service provider is not entitled to start operation until it has received approval from the NRA.

334 In New Zealand, the equivalent of authorisation is provided by simple registration with Ministry for Economic Development. The equivalent of designation is a separate contract between the government and NZ Post called a 'Deed of Understanding'.

6.3.6 Authorisations for services within the universal service area

Best practice: For services within the universal service area, authorisations should be introduced only if, and only to the extent, necessary to guarantee compliance with essential requirements, ensure provision of universal service, or implement other provisions of the Postal Directive. Where necessary, authorisations should be in the form of general authorisations applicable to all postal operators.

Explanation of best practice: Under the principle of proportionality, authorisation procedures should not be introduced unless necessary to accomplish an identified public purpose. Article 9(2) of the Third Postal Directive states that authorisations procedures — i.e., an individual licence or general authorisation — should be introduced 'to the extent necessary in order to guarantee compliance with the essential requirements and to ensure the provision of the universal service'. It is not obvious whether such considerations justify imposing authorisation procedures on postal service providers in all Member States.[335] In this sense, the forbearance from authorisation procedures by some Member States (CZ, DK, NO) may be considered best practice. On the other hand, this survey has also highlighted several public purposes that may plausibly justify introduction of authorisation procedures, including (but not necessarily limited to) confidentiality of correspondence, user protection, administration of a compensation fund, and maintenance of industry statistics.[336]

There seems to be no compelling reason why legitimate public purposes cannot be protected by authorisations cast in the form of a general authorisation rather than an individual licence. A general authorisation is likely to be simpler, quicker, and less expensive for a new market entrant than an individual licence. Given the principles of proportionality and least market distortion, it seems evident the best practice is to employ the general authorisation procedure in preference to the individual licence where the general authorisation is necessary and sufficient to safeguard the public interest. Given the principle of non-discrimination, it would appear to be best practice to require the same general authorisation of all postal service providers, including postal service providers who are further obliged to provide universal services by means of designation or public procurement.

New Zealand offers an example of a very simple registration that applies to all postal service providers including New Zealand Post. The New Zealand procedure is especially simple because the postal statute, rather than the authorisation procedure, includes provisions that ensure confidentiality of correspondence and protect the interests of users. Within the Community, Ireland offers an example of a well

335 See section 3.5.1, above.
336 Ibid.

implemented general authorisation procedure for postal service providers, albeit excluding the universal service provider.

Where a Member State finds it necessary to grant 'specific rights' or impose 'specific obligations' on an individual postal service provider in order to ensure the universal service, the authorisation is, by definition, an 'individual licence' rather than a 'general authorisation'.[337] In practice, however, even where a Member State has introduced individual licences, most operators are not given specific rights or subject to specific obligations. Most postal service providers receive a standard authorisation with a standard set of conditions. In such case, one might imagine the introduction of two authorisations, a general authorisation for most postal service providers and an individual licence for postal service providers who are designated universal service providers. However, since under the Third Postal Directive both the designation and the individual licence must be conferred by means of transparent, non-discriminatory, and proportional procedures, the simplest approach would be to combine the procedures that confer designation and grant the individual licence into a single designation procedure as suggested in the preceding section.

Examples of best practice: Forbearance from authorisation procedures: Czech Republic, Denmark, Norway. General authorisations for universal service: New Zealand, Ireland.

Practices of concern: Member States which have introduced individual licences for all services within the universal service area, thus creating new regulatory obstacles to the provision of services that were previously outside the reserved area and provided without regulatory control (BE, BG, CY, EE, EL, ES, HU, IT, LV, MT, PL, PT). This survey has not uncovered any reason to believe that such regulation of formerly liberalised markets has served the public interest. These authorisations deserve careful reconsideration.

337 Third Postal Directive, Article 2(14).

6.3.7 Conditions on authorisations

Best practice: Conditions on authorisations for services within or outside the universal service area should be introduced only if, and to the extent that, they are (i) strictly consistent with the types of conditions permitted by Article 9 of the Postal Directive or necessary to implement other provisions of the Postal Directive and (ii) consistent with the principles of proportionality and least market distortion, taking into account the multiple objectives of the Postal Directive.

Explanation of best practice: Best practice, necessarily, limits the scope of conditions that may be attached to authorisations to those conditions which are permitted by the Third Postal Directive. Article 9 of the Third Postal Directive explicitly permits NRAs to attach only certain types of conditions to authorisations. In addition, it might be argued that other provisions of the Third Postal Directive implicitly justify conditions on authorisations. For example, since Article 19 requires NRAs to ensure the postal service providers implement minimum user protection measures, and Article 22a requires postal service providers to provide NRAs with appropriate statistical data, it might be considered justified to add conditions to authorisations to ensure compliance with user protection and statistical requirements adopted by the NRA. Without attempting to define the precise scope of conditions permitted by the Third Postal Directive,[338] it is clear that, in principle, best practice rules out conditions that are not supported by the directive. This survey suggests that several NRAs will need to reconsider conditions on authorisations based on a careful reading of the Third Postal Directive.[339]

In addition, best practice must conform to the principles of proportionality and least market distortion. These principles emanate not only from the Third Postal Directive but also from good administrative practice generally. In best practice, conditions which may be technically permitted by the directive should not be adopted if they inappropriately or unnecessarily conflict with other objectives of the directive. In this respect, conditions on authorisations must be weighed against the principles of proportionality and least market distortion with special care because conditions on authorisation are, in effect, restrictions on the right to compete. There is an inherent tension between conditions on authorisations and full market opening. Before any conditions can be attached to authorisations, therefore, best practice would require a reasoned balancing of the effects on universal service and full market opening and an analysis of whether similar ends may be accomplished by less distortive means.

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338 We do not seek to argue for or against such an interpretation of Articles 19 and 22a. While there is plausibility to the argument that conditions on authorisations may be grounded in Article 19 and 22a , there is also plausibility to the contrary position — i.e., that Articles 19 and 22a must be enforced by other regulatory means.

339 See section 3.5.1 and 3.5.2, above.

Authorisation conditions which are intended to protect universal service by restricting competition with the incumbent universal service provider appear to be both inconsistent with the scope of permissible conditions and disproportionate to any legitimate purposes under the Third Postal Directive. Such conditions are normally justified as consistent with the second indent of the second paragraph of Article 9(2). In our view, revision of Article 7 in the Third Postal Directive renders this justification untenable. By prohibiting a reserved area, the revised Article 7 effectively limits Member States to two types of measures that can be used to ensure adequate compensation for the incumbent USP: (i) public procurement under Article 7(2) and (ii) designation and compensation under Articles 4(2), 7(3), and Annex I. Any other reading of Article 9(2) would render meaningless the termination of the reserved area by Article 7(1). Moreover, even if such conditions to protect the USP were technically permitted by the second indent of the second paragraph of Article 9(2), they would be inconsistent with the principles of proportionality and least market distortions since — as the experience of several Member States demonstrates — the directive provides other, less distortive means for ensuring universal service.

Several Member States offer good examples of authorisations without undue conditions on authorisations. In Germany, Sweden, and the United Kingdom, universal service is ensured without a reserved area and without restrictive conditions on authorisations.

Examples of best practice: Germany, Sweden, United Kingdom.

Practices of concern: Authorisation conditions which are intended to protect universal service by restricting competition are of particular concern, such as found in Finland, Estonia, and proposed in Belgium. Also of concern are conditions which exceed the scope of conditions permitted by the Postal Directive such as conditions relating to financial guarantees (CY, HU) and technical expertise (BE, DE, FR, HU, PT).

6.3.8 Scope of regulated accounts

Best practice: In general, the NRA should ensure that postal operators that provide universal services with significant market power maintain cost and revenue product accounts for (i) each universal service or other postal service provided pursuant to a designation or public procurement contract and (ii) each non-universal service that is produced jointly with a service covered by (i).

Explanation of best practice: Appropriate regulation of accounts is necessary to implement both of the primary objectives of the Third Postal Directive: ensuring the universal service obligation and facilitating full market opening.

For universal services, the legal requirement to maintain regulated product accounts is clear, although it is less clear who it should apply to. In the Third Postal Directive, Article 14(2) requires 'universal service providers' to maintain product accounts for each universal service.[340] In the Second Postal Directive, the phrase 'the universal service providers' apparently refers only to postal operators designated as USPs pursuant to Article 4. In the Third Postal Directive, however, Article 4 has been modified to permit Member States to ensure universal service by reliance on market forces or public procurement as well as by designation. Thus, universal service may be provided by several different postal operators.[341] As a practical matter, it seems unnecessary to regulate the accounts of a postal operator that provides some universal services without significant market power in any universal service market. For example, a small parcel company might contribute to the 'market forces' that a Member State relies upon to ensure universal parcel post services. Yet for a small non-dominant postal service provider providing a portion of the universal parcel services, it seems to us that the NRA may reasonably rely upon the threat of competition to ensure that quality of service is adequate and that prices are cost-oriented and otherwise consistent with Article 12. Moreover, a small postal operator without significant market power is very unlikely to seek compensation for the provision of universal services.[342] Since regulated accounts for 'universal service providers' operating in a competitive market without significant market power are unnecessary to allow the NRA to control prices or calculate

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340 Third Postal Directive, Article 14(2): 'The universal service provider(s) shall keep separate accounts within their internal accounting systems in order to clearly distinguish between each of the services and products which are part of the universal service and those which are not'.

341 See section 2.5, above.

342 Only postal operators that have been designated as USPs or granted public procurement contracts will be eligible for compensation. Neither designation nor procurement should involve postal services which are produced in an effectively competitive market.

compensation, the principle of proportionality implies that the accounts of such postal service providers should not be controlled unnecessarily.[343]

For non-universal postal services, there is also a need for regulated product accounts in certain, limited circumstances. In the Third Postal Directive, new paragraph (3)(b)(iv) of Article 14 explicitly requires NRAs to monitor how 'universal service providers' allocate common costs to non-universal services as well universal services.[344] Hence, regulated product accounts for non-universal services are appropriate where a postal service provider jointly produces both universal and non-universal services — that is, incurs 'common costs' through the use of the same facilities, vehicles, and personnel to produce both types of services. An example would be a public postal operator that provides a universal letter post service (with a significant market power) and also uses the same facilities to compete in a competitive, non-universal service market for distribution of unaddressed advertising items.[345]

Where the postal service provider has significant market power in the provision of universal services, there is a risk that the postal service provider will overcharge users of universal services and use the additional revenues to underwrite unfairly low prices for non-universal services. Such a practice would both burden the universal service and distort competition in non-universal services. Indeed, even without such cross subsidy, a market dominant position in a universal service could help a postal service provider to maintain a market dominant position in a related, non-universal service if there are joint economies of scale.[346] In either case, the presence of a postal service provider with a market dominant position in universal services could create a significant risk of distortions in markets for other jointly produced products. The only practical means of effectively monitoring potentially abusive or anti-competitive behaviour is to require a complete set of regulated product accounts for all jointly produced products, universal and non-universal.[347]

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343 Even a small postal service provider without significant market power would need to maintain regulated accounts if it sought compensation under a designation, but the control of such accounts could plausibly be limited to the services for which compensation is sought.

344 Third Postal Directive, Article 14(3)(b)(iv). See section 3.6.2, above. On the other hand, in section 6.3.9, below, we suggest an approach to implementing paragraph (b)(iv) that should not be too burdensome to regulated USPs.

345 Similarly, bulk mail services are not considered universal services in some Member States, and bulk mail services is almost necessarily produced jointly with non-bulk services.

346 For example, economies of scale in basic letter post services might give rise to economies of scale in bulk letter services which lie outside the USO.

347 See, e.g., European Commission, 'Proposal For a Directive of the European Parliament and of the Council Amending Directive 97/67/EC Concerning the Full Accomplishment of the Internal Market of Community Postal Services', COM(2006) 594 (2006), p. 7 ('In a fully competitive environment, Member States must conduct the delicate exercise of providing sufficient freedom to universal service providers to adapt to competition and at the same time, *ensure adequate monitoring of the behaviour of the likely dominant operator in order to safeguard effective competition* [emphasis added]').

A good example of the need to consider competitive issues as well as universal service issues in defining the scope of regulated accounts is provided by Postcomm's (the UK NRA's) review of regulation of bulk mail services. After a considered analysis, Postcomm concluded that about three quarters of the bulk mail services of Royal Mail (the UK USP) should be considered non-universal services. Nonetheless, Postcomm concluded that continued regulation of accounts and prices was required because of 'the absence of genuine alternatives'.[348] In its most recent price control procedure, Postcomm explicitly considered the basis for maintaining price controls over non-universal service products:

> Postcomm does not believe that it would be appropriate to limit the price control to universal service products. Postcomm has assessed the development of competition for all products irrespective of whether or not they are universal service products, to determine the coverage of the price control. Competitive pressures for some products not included within the universal service may be insufficient to protect customers.[349]

Example of best practice: United Kingdom

Practices of concern: Nine NRAs (CY, DK, IT, LV, NL, RO, SI, IS, NO) report that they have conducted no review of the allocation of common costs to non-universal services..

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348 UK Postcomm, 'The Universal Service for Bulk Mailers: A Decision Document', p. ii, paragraph S.8 (June 2005) ('Only around one quarter of Royal Mail's bulk mail volumes will be conveyed by services now to be regarded as universal services. This represents a major step towards deregulation and the removal of regulatory constraints on Royal Mail. However, in the absence of genuine alternatives, especially for small businesses, Postcomm does not consider it appropriate to deregulate any further for the time being and is proposing some transitional restraints'). Then, too, in some Member States, the NRA's role in facilitating competition implies a need for accounting controls for joint products. See, e.g., German Post Law §§ 20(2), 25.

349 Postcomm, '2006 Royal Mail Price and Service Quality Review: Initial Proposals' (Jun. 2005), pp. 40-41.

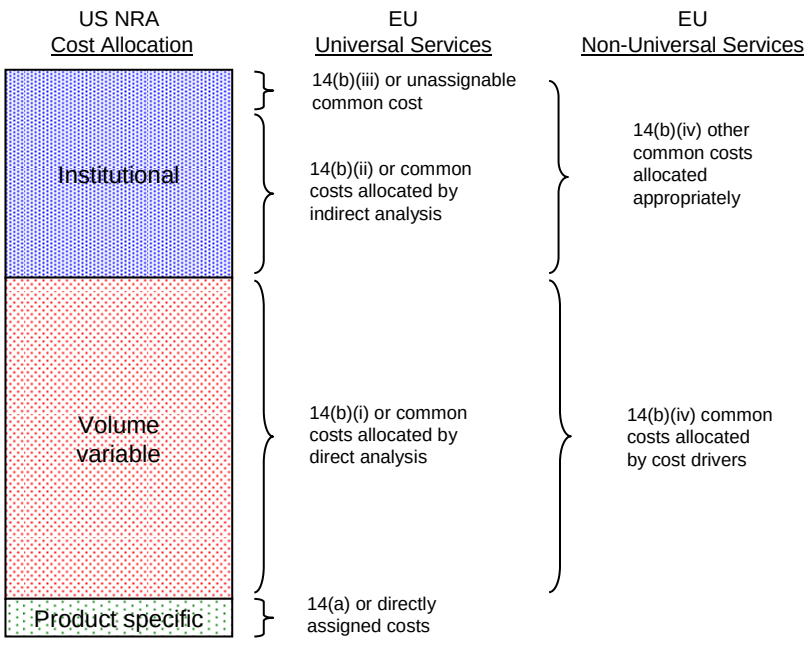
6.3.9 Allocation of costs according to Article 14

Best practice: Where the accounts of a postal operator are regulated, the NRA should ensure that the direct and common costs associated with production of universal services are allocated to product accounts in a manner that is clear, economically valid, and consistent with Article 14.

Explanation of best practice: Article 14 provides a conceptual framework for allocating the costs of universal service products. Cost allocation is central to the role of the NRA in the regulatory framework established by the Third Postal Directive. Hence, best practice requires NRAs develop a clear, consistent, economically valid approach towards the implementation of this framework.

What this means in practice is less easy to express. In general, cost allocation is the least well developed aspect of postal regulation in the Community.[350] So far, the most sophisticated analysis of Article 14 appears to be that of the French NRA, ARCEP. In addition, based on information received in this survey, it appears that several NRAs are taking plausible first steps to control accounts in accordance with the guidelines of Article 14, including the NRAs of the Czech Republic, Hungary, Portugal, and Poland.

Figure 6-1 Suggested translation of US NRA cost allocation model



350 See sections 3.6.2 and 3.6.3, above.

Nonetheless, no NRA seems to have developed an approach towards the cost allocation requirements of Article 14 that is fully consistent with the objectives of the Third Postal Directive. Indeed, there seems to be no common view among NRAs as to what the accounting categories established by Article 14 refer to. For example, NRAs have interpreted the term 'direct costs' in Article 14(3)(a) to refer a category of costs as small as 0.7 percent of total costs and as large as 90 percent of total costs. It is apparent that these NRAs are interpreting Article 14 in fundamentally different ways.

Given this lack of consensus on what Article 14 requires, we cannot suggest an overall 'best practice' in the Community. We will, however, offer some suggestions regarding the implementation of Article 14 based on our review of accounting practices in the United States.

- In general, among postal economists, the analysis of costs carried out by the United States Postal Rate Commission prior to the 2006 is generally regarded as 'best practice'.[351] The US accounting techniques are exceptionally well documented and transparent and, after three decades of litigation, reasonably well accepted by all parties.

- Fundamental differences in the accounting concepts embedded in the US postal law obscure its relevance to EU postal law. Nonetheless, the pre-2006 regulatory approach in the US suggests a possible approach towards implementation of Article 14 in the EU.

- According to the US approach, only a very small percentage of total costs (less than 1 percent) can be directly assigned to individual universal service products. This group of 'product specific' costs might be considered equivalent to the EU category defined by Article 14(3)(a).

- According to the US approach, about 62 percent of total costs are 'attributable costs' that can assigned to universal service products based on volume variability and other cost drivers. This group of costs might be considered equivalent to the EU category defined by Article 14(3)(b)(i).

- According to the US approach, about 38 percent of total costs are 'institutional costs' that are allocated to universal service products based upon statutory

351 In the United States, the 2006 Postal Accountability and Enhancement Act substantially replaced the Postal Regulatory Commission's regulation of the prices of universal service products provided under conditions of market dominance with price caps set by statute. Although the underlying accounting techniques have changed little, accounting controls have become less transparent and distorted by the requirements of the statutory price cap system.

principles and policies. This group of costs might be considered equivalent to the EU categories defined by Articles 14(3)(b)(ii) and (b)(iii).[352]

- Basic economic analysis makes clear that most of what the US calls 'institutional costs' must be treated in the EU as (b)(ii) costs rather than (b)(iii) costs because to do otherwise — and thus to assign such costs to products based on a general allocator specified in (b)(iii) — would be to sharply reduce the total supply of postal services and jeopardise the financial equilibrium of USPs, especially in rapidly changing postal markets. Such an outcome would be directly contrary to the objectives of the Postal Directive. No NRA has interpreted (b)(iii) to include all of what are called 'institutional costs' in the US. NRAs therefore need to develop reasoned techniques for regulating the allocation of what the US regulator calls 'institutional costs' using the tools and standards set out in (b)(ii).[353]

- New paragraph (b)(iv), added in the Third Postal Directive, requires NRAs to ensure (i) that the common costs incurred in the joint production of universal and non-universal services are allocated 'appropriately' and (ii) that the same 'cost drivers' must be applied to both universal services and non-universal services.[354] Paragraph (b)(iv) thus sets out *two* requirements for allocation of costs to competitive products. First, there is a requirement to use the same 'cost drivers'. This provision may require NRAs to ensure that methodology of allocating (b)(i) common costs — i.e., common costs assigned by direct analysis or 'cost drivers' — is also applied to non-universal services *individually*. Second, there is a requirement that common costs overall must be allocated 'appropriately'. This provision may require NRAs to determine an 'appropriate' allocation for (b)(ii) and (b)(iii) common costs to non-universal services *collectively*.

Under such an interpretation, it seems to us that Article 14 may be implemented in a manner that takes advantage of best practices developed in the United States and results in economically reasonable allocation of costs that is well adapted to advancing the objectives of the Third Postal Directive.

Regardless of whether these suggestions are considered meritorious, NRAs in the Community need to adopt a more harmonised approach towards implementation of

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352 Such an approach assumes that the 'indirect linkage' envisioned in Article 14(3)(b)(ii) may be interpreted to allow consideration of demand factors and public interest factors as well as cost factors.

353 This appears to be the approach being pursued by the ARCEP in allocating the fixed cost of delivery. Where the allocation of the fixed cost of delivery depends on the number of weekly deliveries required for a certain services, this could be interpreted as 'indirect linkage' in the meaning of b(ii).

354 Third Postal Directive, Article 14(3)(b)(iv) states: 'common costs, which are necessary for the provision of both universal services and non-universal services, shall be allocated appropriately; the same cost drivers must be applied to both universal services and non-universal services'.

Article 14. If Article 14 is interpreted in completely different ways by different NRAs, then its value as a Community standard is negated. Moreover, more harmonised implementation will allow NRAs to benefit from each other's analyses. In addition, NRAs need to verify periodically the reliability of the data collection systems underlying cost accounts.

Example of best practice: United States (prior to 2006).

Practices of concern: No NRA seems to have developed an approach towards the cost allocation requirements of Article 14 that is fully consistent with the objectives of the Third Postal Directive.

6.3.10 Verification and transparency of accounting regulation

Best practice: The NRA should ensure that

(i) cost accounting practices of USPs are verified at least annually by either the NRA or by a competent independent body retained by the NRA;

(ii) a statement verifying the compliance of USPs with Article 14 is published at least annually;

(iii) a summary of the regulated product accounts of universal services provided by any postal operator with significant market power is published at least annually (taking into account the need for adequate protection of commercially sensitive information); and

(iv) a full explanation of methodology used in cost accounting is published at least annually.

Explanation of best practice: Best practice should provide transparency of regulation as much as possible. Items (i) and (ii) are specifically required by the Postal Directive and therefore must be considered elements of best practice. Items (iii) and (iv) are provided by some NRAs and, seemingly, could be provided by all.[355]

Examples of best practice: Norway (the only Member States that ensures all four measures of transparency). The UK provides a good example of publication of summaries of regulatory accounts. France offers an example of a particularly transparent methodology for cost allocation.

Practices of concern: Of particular concern, because they are required by the Postal Directive, are (i) a lack of any outside review of the USP's accounts (CY, EE, IS) or review by an auditor retained by the USP and thus not wholly independent of the USP (EL, FR, IE, IT, MT, NL, RO) and (ii) failure of NRAs to issue an annual statement verifying the USP's compliance with Article 14 (AT, BE, CY, DE, DK, EL, ES, HU, IE, IT, LU, LV, MT, RO, UK). Also of concern, because of the desirability of transparency, are a NRA's (iii) failure to publish a summary of regulatory accounts for the information of the public (AT, BE, CZ, DE, EE, EL, ES, FR, HU, IE, IT, LU, MT, NL, PL, PT, RO, SE, SI, SK, UK) or (iv) the system of cost allocation (AT, CY, DE, EE, ES, HU, IT, LT, LU, MT, PL, PT, RO, SE, SI, SK, UK, IS).

355 See section 3.6.5, above.

6.4 Ensuring the universal service

6.4.1 Standards for access, affordability, and quality of service

Best practice: Standards for access, affordability, and quality of service should reflect the minimum level of service that is (i) objectively required to protect the evolving public need for universal services and (ii) consistent with the minimum level of universal service required by the Directive.

Explanation of best practice: In the Third Postal Directive, Articles 3, 12, and 16 require Member States to set standards for access to, affordability of, and quality of service of universal services. The directive allows Member States substantial discretion in what those standards should be.[356] How that discretion should be exercised in best practice is guided by the directive as a whole. Article 5 declares that the definition of the universal service obligation must 'evolve in response to the technical, economic and social environment and to the needs of users'. At the same time, the definition of the universal service obligation must support as fully as possible the objectives of full market opening and user protection.

In light of such considerations, the best practice is for Member States to set standards for access, affordability, and quality of service at the minimum level that objectively reflects the actual needs of users. These needs may evolve over time. If, for example, expanding use of email reduces the need of rapid delivery of letters, then the quality of service standards should be relaxed. If postal agencies prove to be satisfactory replacements for post offices, then USPs should be permitted to switch from post offices to postal agencies. On the other hand, if isolated or technologically unsophisticated communities have a greater need for postal services than other communities — perhaps greater than would be sustained by market forces — then this circumstance, too, must be reflected in the definition of the universal service obligation. To ascertain the evolving needs of users, NRAs must consult with users periodically and seek to determine their true needs, not only their preferences which may be affected by the fact the users do not always pay directly for the postal services they consume.

This survey indicates that Sweden and United Kingdom are especially vigilant in reviewing the needs of users by means of annual surveys. Several other NRAs (BE,

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356 See sections 3.3.2, 3.3.5, and 3.7.2, above. Discretion with the respect to quality of service standards is less open-ended than with respect to access and affordability because quality of service standards must be consistent with quality of service standards for intra-Community cross-border mail set in Annex II of the Third Postal Directive. See the next section.

DE, FR, EL, HU, IE, LT, MT, PT) have also recently conducted reviews of users' needs.[357]

Examples of best practice: Sweden and United Kingdom.

Practices of concern: Sixteen NRAs (BG, CY, CZ, DK, EE, ES, FI, IT, LU, LV, PL, RO, SI, SK, IS, NO) report that the government has not undertaken a study of users' needs for universal services.[358]

6.4.2 Exceptions to the delivery frequency and quality of service of universal services

Best practice: Exceptions to the scope of universal service should be interpreted with respect to overall conditions prevalent in the Community and not only with respect to the conditions within a single Member State.

Explanation of best practice: The Third Postal Directive, like earlier versions, allows Member States to introduce exceptions in standards for delivery frequency and quality of universal services. Article 3 requires Member States to ensure universal service five days per week '*save in circumstances or geographical conditions deemed exceptional*'. Similarly, Article 18 provides that Member States may adopt exemptions from Community quality of service standards '*where exceptional situations relating to infrastructure or geography so require*'.[359] Recital 20 of Directive 2008/6/EC emphasised that in continuing the USO standards set in the original Postal Directive,

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357 See section 5.6.2, above.

358 Questionnaire 121-1 ('Has the NRA or government prepared a study or report on the needs of senders and addressees for specific types and levels of universal postal services that takes into account expected changes in technology, the effects of full market opening, and other future considerations?').

359 Technically, the exceptions provision in Article 18 creates an exemption from the standards for intra-Community cross border of the fastest standard category established in Annex II of the Third Postal Directive. Article 17 requires a Member State to establish 'quality standards for national mail and shall ensure that they are compatible with those laid down for intra-Community cross-border services'. An exception from intra-Community standards thus creates an exception from national standards as well.

the new directive was '*taking into account that Member States may adapt some specific service features to accommodate local demand by making use of the flexibility provided for in Directive 97/67/EC*'.

Nonetheless, this survey suggests that Member States have made little use of these exceptions provisions. Member States, with the sole exception of Greece, have limited deviations from the 5-day delivery standard to less than 1 percent of the population in *each* Member State.[360] One explanation for the rare use of the exceptions may be that operators in most Member States provide daily nationwide service on commercial grounds and have not requested such exceptions from NRAs. Another possible explanation for this limited application of the exceptions provisions may be that these provisions are interpreted by reference to national postal markets rather than the Community postal market. If so, such an interpretation implies that compliance with the Postal Directive is more onerous for some Member States than others. In some Member States substantial portions of the postal market differ fundamentally from the postal markets in the Community as a whole. For example, consider Romania. The postal volume per capita in Romania is about 30 items per year, about 15 percent of the postal volume in the EU/EEA market as a whole and 36 percent less than the Member State with the lowest postal volume per capita in 1992 when the Postal Green Paper was published.[361] Most of Romania's population and economic activity is concentrated in the capital so that mail volumes in the rural areas are likely well below the Romanian average. In our survey, the Romanian NRA was one of only two NRAs that declared that *none* of the national territory would be provided satisfactory universal service by market forces.[362] Under such circumstances, it appears unreasonable to apply the exceptions clause to the Romanian postal market in same way as to, say, the Dutch postal market, where the annual postal volume is 342 postal items per capita in a very densely populated, relatively small territory. Even in Member States with high postal volumes such as Sweden (346 postal items per capita) and Norway (362 postal items per capita), extraordinary geographic conditions may mean that an inflexible application of Community-wide quality of service standards could compel the USP to provide air transportation that would be considered excessive in other Member States.[363]

The most reasonable approach to such anomalies seems to be to interpret the exceptions provisions in Articles 3 and 18 to refer to conditions that are extraordinary by reference to the postal market in the Community as a whole rather than by reference to

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360 See section 3.3.3, above.
361 Postal Green Paper, Annex 2, p. 273.
362 Questionnaire 123-11. See section 4.4.1, above.
363 For example, Norway Post must contract for its own air transportation to the northern parts of the country in order to meet national quality of service standards influenced at least in part by the Postal Directive. If overnight service is not truly needed by the public interest in Norway, then it would be more efficient and environmentally friendly for Norway Post to make use of commercial air transportation which is scheduled to meet the needs of passengers rather than the mail.

the postal market in each national territory. This appears to be the position of Greece. Greece is the only Member State which, by referring to average conditions in the Community as a whole, claims that a significant portion of this universal service (7 percent) presents exceptional circumstances or geographical conditions.[364] Without addressing the merits of the particular circumstances in Greece, we believe that best practice should follow the economically sensible principle advocated by Greece in applying the exceptions provisions of the Postal Directive.

Example of best practice: Greece.

Practices of concern: Member States which, from a merely formal adherence to the Postal Directive, require extension of universal services to isolated or remote portions of the Community at a cost that is unreasonably high and not objectively justified (there is insufficient data to identify specific examples).

6.4.3 Price control of universal services provided by market dominant postal service providers

Best practice: In general, prices for universal services provided by postal operators with significant market power should be regulated by the NRA using forward-looking procedures (ex ante review, price caps) to ensure conformance with Article 12. Forward-looking procedures should normally be employed with respect to services provided by postal service providers where they benefit from designation or public procurement procedures. Where universal services are provided under conditions of effective competition, the NRA should normally rely upon the competitive market to ensure compliance with Article 12.

Explanation of best practice: Most, but not all, NRAs regulate the rates of universal services to ensure compliance with Article 12.[365] Most, but not all, use forward-looking price control regulation (ex ante review or price caps) for services provided by a postal

364 See section 3.3.3, above.
365 See section 3.7.2, above.

operator with significant market power.[366] We believe this is the best practice. By definition, universal services are especially important for society. Ex post price controls may be insufficient to deter a market dominant postal operator from collecting excessive rates for a sustained period, and effective redress for overcharged users may be practically impossible. For the postal operator, ex post review creates a risk that rates already collected may be deemed illegal.

Significant market power is usually determined by the presence or absence of effective competition.[367] However, it seems reasonable to presume significant market power whenever a postal service provider provides services under a designation or public procurement because the fact of designation or public procurement creates significant benefits (such as exemption form VAT, eligibility for compensation, etc.).

While either ex ante review or price caps appear effective, an amendment to Article 12 in the Third Postal Directive may create a preference for price caps in some circumstances. The revised Article 12 states that price regulation should '*give incentives for an efficient universal service provision*'. Compared to ex ante regulation, price caps can create additional incentives for efficiency if the owners of a postal service provider can keep the increased profits that result from increased efficiency. Since private shareholders of a postal service provider can keep the profits of increased efficiency, price caps may stimulate greater efficiency in a privatised or partially privatised postal service provider. A similar stimulus for efficiency might be felt by a government owned postal service provider if the government agency responsible for exercising ownership rights gets appropriate bureaucratic credit for profits earned.

Where universal services are provided under conditions of effective competition, the best practice would appear to be to rely upon competition to ensure that prices are affordable, cost-oriented, non-discriminatory, efficient, and otherwise compliant with Article 12. Member States may also wish to provide for ex post review of prices for universal services offered under conditions of effective competition — for example, to ensure absence of illegal discrimination — by either the NRA or NCA. In general, however, we believe that, in light to the goal of the Third Postal Directive to move towards full market opening, the verdict of an effectively competitive market should be presumed consistent with the price standards of the Directive, at least absent contrary evidence.

The principle that the method of price regulation should be adjusted according to whether or not the product is provided by a postal service provider with significant

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366 See section 3.7.4, above.

367 The Commission undertakes a similar analysis of the actual competitiveness of postal markets in determining the scope of Utilities Directive, Directive 2004/17/EC. See, e.g., Decision of 19 December 2008 exempting certain services in the postal sector in Sweden from the application of Directive 2004/17/EC, OJ L 19, 23 Jan 2009, p. 50.

market power (and not whether the product is a universal service) is evident in the evolution of regulatory practices of several countries.[368] The British NRA, Postcomm, has limited price control to products which do not face substantial competition.[369] For non-competitive postal products, Postcomm has adopted a price cap regime in which rates for 'captive' users are regulated more tightly than for 'non-captive' users (where there is potential for competition).[370] Similarly, as noted above,[371] the German law prescribes price caps to control non-bulk letter post rates of postal service providers with a market dominant position; other rates are controlled by ex post review if necessary. In Sweden, the NRA has established a price cap for letter post items weighing up to 500 grams and otherwise reviews rates of universal service ex post. In the United States, the 2006 postal reform law divides all postal products into two categories, 'market dominant' and 'competitive'. Market dominant products are subject to price cap controls while the prices of competitive products are required (i) to cover long term marginal costs of each individual product and (ii) to cover a reasonable portion of common costs on a collective basis.[372]

Examples of best practice: United Kingdom, Germany, Sweden.

Practices of concern: Six NRAs (BE, DK, FI, HU, LU, NL) apparently do not base price regulation on costs.

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368 See section 5.5.2, above, for a discussion of the relationships between postal regulation and competition regulation.

369 Five factors are evaluated in order to decide whether a product is competitive or not: (i) barriers to entry; (ii) scale and nature of competition; (iii) customer awareness and behaviour; (iv) behaviour of Royal Mail; and (v) other factors. Postcomm, 'Royal Mail Price and Service Quality Review: Final Proposals for Consultation' (Dec. 2005) at pp. 9-13.

370 This concept is explained in Postcomm, '2006 Royal Mail Price and Service Quality Review: Initial Proposals' (Jun. 2005), pp. 73-76.

371 See section 3.7.4, above.

372 United States Code, Title 39, sections 3621-23, 3631-33 (2006). Although the 2006 U.S. postal act reasonably adjusts the methods of price regulation of the degree of competitiveness, the act also defines price caps that are too inflexible to list the U.S. as a best practice.

6.4.4 Delivery of inbound cross border postal items

Best practice: Where cross border postal items are collected and forwarded as part of the universal service in a Member State, the NRA in the destination Member State should ensure that providers of postal services with significant market power comply with Article 13 and otherwise provide incoming postal items with similar services at similar prices compared to the services offered by that operator for similar domestic postal items.

Explanation of best practice: To protect the 'cross border provision of universal service', Article 13 requires NRAs to 'encourage' USPs to follow pricing principles similar to, but not as detailed as, those set out in Article 12 for national universal services. In particular, Article 13, like Article 12, provides that terminal dues (i.e., charges for delivery of incoming cross border postal items) should be transparent, non-discriminatory, and cost-based. Article 5 states flatly the Member States shall ensure that the universal service shall '*offer an identical service to users under comparable conditions*'. Since these principles are endorsed by the Postal Directive, best practice implies that practices should be not only encouraged but implemented.

The suggested best practice standard is limited to postal items that meet two tests. First, the postal items must be treated as universal service items in the originating Member State.[373] Second, the postal items must be delivered by a postal operator with significant market power in the destination Member State. For such items, it is suggested that objectives of Article 13 must be met in fact and that discrimination between cross border and domestic mail ended. In effect, each NRA should ensure that a provider of postal services with significant market power in its Member State will honour the universal service obligation of other Member States. Where postal items are delivered by postal operators participating in an effectively competitive market in the destination Member State, the principles of proportionality and least market distortion imply that the NRA should rely upon the competitive market to supply inbound delivery services. Nonetheless, the NRA and NCA should remain vigilant against lapses in the effectiveness of the competitive market and violations of the competition rules.

The Irish NRA, ComReg, is one of the very few NRAs to attempt to implement Article 13. In 2003, ComReg notified the national USP that its terminal dues agreements

373 The suggested best practice does not apply to postal items which are not considered universal service items in the originating Member State because this section, like Articles 5 and 13, is focused on ensuring universal service. See section 5.5.6, below, for a brief discussion of other international postal practices.

appeared to be inconsistent with statutory requirements that charges should be cost-based.[374] ComReg is currently following up this notice.

Example of best practice: Ireland.

Practices of concern: There are several sources of unreasonable price and service discrimination in the provision of intra-Community cross border postal services. First, because some national USPs (ES, NL, PT, UK) do not participate in REIMS III, national USPs charge different rates for delivery of similar cross border mail depending on the originating Member State. Second, where REIMS III rates are not aligned with domestic postage, national USPs charge different rates for similar mail depending on whether the mail is domestic or cross border in origin. Third, because third party access requirements are difficult to meet, participants in REIMS III generally charge different rates for similar mail depending on whether it is tendered by a national USP or a private operator.[375] Fourth, because some national USPs, in concert with the Universal Postal Union, have agreed to hinder the ability of national USPs to open offices outside their national territories, some national USPs charge different rates for delivery of similar mail depending on whether the mail is dispatched by a national USP from an office in its national territory or dispatched by the same national USP from an office outside of its national territory. Fifth, some national USPs delay the delivery of cross border mail or refuse to deliver cross border mail in an effort to enforce such discriminatory terminal dues arrangements. Sixth, because the REIMS III terminal dues agreement is non-public, the rates for the delivery of cross border universal service products are not transparent; while the terminal dues rates of the Universal Postal Union (UPU) are transparent, they are not cost based.[376]

374 See ComReg, 'Terminal Dues Agreements – Compliance with Regulation 10(1) of S.I. 616 of 2002' (23 Oct 2003).
375 Since REIMS III rates are non-public, the extent of such discrimination cannot be evaluated.
376 See sections 3.4.3 and 3.7.7, above.

6.4.5 Financing of the net cost of universal service (if any)

Best practice: After transposition of the Third Postal Directive, Member States should ensure that methods of financing the net cost of universal service, if any, conform to the principles of proportionality and least market distortion and, in any case, create no greater market distortions than existed prior to transposition.

Explanation of best practice: Under the Second Postal Directive, Member States were authorised to fund the net cost of universal service, if any, using revenues generated from two sources: a reserved area and a compensation fund. The bottom line was that some users of public or private postal operators paid a little more than they otherwise would have and some users paid less. Under the Third Postal Directive, a specific definition of the 'net cost of universal service' has been introduced and options for financing the net cost of universal service, if any, have changed.

So far, there has been little analysis of the need for these new financing methods[377] or their potential for market distortions. At the outset, it appears likely that the most efficient, least distortive means of financing the USO is by payment from the general government budget.[378] If further analysis confirms these conclusions, then best practice will be to finance the net cost of universal service, if any, by means of public funds.

If compensation funds are used, it appears that the degree of market distortion varies significantly depending on the specific measures adopted.[379] Since the overall objective of the Third Postal Directive is to move in the direction of full market opening and greater reliance on market forces while ensuring universal service, in defining new methods for financing the net cost (if any) of the USO, NRAs should undertake a reasoned examination of alternatives and structure the compensation fund in a manner that conforms to the principle of least market distortion. As a reasonable safeguard, NRAs should ensure that new methods of financing universal service do not cause greater market distortions than existed prior to transposition of the Third Postal Directive.

So far, the leading example of a reasoned and objective approach towards financing the net cost of universal service is Norway. As noted in section 3.3.5 above, Norwegian law provides that the government will pay Norway Post an amount that represents the net

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377 See section 5.6.3, above.

378 For two recent analyses, see Claire Borsenberger, Helmuth Cremer, Philippe De Donder, Denis Joram and Bernard Roy, 'Funding the Cost of Universal Service in a Liberalized Postal Sector' and Christian Jaag and Urs Trinkner, 'Would the Real Net Cost of Universal Service Provision Please Stand Up? A Calibrated Approach to Universal Service Costing and Financing?'. Both papers were presented at the 17th Conference on Postal and Delivery Economics, May 27–30, 2009, Bordeaux, France. Updated versions may be obtained from the authors at http://www.idei.fr/ and http://www.swiss-economics.ch, respectively.

379 Ibid.

loss incurred for universal services after deducting the value of the postal monopoly. The calculation is transparent and the funds are paid from public funds.[380] To date, there is no example of a well considered compensation fund to finance universal postal service.[381]

Example of best practice: Norway.

Practices of concern: Member States which have granted the USP financial support for universal services — either in the form of a reserved area (all Member States except DE, EE, FI, NL, SE, UK) or payment of funds (ES, IT) — without ensuring that the value of the support provided does not exceed the net cost of universal services provided.

380 See section 3.3.5, above.
381 See section 3.5.4, above.

6.5 Ensuring full market opening for postal services

6.5.1 Phasing out of the reserved area

Best practice: Member States that must end the reserved area by the end of 2012 should phase out the reserved area in a manner calculated to provide an orderly transition to full market opening while preparing the public postal operator for competition.

Explanation of best practice: The Third Postal Directive requires 10 EU Member States (AT, BE, BG, DK, ES, FR, IE, IT, PT, SI) to end the reserved area by 31 December 2010 and the remaining 11 EU Member States (CY, CZ, EL, HU, LT, LU, LV, MT, PL, RO, SK) to end the reserved area by 31 December 2012.[382]

Experience in other industrialised countries indicates that ending the reserved area requires substantial adjustments by the public postal operator and postal market. While beneficial in the long run, short term effects can be difficult. Among industrialised countries which have ended the reserved area, most have introduced a multi-year transition period to prepare the public postal operator, its employees, and other participants in the postal market. During this period, the public postal operator is subject to increasing levels of competition while retaining some of its former legal protections as a safety net. The objective is to improve the ability of the public postal operator to manage in a fully competitive market.

For the 11 Member States which have until the end of 2012 to end the reserved area,[383] best practice would seem to be to develop specific plans for phasing out the reserved area in an orderly manner. These plans should include an evaluation of the possible costs and benefits to ending the reserved area before the end of 2012 since there is no a priori reason to believe that 31 December 2012 is the most appropriate date for all Member States.

To date, the most carefully considered plan for phasing out the postal monopoly is the plan adopted in 2002 by the UK NRA, Postcomm. After extensive public consultation and comprehensive analyses by outside consultants, Postcomm adopted a transition plan that sought to emulate the process by which competition would naturally erode the reserved area while, at the same time, controlling the pace of that process.[384] A

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382 The deadline for the 3 EEA Member States (IS, LI, NO) will be determined by the EEA Joint Committee. See section 2.1, above.

383 For Member States which must liberalise by the end of 2010, it is probably too late to introduce an effective transition period.

384 Postcomm, 'Promoting Effective Competition in UK Postal Services: A Decision Document' (May 2002).

different approach was adopted by Germany. The German postal law emphasised free entry into value-added services closely akin to traditional postal services.[385] Although several countries have moved towards liberalisation by introducing declining price and weight limits for the postal monopoly, these measures do not appear to provide an effective transition since they do not permit significant competition until the last price and weight steps are opened to competition.

Examples of best practice: United Kingdom, Germany.

Practices of concern: None of the 11 Member States (CY, CZ, EL, HU, LT, LU, LV, MT, PL, RO, SK) which have until 31 December 2012 to transpose the Third Postal Directive have developed a plan for an orderly phase out of the reserved area.

6.5.2 Planning for application of competition rules to protect full market opening

Best practice: In preparation for full market opening, the NRA and NCA should cooperatively develop a plan to monitor and control activities which are inconsistent with the competition rules.

Explanation of best practice: As liberalisation develops, it may be expected that some incumbent postal operators or their governments will seek to maintain the status quo by measures which are questionable under the competition rules. Similarly, at the international level, the Universal Postal Union has generally reacted to the gradual development of a multi-operator environment by trying to protect incumbent postal operators. Unless NRAs and NCAs plan *in advance* to monitor and deal with such activities effectively, they may be ill prepared to facilitate the full market opening

385 The German practice of granting licenses to providers of value-added services has lead to entry by a very substantial number of licensed postal operators. In the first years following partial liberalisation in 1998, most of these operators provided delivery services locally because they could only meet the service standards of their licence (e.g. guaranteed overnight delivery) on a local basis. In fact, many entrants were spin-offs of local publishers that had previously primarily provided morning delivery of newspapers. See Oelmann, M. (2007): Regulatorische Marktzutrittsbedingungen und ihre Auswirkungen auf den Wettbewerb: Erfahrungen aus ausgewählten Briefmärkten Europas. WIK discussion paper no. 291, Bad Honnef, p. 70f.

required by the Postal Directive. The slow reaction of the Swedish NCA in support of liberalisation in the1990s provides a clear cautionary example.

Examples of best practice: None.

Practices of concern: There is so far little evidence that NRAs and NCAs are jointly considering the transitional problems that may be posed by full market opening. Given the imminence of full market opening in the postal sector and difficulties encountered in liberalising public monopolies generally, appropriate preparations are now urgently required from national authorities as well as the Commission.

6.5.3 Access to national postal infrastructure

Best practice: Where necessary to protect the interests of users or to promote effective competition, the NRA should ensure that, in accordance with Article 11a, transparent and non-discriminatory access is provided for all postal service providers to elements of the postal infrastructure.

Explanation of best practice: Opening of access to the national postal infrastructure is a best practice because it is explicitly mandated by the Third Postal Directive. The directive generally requires Member States to ensure transparent, non-discriminatory access to elements of the postal infrastructure or services provided within the scope of the universal service whenever necessary to protect the interests of users and/or to promote effective competition. Six elements of postal infrastructure are listed as examples: postcodes, address database, post office boxes, delivery boxes, change of address database, and redirection and return services.

As described above, several Member States have already acted to ensure that important elements of the postal infrastructure are available to all postal service

providers. Three Member States have ensured access to all six elements of the postal infrastructure listed in Article 11a: Estonia, France, Sweden.[386]

Examples of best practice: Estonia, France, Sweden.

Practices of concern: Failure to grant access to the postal infrastructure appears to be particularly unjustified in cases in which Member States (AT, BE, BG, CY, CZ, ES, FI, HU, IT, LT, LU, LV, NL, PL, SI, SK, IS, NO) force wasteful deliveries to incorrect or invalid addresses by denying private operators access to the database of valid addresses and in cases in which Member States (AT, BE, BG, CY, CZ, DK, EL, ES, FI, LU, LV, PL, SI, SK, UK, IS, NO) distort competition and inconvenience users by not allowing private operators to deliver to post office boxes for a reasonable fee.

6.5.4 Access to elements of the international postal infrastructure

Best practice: Where necessary to protect the interests of users or to promote effective competition, the NRA should ensure that, in accordance with Article 11a, transparent and non-discriminatory access is provided for all postal service providers to elements of the international postal infrastructure and services provided within the scope of the international universal service, including standardised operating documents and their electronic equivalents, standardised codes such as IMPC codes, and other elements of the international postal infrastructure.

Explanation of best practice: As discussed above, the Universal Postal Union has hindered both public and private postal service providers in efforts to compete at the cross border level by restricting access to standardised operating documents and their electronic equivalents and to standardised codes such as IMPC (international mail processing centre) codes.[387] Such practices are analogous to a national USP refusing to grant access to post office boxes or clustered delivery box in order to hinder entry into the domestic postal sector. In both cases, ‘elements of postal infrastructure or

386 See section 5.4.1, above.
387 See section 3.4.3, above.

services provided within the scope of the universal service' are reserved to incumbent postal operators to thwart potential competitors. Realisation of the multi-operator environment envisioned by the Third Postal Directive depends in part on transparent and non-discriminatory access to the international as well as the national postal infrastructure. Under the directive, it is the task of NRAs to determine the conditions under which postal operators should have access to elements of the postal infrastructure which are, for technical or legal reasons, limited in supply. Given UPU restrictions on the number and the use of UPU documentation and IMPC codes, it appears that NRAs should regulate access to elements of the international postal infrastructure in order to facilitate full market opening and protect the rights of users

Examples of best practice: None.

Practices of concern: Application of Article 11a — not yet in effect in most Member States — to the international postal infrastructure has not yet been considered by any NRA.

6.5.5 Valued-added tax

Best practice: Member States should apply value-added tax to public and private postal services in a manner that creates the least market distortion while conforming to the requirements of Community law.

Explanation of best practice: As the Commission has recognised, unequal application of the value-added tax (VAT) to public and private postal operators creates significant market distortions that will inhibit full market opening.[388] From the perspective of the Third Postal Directive, there are no counter-balancing considerations. Neither maintenance of universal postal service nor effective user protection requires discriminatory application of VAT laws. Therefore, the best practice must be to apply VAT laws equally to all postal operators.

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388 See section 3.4.2, above.

The recent decision by the European Court of Justice in *TNT Post UK* clarifies the requirements of Community law on VAT and public postal services. In light of this decision, it appears that Member States need to

- ensure that postal service providers that provide services within the universal service area operate under equal legal regimes (i.e., without designation or public procurement) to the maximum extent possible; and
- where provision of services within the universal service area under equal legal regimes cannot be achieved, ensure that application of unequal legal regimes (i.e., with designation or public procurement) is administered in a manner that is, to the maximum extent possible, objective, transparent, and non-discriminatory.

Alternatively, of course, the Council and Parliament could amend Community law to provide equal application of the VAT.

Six NRAs (FI, LV, SE, SI, IS, NO) report that the VAT regime in their Member State applies equally to all postal service providers.[389]

Examples of best practice: Finland, Latvia, Sweden, Slovenia, Iceland, Norway.

Practices of concern: There are two areas of particular concern. The first issue is the effect of differential application of VAT laws on letter post markets. If a market dominant postal operator in a letter post market is exempt from VAT and other postal operators are not, full market opening may be thwarted because preferential treatment under the VAT law reinforces economies of scale and other natural barriers to entry in this market segment. The second issue is the effect of differential application of VAT laws in fully competitive markets such as bulk postal services (in some Member States) and express services. Here unequal application of the VAT law appears to be especially unjustifiable as a matter of public policy.

389 See section 3.4.2. Sweden's VAT rules for the postal sector predate its entry into the European Union. Whether its VAT law is compatible with Community law is now under review by the Commission.

6.5.6 Customs laws

Best practice: Member States should apply customs laws as equally as possible to all postal service providers under comparable conditions consistent with the requirements of Community and international law.

Explanation of best practice: An undistorted market in the carriage of cross border postal items will not be possible unless customs laws are applied identically to all postal service providers under comparable conditions. Traditionally, the Universal Postal Convention has provided for simplified customs procedures for postal items transmitted by postal administrations and limitations on their liability under national customs laws.[390]

As discussed in chapter 3,[391] international and Community provisions appear to allow Member States discretion to apply customs laws in an equal, or substantially equal, manner to all postal service providers under comparable conditions. From this survey, it appears that several Member States (DE, DK, ES, LU, LV, NO, SE) limit UPU customs privileges to postal items transmitted in the universal service. Other Member States provide UPU customs treatment to all items transmitted by the national universal service provider, a substantially more anti-competitive approach.

Community rules for the clearance of customs treatment of postal items will be considered by the Commission in the development of regulations implementing the Modernised Customs Code in 2013. However, in light of the introduction of a liberalised postal market in 2011 (in most of the EU), it may be appropriate for the Commission to reconsider this portion of its current customs regulations in advance of 2013. In this respect it may be noted that in 2006 the United States adopted a statute which provides for equal application of customs and other import and export laws to all 'competitive products' of the U.S. Postal Service and similar products conveyed by private companies.[392] While the United States has yet to implement this statute in practice, it provides a basis for a possible joint EU-US approach to eliminating market distortions due to customs law. In the end, to achieve equalised customs treatment it may be necessary to develop two channels for customs control, a channel for non-commercial postal items and a channel for commercial postal items.

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390 Article 18 of the Universal Postal Convention (2004) says merely that, "The postal administrations of the countries of origin and destination shall be authorised to submit items to customs control, according to the legislation of those countries." Nonetheless, Regulation RL 152, adopted by the UPU's Postal Operations Council, sets out simplified documentation for use by postal administrations. Article 22(3) declares, "Postal administrations shall accept no liability for customs declarations in whatever form these are made or for decisions taken by the Customs on examination of items submitted to customs control".

391 See section 3.4,3, above.

392 Title 39, United States Code, section 407(e)(2) (2006). See section 3.4.3, case-history 3-9.

Examples of best practice: United States (in law only). Good practices include Member States (DE, DK, ES, LU, LV, NO, SE) which limit unequal customs treatment to postal items conveyed in the universal service.

Practices of concern: Member States (BE, BG, CZ, EE, FR, HU, IE, RO, SK, IS) which extend simplified customs treatment to postal items conveyed by the national universal service provider outside of the universal service, for example, in bulk parcel and express services.

6.5.7 Facilitation of multi-operator environment

Best practice: The NRA should review the issues posed by a multi-operator postal market and ensure that, compatible with full market opening, postal operators cooperate to ensure maintenance of universal service and protection of the rights of users.

Explanation of best practice: Recital 34 of Directive 2008/6/EC requires Member States to ensure interoperability between postal service providers where necessary. Best practice, therefore, implies that NRA should specifically address how postal operators in a multi-operator environment will work together to address issues such as the exchange of universal service items, identification of postal carriers, complaint procedures, user inquiries, and return-to-sender services.

As described above, the UK NRA, Postcomm, in particular, has made a careful study of the problems of interoperability and developed a model set of requirements for all postal service providers to facilitate interoperability. The NRAs of Denmark, France, Lithuania, Sweden have also actively addressed elements of interoperability.[393]

393 See section 5.4.2, above.

Examples of best practice: United Kingdom. Good practices: Denmark, France, Lithuania, Sweden.

Practices of concern: At least 10 NRAs (BE, CY, CZ, EE, FI, HU, IT, SI, SK, IS) report no provision for any of the five elements of interoperability reviewed in this survey (exchange of universal service items, identification of postal carriers, complaint procedures, user inquiries, return to sender) and no plan for studying interoperability in the future.

6.5.8 Review of application of laws generally for barriers to entry and market distortions

Best practice: In order to facilitate full market opening, the NRA should systematically and transparently review all potential legal and operational barriers to entry and market distortions and take appropriate actions or recommend appropriate actions to government.

Explanation of best practice: In most Member States, the reserved area is only one of many measures embedded in the laws which may favour or disfavour the incumbent national USP in competition with other postal operators. Given its expertise in the operation of postal markets, the NRA is well placed to undertake a systematic evaluation of such issues.

In the United Kingdom, the NRA, Postcomm, undertook a model of such a review in 2006.[394] Another example is provided by a study by the US Federal Trade Commission in 2007 that examined the application of non-postal laws to the U.S. Postal Service and

394 See Postcomm, 'Competitive Market Review: Tackling Barriers to Entry In Postal Services Final Decisions and Recommendations' (April 2006).

competing private companies.[395] The US study was ordered by Congress in the 2006 postal reform act.

Examples of best practice: United Kingdom, United States.

Practices of concern: Except for the UK, very few Member States appear to have undertaken a systematic study of how to provide for the equal application of laws to all postal operators under similar circumstances.

395 See Federal Trade Commission, 'Accounting for Laws That Apply Differently to the United States Postal Service and its Private Competitors' (Dec. 2007).

6.6 Protecting the rights of users

6.6.1 Transparency of prices and quality of service of universal services

Best practice: The NRA should ensure that information on prices, conditions of access, and the quality of universal services is published frequently and in a timely manner, consistent with appropriate protection of commercially sensitive information and promotion of full market opening.

Explanation of best practice: Article 6 of the Third Postal Directive requires that users are 'regularly given sufficiently detailed and up-to-date information by the universal service provider(s) regarding the particular features of the universal service offered, with special reference to the general conditions of access to these services as well as to prices and quality standard levels'. Article 12 requires that prices of universal services are transparent. Article 16 requires NRAs to publish the results of performance monitoring at least once a year.

Given the Directive's repeated calls for transparency, it is evident that best practice includes ensuring that users have access to complete and up-to-date information about universal services. At the same time, NRAs, however, must be mindful of the need to foster full market opening. In an effectively competitive market, too much transparency can inhibit vigorous competition. Thus, in order to protect users, particular focus should be placed on universal services offered by a postal service provider with significant market power.

All Member States report that they ensure the transparency of basic universal services.[396] Only a minority of NRAs (BE, BG, FR, IE, PT, SE, IS) report that transparency for bulk letters and direct mail services is required by law and verified in practice.[397] Similarly, a minority of NRAs (ES, IE, IT, LV, PL) report that quality of service is monitored by the NRA directly or by an independent body contracted by the NRA.[398] Based on this survey, the Irish NRA appears to be the most vigilant in ensuring the transparency of user information.

Examples of best practice: Ireland.

Practices of concern: Several NRAs reported that bulk postal services are deemed to be universal services, but that rate transparency is not required as a matter of law and/or transparency is not verified in practice for, in particular: bulk letters (DK, EL, HU,

396 See section 3.7.1.
397 See section 3.7.5.
398 See section 3.3.4.

IT, LV, SK, UK), direct mail (EL, IT, MT, SK, UK), and bulk parcels (DK, HU, UK). Most NRAs (BE, CZ, DK, EE, FI, FR, HU, LT, LU, MT, NL, RO, SE, SI, SK, UK, IS, NO) rely upon consultants to the USP to monitor quality of service performance, an arrangement that seems to fall short of the ideal expressed in the Postal Directive ('external bodies having no links with the universal service providers'). Moreover, 9 NRAs (DE, FI, IT, LU, LV, PL, RO, SI, SK) report that quality of service is not monitored at least annually for all universal services.

6.6.2 Handling of user complaints

Best practice: Member States should ensure that the NRA or other competent national authority is empowered to provide users appropriate redress where universal service is not provided, and the NRA or other competent national authority should actively ensure that the rights of users are effectively protected.

Explanation of best practice: Article 19 of the Third Postal Directive requires Member States to ensure that users have transparent, simple and inexpensive procedures for complaint and that USPs issue an annual report on the handling of such complaints. Best practice, by definition, requires active monitoring of these requirements. In addition, however, it seems clear that best practice should also include an annual report by the NRA or other 'competent national authority' which is authorised to review complaints handled unsatisfactorily by the USP. Then, too, if the user's complaint is justified, the competent national authority should be empowered to provide the user meaningful relief in the form of monetary damages or initiation of appropriate services. Based on these criteria, it appears that at least four Member States, Ireland, Lithuania, Poland, and the United Kingdom are currently providing active protection of users.[399]

399 See sections 3.8.1 to 3.8.3, above.

Examples of best practice: Ireland, Lithuania, Poland, and the United Kingdom.

Practices of concern: Three Member States (LU, NL, RO) appear to lack any mechanisms for user protection. In at least 8 Member States (CY, CZ, DE, DK, FI, NL, PT, RO), it appears that the NRA does not approve the USP's procedures for protecting users of universal services. While most Member States authorise a 'competent national authority' to review the handling of user complaints by the USP, few such authorities have the power to award monetary damages to user or order the USP to provide omitted services where justified. In at least 5 Member States (DE, EL, FI, IS, NO), the NRA reports that the USP does not publish an annual report on user protection as required by the Postal Directive.

7 Cooperation Among NRAs

The preceding analysis of postal regulatory practices in the Member States makes clear that closer cooperation among national postal regulators would facilitate more efficient, effective, and uniform implementation of the Third Postal Directive. Article 22(2) of the directive specifically calls for enhanced cooperation among NRAs:

> The national regulatory authorities shall work in close collaboration and shall provide mutual assistance in order to facilitate the application of this Directive within the appropriate existing bodies.

Directive 2008/6/EC explained the goal of improved cooperation as follows:

> National regulatory authorities should, where necessary, cooperate with other regulatory bodies of Member States and with the Commission in carrying out their tasks under Directive 97/67/EC. This would promote the development of the internal market for postal services and help to ensure the consistent application, in all Member States, of the provisions laid down by the Directive, in particular in areas where national law implementing Community law gives national regulatory authorities considerable discretionary powers in the application of the relevant rules.[400]

The recital notes that this cooperation could take place, inter alia, within the Postal Directive Committee[401] or within a group comprising European regulators.

This chapter examines possibilities for enhanced cooperation among postal NRAs and recommends steps to achieve this end. In particular, this chapter considers:

- current administrative cooperation in the postal sector;
- cooperation among national regulators in other EU sectors (competition authorities, electronic communications, energy, and railways); and
- recommendations for enhanced cooperation.

400 Directive 2008/6/EC, Recital 50.
401 The Postal Directive Committee is a committee assisting the Commission in the implementation of the Postal Directive. It is established by Article 21 of the Postal Directive.

7.1 Current status of administrative cooperation in the postal sector

At present in the postal sector — unlike in other regulated industries such as electronic communications, energy and railways sectors — there is no organisation dedicated to facilitating cooperation among Community postal regulators. However, Community NRAs are able to cooperate to a limited extent through two bodies with more general missions:

- the Postal Directive Committee, and
- CERP, the European Committee for Postal Regulation, a committee of CEPT, the European Conference of Postal and Telecommunications Administrations.

Neither body is composed of NRAs or specially focused on regulatory issues. Both are committees of Member States. NRAs occasionally represent their Member States at these bodies depending on the agenda agreed by Member States.

In addition, some postal NRAs consult with each other bilaterally, but irregularly and without any formal arrangement or procedure. In particular, some NRAs from the EU-15 Member States have assisted NRAs in Member States that joined the EU in 2004 and 2007 in 'twinning projects' funded by the Community with the objective of facilitating knowledge transfer.

A multilateral group of NRAs has also been discussed, but so far without effect. Between 2002 and 2005, the NRAs from Germany, the Netherlands, Sweden, and the UK informally discussed creation of an 'independent postal regulators group' (IPRG). These plans never materialised. More recently, this idea has resurfaced in talks among some NRAs, possibly as a organisation attached to the Independent Regulators Group (IRG) in the electronic communications sector. Such an arrangement might have practical benefits since 22 of the 27 EU postal regulators are also responsible for electronic communications and already members of the IRG, so the new organisation could build upon established contacts. However, the outcome of these discussions appears uncertain at present.

This section describes the current status of NRA cooperation via the Postal Directive Committee and CERP, and assesses whether these organisations are adequate to meet the needs of NRAs and the requirements of the Third Postal Directive for greater cooperation.

7.1.1 Postal Directive committee

The Postal Directive Committee is classified as a 'Regulatory Procedure with Scrutiny Committee' under Decision 1999/468/EC.[402] The primary purpose of this committee is to solicit the Member States' views on draft proposals prepared by the Commission.

By its nature, the Postal Directive Committee is a body of Member State governments, not NRAs. The whole committee meets twice per year, and the Commission has convened several additional meetings of 'working groups' since 2007. Since some Member States are sometimes represented by NRAs, the committee to some extent facilitates interaction between regulators. Nonetheless, the Postal Directive Committee is insufficient to sustain substantial cooperation among NRAs for two reasons. First, intensive practical cooperation requires smaller, less formal working groups to be effective. In particular, for technical details of postal regulation (e.g. detailed challenges arising from the implementation of accounting separation), smaller expert groups would seem more adequate to develop recommendations for regulatory practice. Second, since members of the committee are Member States, there can be no assurance that NRAs will meet and cooperate at the committee independent of their governments (the ministries responsible for the postal sector).

The key purpose of the Postal Directive Committee is to solicit the Member States' views on draft measures prepared by the Commission. The Postal Directive Committee does not facilitate – and does not aim at facilitating – extensive and effective cooperation of European NRAs.

402 See Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L184, 17 Jul 1999, p. 23; Regulation 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, OJ L 284, 31 Oct 2003, p. 1; and Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L200 p. 11.

7.1.2 CERP

CERP, the European Committee for Postal Regulation was created in 1992 as a committee within CEPT, the European Conference of Postal and Telecommunications Administrations. Forty-eight countries are members of CEPT and thus members of CERP.[403] Member countries include all 27 EU Member States and 3 EEA countries. As a practical matter, work within CERP is carried out almost exclusively by the Member States of the EU/EEA and Switzerland.

CEPT was established in 1959 by the postal and telecommunications administrations of 19 European countries. Membership increased rapidly in the following years as virtually all Western European countries joined the conference. The organisation's activities include cooperation on commercial, operational, regulatory, and technical standardisation issues. When postal and telecommunications operations were separated from regulatory functions in 1992, the postal and telecommunications operators established separate organisations: PostEurop and ETNO (European Telecommunications Network Operators' Association). CEPT thus became a body of policy makers and regulators. At the same time, Central and Eastern European Countries joined CEPT, increasing membership to 48 countries.

Since the 1990s, the overall objectives of CEPT have included: (i) establishing a discussion forum and providing mutual assistance among members with regard to the settlement of sovereign/regulatory issues; (ii) influencing the goals and priorities in the field of European post and telecommunications through common positions; (iii) strengthening and fostering more intensive cooperation with Eastern and Central European countries; (iv) promoting and facilitating relations between European regulators; (v) influencing, through common positions, developments within the International Telecommunications Union (ITU) and Universal Postal Union (UPU) in accordance with European goals.[404] The specific objectives of CERP in the postal sector are to (i) examine postal regulatory affairs; (ii) assess influence of international regulatory policies in member countries; (iii) establish and maintain contacts with EU institutions and other relevant bodies and associations concerned with postal regulation; (iv) develop common approaches to postal regulatory issues; and (v) develop proposals where appropriate.[405] In the postal sector, CEPT has the status of a restricted union of

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403 The current 48 CEPT member countries are: Albania, Andorra, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, the United Kingdom, and the Vatican.

404 See www.cept.org ('About CEPT)'.

405 See CERP Rules of Procedure of 2005 (Preamble).

the UPU, and discussion of UPU policies has traditionally been an important subject of CERP's work.

The top level body of CERP is the plenary. Plenary sessions are held twice annually, in spring and in fall. Between plenaries, work is carried out in working groups that usually convene twice per year and project teams that at least as often. Working groups present the results of their work to the plenary. Each project team is subordinated to one working group. Project teams present reports to the two working groups (Application and Policy) in a first step. If the reports are adopted by the working groups, they may then be presented to the CERP plenary.

Internal organisation is carried out by the chairman, assisted by a steering committee composed of the chairmen of CERP and all working groups and project teams. There is no permanent secretariat. As a practical matter, a secretariat is provided by the chairman.

There are no procedural rules that require high-level participation of member countries at the CERP plenary. It appears that only a small minority of member countries are represented by ultimate decision-makers (i.e. by ministers/state secretaries for governments or by heads of NRAs) at CERP plenary meetings.[406] For the past ten years, CERP has been chaired by officials of NRAs, but in no case was this official the head of the NRA.

Positions adopted by the CERP plenary are not binding on member countries. According to CERP's rules of procedures, the CERP plenary can adopt three types of decisions. 'Decisions' and 'recommendations' may relate to domestic regulatory practices or policies and aim at harmonizing regulatory practice. Member countries must report to CERP about the implementation of any 'decisions'. 'Recommendations' merely encourage a certain practice. Finally, 'common positions' relate to the activities of the UPU and the European Union. According to the rules of procedures, the plenary shall 'reach consensus whenever possible'. Absent consensus, propositions can be adopted by simple majority.

It appears that the instrument of 'decisions' has not been used in recent years. Detailed information on the numbers of recommendations or common positions adopted by CERP is unavailable. It appears that recent plenary sessions have merely adopted the reports prepared by project teams but that formal 'recommendations' and 'common positions' have hardly been used at all. Consequently, the effect of CERP on domestic regulatory practices seems to have been very little. However, the reports of CERP project teams provide some transparency and disseminate information about practices

406 Assessments by WIK-Consult, based on interviews and review of attendance lists.

in each member country, and the meetings provide a forum for ministries and NRAs to establish contacts and discuss postal policy informally.

Even though much of the work in project teams is carried out by NRA officials, the formal members of CERP are countries, not NRAs. At plenary sessions, some member countries are represented by ministry officials responsible for the postal sector, while others are represented by NRA representatives. Delegations of several member countries — in particular the larger ones — include representatives of both ministry and NRA. In recent years, and in those member countries where independent NRAs exist, there seems to be a trend towards more active participation by NRAs at CERP working groups and project teams and less active participation by ministries.[407]

In 2008, the structure of CERP working groups was modernised in an attempt to separate the work on policy and UPU matters, on the hand, and regulatory issues, on the other hand. The change also aimed at simplifying the organisational structure and referring more work to smaller project teams. With this change the number of working groups was reduced to two. The current two working groups are called 'Policy' and 'Application'. At present there are nine project teams: (i) policy, (ii) NRAs; (iii) financing of USO; (iv) universal service; (v) market supervision; (vi) statistics; (vii) consumer issues; (viii) cost accounting; and (ix) sustainable development.

While CERP is formally an organisation of governments, it appears that NRAs — rather than ministries — are increasingly taking part in the work of CERP. This underlines the need for cooperation among NRAs, and indicates that NRAs have an interest in such cooperation. According to estimates made by CERP representatives, the meetings of the working group 'Application' and meetings of related project teams are almost exclusively attended by NRA representatives. Meetings of the working group 'Policy' and meetings of related project teams are typically attended by either NRA or ministry representatives (different participation from different countries).

The European Commission and the secretariat of the European Free Trade Association (EFTA) have an advisory status at CERP. The European Commission is invited, and usually participates, in all CERP meetings (plenary, working group, and project team meetings).

The Postal Directive explicitly calls for 'close collaboration and mutual assistance among NRAs in facilitating application of the directive' (Article 22), and this study identifies a need for enhanced cooperation among NRAs (see section 7.3 below). The following paragraphs discuss whether CERP provides an adequate forum for this cooperation.

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407 This assessment was provided by several CERP representatives interviewed by the authors.

At present CERP is the primary forum for cooperation among NRAs. Traditionally however, CERP has been an organisation of postal administrations and, later, of governments. The fact that NRAs are increasingly using this forum to meet with each other clearly indicates that NRAs have an interest in cooperation.

As a means of facilitating effective cooperation among NRAs, however, there are several shortcomings to CERP:

- First, CERP is not a organisation of NRAs, but of governments. While in practice many NRAs represent their member countries in some meetings, this organisation does ensure that NRAs can carry out their work and discuss their regulatory policies independently of governments. This conflicts with the requirement of the Postal Directive that NRAs must be independent of Member States' activities that are associated with their governments' ownership in public postal operators.[408]

- Second, while CERP provides a useful discussion forum for NRAs, the work of CERP does not appear to have any significant impact on decisions taken by NRAs domestically.

- Third, there is a lack of regular high-level representation in CERP meetings. In our view, this lack of high-level representation explains why CERP's work does not have a significant impact of regulatory practice in the Member States at present.

- Fourth, CERP's membership extends far beyond the Community and the EEA. Consequently, not all CERP members share the same tasks in implementing the Postal Directive.

- Fifth, CERP does not appear to effectively allow for cooperation between NRAs on the one hand, and the Commission on the other hand. From a Community perspective, it appears desirable that the Commission should have a more formal mechanism for soliciting advice on specific questions and thus enlisting the expert knowledge of NRAs.

In light of these shortcomings, CERP appears insufficient to facilitate cooperation among NRAs on matters related to the implementation of the Postal Directive. CERP has traditionally had a distinct role as a inter-governmental organisation. Facilitating the specific type of cooperation called for by the Postal Directive never was the primary purpose or ambition of this organisation.

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408 See Article 22(2), Postal Directive.

The Third Postal Directive requires close collaboration and mutual assistance among Community NRAs in facilitating application of the directive. CERP is an inter-governmental organisation that allows government officials from inside and outside the European Union to exchange views and cooperate on postal policy matters. While CERP is a useful forum for such purposes, it is not dedicated to either the requirements of the European Union or the tasks of postal regulators. We conclude that CERP is not an adequate organisation to facilitate the specific type of NRA cooperation that the Third Postal Directive requires.

7.2 Practice in other EU sectors

This section presents the practice of cooperation among competition and regulatory authorities in other network sectors, such as electronic communications, energy and railways. Relevant topics are setting-up and members of the institution, cooperation with other institutions, objectives and activities of the bodies, as well as organisational and procedural issues. In addition, the section discusses concepts and recent developments towards EU regulatory bodies and agencies in the electronic communications (BEREC) and energy (ACER) sectors.

7.2.1 Competition authorities

7.2.1.1 European Competition Authorities (ECA)

Due to an initiative of the Dutch Competition Authority (Nederlandse Mededingingsautoriteit, NMa), the European Competition Authorities (ECA) was established in Amsterdam in April 2001. It is an informal association of competition authorities in Member States of the European Union, the European Commission, the EFTA countries Iceland, Liechtenstein and Norway, and the EFTA Surveillance Authority.

The ECA serves as a discussion forum with the objective to refine mutual working relationship, and to promote efficient application and enforcement of European competition rules and national laws. For this purpose, heads of the competition authorities meet twice a year to debate relevant topics. Additionally, a continuous exchange of information and expertise takes place. There is no permanent organisational structure or dedicated budget.

Several working groups were created to elaborate documents of non-binding nature:

- The Multi-jurisdictional Mergers Working Group pursues the target of improving cooperation and information exchange in multiple merger filings ('Procedures Guide'). It also clarified the procedure of referring merger cases not having Community dimension to the Commission for examination.
- The Leniency Programmes Working Group sets out joint principles regarding leniency schemes to uncover and prosecute cartel agreements.
- The Air Traffic Working Group was founded to pull up collaboration of the authorities (notifications, proceedings, decisions) and to promote sector-specific competitiveness (mergers and strategic alliances, loyalty programmes, slot trading, code-sharing agreements).
- The Financial Services Working Group examines possible competition issues in retail banking and payment systems markets.

7.2.1.2 European Competition Network (ECN)

Existence of the European Competition Network (ECN) rests on the main principles of articles 11 and 12 of Council Regulation (EC) No 1/2003 of 16 December 2002, together with the 'Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities', as well as on the detailed provisions of the 'Commission Notice on cooperation within the Network of Competition Authorities'. The ECN became fully operational as from 1 May 2004 when the Council Regulation had to be applied. It is made up of the competition authorities designated by the 27 Member States of the European Union, and the DG for Competition of the European Commission. The ECN and the ECA operate in parallel, but no formalised links exist between the networks.

The ECN was established as a forum for discussion and cooperation of the competition authorities in cases where articles 81 and 82 of the EC treaty are relevant. In view of ensuring an efficient division of work under a system of parallel competences, and an effective and consistent application and enforcement of EC competition rules, the Commission and national competition authorities agree on working arrangements and cooperation methods, and develop a framework for obligatory and optional information mechanisms.[409] Therefore, they act jointly in the following ways:

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409 See also Reichelt, D. (2005): To What Extent does the Cooperation Within the European Competition Network Protect the Rights of Undertakings?, in: Common Market Law Review, Vol. 42, No. 3 (June

- Mutual information about new proceedings;
- Allocation of new cases:[410] indicative time limit of up to three months; assignment of responsibility to one authority – or in exceptional cases to several authorities or to the Commission – taking into account criteria as for example reception of a complaint or start of a procedure, affected markets, and abilities of authorities (principle of the best-placed authority); coordination of parallel action; re-allocation of cases within a period of two months; guarantee of transparency and predictability;
- Announcement of enforcement decisions in due time;
- Coordination of investigations: initiation of proceedings by the Commission with national authorities acting or not acting on the case; parallel opening of proceedings; transmission of copies of important documents from the Commission to national competition authorities; information before or shortly after taking investigative measures; information of the Commission and other competition authorities about decisions concerning rejection of complaints, suspension or termination of proceedings, termination of an infringement, acceptance of commitments and withdrawal of benefits; decision taking with several authorities involved;
- Mutual assistance in investigations;
- Internal exchange and use of any matter of fact or law in evidence, provision of all information (documents, statements, digital information) in an easily accessible way, as well as determination of rules for gathering, transmission, disclosure and use of information;[411]
- Pooling of experience and identification of best practices;
- Clarification of other issues of common interest.

The ECN is no autonomous institution and does not have a legal personality. It has neither any stand-alone competence, nor does it have authority or rights over its members. Cooperation of competition authorities takes place on the basis of equality, independence and solidarity. As decision-making relies on consensus building, no voting rules apply.

2005), pp. 745-782, here: 748 ff.; and Smits, R. (2005): The European Competition Network: Selected Aspects, in: Legal Issues of Economic Integration, Vol. 32, No. 2, pp. 175-192, here: 176 ff.

410 See Smits, R. (2005: 179 f.); and also Schwab, A. and Steinle, Ch. (2008): Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed, in: European Competition Law Review, Vol. 29, No. 9, pp. 523-531.

411 See Smits, R. (2005: 180 ff.).

Concerning the organisational structure, an Advisory Committee was instituted to function as a forum where representatives of the national competition authorities discuss individual cases and general aspects of competition law, and develop common approaches. It is consulted prior to decisions of the Commission (finding and termination of infringements, interim measures, commitments, finding of inapplicability, fines, withdrawal in individual cases) or of national authorities (important cases on request), as well as on certain draft Commission regulations, notices and guidelines. Besides, working groups of experts in specific sectors (telecommunications, media, IT, energy, motor vehicles, railways, banking, securities, insurance, professional services, pharmaceuticals, health care, environment, food, abuse of dominant positions) were installed to deal with general and sector-specific issues of competition policy and law.

7.2.2 Electronic communications

7.2.2.1 Independent Regulators Group (IRG) and European Regulators Group (ERG)

The network of European telecommunications regulators is organised in two groups: the Independent Regulators Group (IRG) and the European Regulators Group for electronic communications networks and services (ERG).

With regard to full liberalisation of telecommunications markets and implementation of the revised ONP ('open network provision') framework, the IRG was established in Paris in 1997 as an informal group of the NRAs. In October 2007, statutes for founding the IRG as a not-for-profit association under Belgian law were signed. Members of the IRG are the 27 EU Member States, the four EFTA countries (Iceland, Liechtenstein, Norway, Switzerland), and the three EU candidate countries (Croatia, Macedonia, Turkey). Membership contribution to the IRG amounts to 20.000 € (to finance secretariat, website and intranet).

In connection with the adoption of the regulatory framework for electronic communications networks and services, the ERG was set up on 30 July 2002 with the Commission Decision 2002/627/EC of 29 July 2002 – amended by the Commission

Decisions 2004/641/EC of 14 September 2004 and 2007/804/EC of 6 December 2007 – as an advisory group to the Commission. Membership is limited to telecommunications regulatory authorities in EU Member States and the Commission. All EFTA and EU candidate countries are observers to the ERG.

The ERG and IRG aim at contributing to a consistent and harmonised implementation and application of regulatory provisions in all Member States, at an identification of appropriate regulatory instruments, and at the development and consolidation of the internal market. Hence, the groups

- Back cooperation and coordination among NRAs as well as between authorities and the Commission; in particular, consultation is required with regard to article 7 of Directive 2002/21/EC of 7 March 2002 (Framework Directive);
- Provide advice and technical assistance based on relevant experience and knowledge to members and to the Commission;
- Exchange information, points of view, expertise and best practice based on benchmarking among its members;
- Discuss on current and future regulatory challenges;
- Consult with market participants, end-users, consumers, European institutions, and other regulatory networks, and deliver inputs to consultations of the Commission.

The ERG formulates legally non-binding common positions on fundamental attitudes on regulatory issues concerning harmonisation. Eligible priority areas are reviewed and updated regularly, and draft common positions are published for public consultation before they are finalised. Members commit themselves to follow common positions in adopting regulatory decisions. Since 2007, implementation of common positions by NRAs is monitored and compared, and reports of compliance of application are published. The ERG makes available reports on selected regulatory aspects and has also started to develop case studies of regulatory best practice with respect to remedies. Opinions (on demand of the Commission), responses (as part of a consultation) and statements of the ERG express points of view on regulatory issues; they may be requested by the Commission to prepare legal positions, for instance recommendations. The IRG implements its coordinating tasks of regulatory practice on a voluntary basis by devising ‘Principles of Implementation and Best Practice (PIB)’ members promise to adhere to in their decisions; application is monitored, too. It also issues statements and benchmarks.

ERG and IRG prepare a common work programme for each calendar year regarding regulatory issues of the preceding year. For that purpose, they have to formulate a draft

version, publish it for consultation and hold public hearings, insert the feedback, and finalise the work programme. In addition, at the end of a year the groups send a common annual report of the activities and the outcome of the work programme to the Commission, the European Parliament and the Council. Reports are also made available to the public on the ERG and IRG websites.

Regarding their bodies, ERG and IRG are composed of the heads of the NRAs or their representatives. As the head of both groups, the chairperson of the ERG/IRG is elected annually from among its members. He/she is supported by an informal 'Troika', consisting of the present as well as of the past and future chair (vice-chairpersons). An IRG board of directors (members of the „Troika' and two additional heads of NRAs, all appointed for a period of one year) assists the chair in his/her duties. Meetings of the IRG board are held at least four times per year. To decide, four directors must be present or represented. In general, decisions are taken by consensus by present members (or in urgent cases by the chair following a vote with the two vice-chairpersons). The board proposes the budget to the general assembly, submits the work programme to the general assembly, proposes to exclude members, supervises the secretariat, monitors legal actions, and represents the association externally.

Plenary sessions of the ERG and IRG are held at least quarterly. At ERG meetings one delegate per EU Member State and the Commission are present. Representatives of other EEA countries and EU candidate countries can participate as observers; other experts and observers may be invited to attend the meetings. If issues are of confidential nature, presence at the meetings is to be restricted to members of the ERG. The chairperson convenes the meetings of the ERG in agreement with the Commission. Rules of procedure have to be adopted by consensus or in absence of consensus by a two-thirds majority vote (one vote per Member State). Commission representatives are not entitled to vote but rules are subject to approval by the Commission. Results of the plenary sessions are made public.

Sessions of the IRG general assembly are pioneered by the Contact Network (efforts to resolve differences of opinion, preparation of papers, agenda setting). The heads of the NRAs or their deputies represent the countries. Two-thirds of the members must be present to decide. External experts and observers may attend the meetings. The general assembly takes all decisions to fulfil the objectives of the IRG. Besides, it adopts and amends rules of procedure, amends the statutes, agrees to all official documents, approves the budget and the annual accounts, adopts financial rules, appoints and dismisses the chairperson, other members of the board of directors and the members of the secretariat, sets up working groups, admits and excludes Member States, and dissolves the IRG. Decision-making is based on consensus. If no consensus is achieved, decisions are made by the greater of a two-thirds majority of members present or represented, or a simple majority of the votes of all members (one vote per Member State). Sessions of the ERG and IRG are held 'back-to-back'.

Detailed work of the ERG/IRG is carried out in common dedicated working groups or project teams that deal with:

- Framework Review,
- Significant Market Power,
- International Roaming,
- Remedies & Benchmark,
- Mobile and Fixed Termination Rates,
- Next Generation Networks,
- Convergence,
- End User.

The project teams, which are headed by a chairperson, prepare specific deliverables for issues in question. The Commission is allowed to attend all meetings. Additionally, there are three supporting teams, a Task Force on Termination Rates and electronic contact groups of experts.

The Commission had to provide an ERG secretariat but the post of the general Secretary has been vacant since 2006. The IRG secretariat worked under the responsibility of the chairperson and the board of directors, and was accountable to the general assembly. In 2007, a permanent secretariat was established at the Commission in Brussels, replacing and enhancing functions of the previous ERG and IRG secretariats. The secretariat consists of three national experts (one senior member, two junior members), who manage day-to-day assignments, and support activities of the chair as well as measures improving efficiency and cooperation among members. It also coordinates project teams, and monitors the fulfilment of the work programme.

7.2.2.2 A further stage: Body of European Regulators for Electronic Communications (BEREC)

On 13 November 2007, the Commission adopted a proposal for a Regulation establishing the European Electronic Communications Market Authority (EECMA). Following the opinions of the European Economic and Social Committee and the Committee of Regions, the European Parliament at its first reading deviated from this model and opted for a Body of European Regulators in Telecoms (BERT). On 5 November 2008, the Commission presented an amended proposal still favouring EECMA. However, the Council in its common position of 16 February 2009 developed the concept of a Group of European Regulators in Telecoms (GERT), once again differing significantly from the Commission proposal and the opinion of the European

Parliament. GERT should not have been established as an agency with legal personality, but as an independent advisory group without a board and resources from the general budget of the European Union. As a result of a compromise negotiated with the Council, the European Parliament adopted several amendments to the common position at second reading on 6 May 2009. According to this compromise, the new institution will be named Body of European Regulators for Electronic Communications (BEREC). The creation of BEREC is part of the legislative package for electronic communications and is currently negotiated between Parliament and the Council (as of end June 2009).

The reasons stated by the Commission for the necessity to create a new authority (e.g. agency, body or group) and for the replacement of ERG are as follows: to contribute to the development of the internal market by ensuring a consistent application of the common regulatory framework for electronic communications markets; to improve existing structures and functioning of the ERG in order to intensify cooperation and coordination among NRAs; to upgrade competences, and to state powers, functioning and relations with Community institutions more precisely; and to enhance independence, transparency and efficiency in decision-making.

BEREC shall operate as a body of the sector-specific regulators of the 27 EU Member States, but will neither have the status of an agency nor legal personality. NRAs from EEA countries and EU candidate countries will have observer status.

BEREC shall have the following tasks:

- It will have to promote cooperation among NRAs as well as between authorities and the Commission.

- Based on its expertise, BEREC will advise the European Parliament, the Council and the Commission (but not the market players), debate issues with and deliver opinions to these institutions, and assist them in relations with third parties.

- It will support NRAs in executing market analyses and disseminate regulatory best practice among them.

- Beyond that, BEREC shall have the competence to deliver opinions on draft decisions, recommendations and guidelines (definition and identification of relevant markets, designation of operators with significant market power, imposition of remedies, notifications, harmonisation measures, cross-border disputes, taking of exceptional measures by NRAs, draft measures relating to numbering, rules and requirements for providers of cross-border business services).

- BEREC will monitor the electronic communications sector, and publish annual reports on sector-specific developments.

- Other specific tasks may be assigned to BEREC by the Commission.

Before adopting opinions, recommendations, guidelines, best practice or reports, BEREC shall consult national competition authorities and interested parties. Furthermore, it will adopt an annual work programme and publish an annual report of its activities. The Commission will have to prepare an evaluation report on BEREC, assessing the results achieved and its working methods.

The organisational structure of BEREC shall comprise a board of regulators, the office and expert working groups:

The board of regulators shall be composed of the heads or high-level representatives of the NRAs, with one member per Member State; the Commission will have an observer status. The chairperson and the vice-chairpersons representing BEREC externally will be elected among its members; the term of office will be one year. Plenary meetings shall occur at least four times a year, but extraordinary meetings may also be convened. The Commission shall be invited, and experts from EEA countries can participate as observers. The board of regulators will fulfil the tasks of BEREC and take all decisions. Moreover, it will approve voluntary financial contributions, and adopt the annual work programme and the annual report on BEREC's activities. It shall act by a two-thirds majority of members, with each member having one vote.

On initiative of the European Parliament, the office will function as a Community body with legal personality. It shall provide administrative and professional support services to BEREC, assist the chair in preparation of the work of the board of regulators, collect and transmit information to NRAs, disseminate regulatory best practices, and set up expert working groups. The office will consist of a management committee and an administrative manager:

- The Management Committee will be composed of heads or high-level representatives of NRAs, with each member having one vote. It will appoint the Administrative Manager, provide guidance on his tasks, prepare the preliminary draft budget and draw up the final budget, and be responsible for staffing.

- The administrative manager will head the office; referring to this, he/she shall be accountable to the management committee. He/she will supervise the implementation of the annual work programme; assist with the preparation of the agendas of other bodies, as well as with the draft work programme and the annual report on activities; participate in the work of the board of regulators and the management committee; and implement the budget.

Revenues and resources of the office will be financed in part from the budget of the European Union, and from contributions from the member NRAs on a voluntary basis. Revenues shall balance expenditures composed of staff, administrative, infrastructure and operational expenses.

7.2.3 Energy

7.2.3.1 Council of European Energy Regulators (CEER)

The Council of European Energy Regulators (CEER) was voluntarily formed as an informal platform in March 2000 with a Memorandum of Understanding signed by ten national energy regulatory authorities. In June 2003, regulators decided to constitute a not-for-profit association under Belgian law and adopted its statutes which were consolidated on 19 November 2008. Present members are the designated NRAs or their senior representatives in the 27 EU Member States plus the EFTA countries Iceland and Norway. The membership fee depends on the weighted voting in the EU Council.

CEER strives for the promotion, monitoring and enforcement of the internal energy market. To serve this purpose, it

- Reviews the implementation and application of legislation; proposes guidelines, recommendations and best practice; and observes and assesses the evolution of energy markets and of global trends in energy regulation;
- Provides a framework for discussion of regulatory issues, as well as for exchange of experience and expert views; establishes expert knowledge and analyses; contributes to advancement of research; and promotes training of staff;
- Improves cooperation, information exchange and assistance among national regulators;

- Advises and assists European institutions on regulatory issues, and responds to mandates given by European institutions;
- Serves for collaboration between national regulators and the Commission (DG for Energy and Transport, DG for Competition, DG for Research) and with national competition authorities;
- Shares regulatory experience with similar associations in North America (NARUC), Central and Eastern Europe (ERRA), and safeguards membership in the International Energy Regulation Network (IERN); and
- Consults market participants, consumers and operators.

Essential documents of CEER are non-binding decisions and conclusions of the general assembly meetings. In tandem with ERGEG, annual national monitoring reports on the level of compliance with existing legislation and guidelines (national reporting), as well as reports and position papers on specific subjects are authored. Furthermore, CEER publishes an annual work programme at the beginning of the year (together with ERGEG since 2007); submits an annual report on the national regulators' activities during the previous year (joint with ERGEG since 2006), which is sent to all members, the Commission, the European Parliament and the Council; and fact sheets and an online newsletter are offered to the public.

The organisational structure comprises a board of directors, a general assembly, the working groups, and a secretariat:

The board of directors consists of a president and five vice presidents who are elected for a renewable term of five years. To deliberate and decide, at least three directors must be present or represented. Decisions are taken by simple majority, whereat the president or the appointed vice president has a casting vote. Working group members have the right to participate in meetings as observers without a right to vote. For legal actions above 20.000 euro, the board needs prior consent of the general assembly. Beyond, it proposes the budget to the general assembly, submits annual accounts, proposes to exclude members, organises general assembly meetings, supervises the secretariat, keeps the register of members, and represents the association externally.

The general assembly comprises one representative of all members (head of NRA). The representative of the Commission participates in certain debates without voting rights. Sessions are held at least four times a year, and may be convened by the president or the board of directors, who also set the agenda. Meetings are chaired by the president; his/her voting right is linked to the membership.

The general assembly takes all decisions to fulfil the objectives of the CEER, with respect to publications and communications of views and of strategic or long-term

importance, and any other decision assigned to it by law or its statutes. Moreover, it establishes internal rules of association, amends the statutes, gives prior consent to certain acts of the board of directors, endorses position papers and official documents, approves the budget and the annual accounts, determines contributions of members (corresponding to weights of votes), elects and dismisses the president, the vice presidents and the secretary, admits and excludes members, and winds up and liquidates the CEER.

Working and decision-making in the general assembly is based on consensus. If no consensus is reached, decision is carried by a qualified two-thirds majority (weighted votes as for the EU Council); dissenting opinions are identified and reported. Decisions concerning CEER purposes also require majority of EU members. Amendments of statutes require a two-thirds majority (change of statutes on purposes requires unanimity), with each member having one vote. Decisions on winding up CEER or its liquidation involve presence of two thirds of members at the first meeting and four-fifths majority, with each member having one vote.

In order to study specific subjects on market integration and cooperation, CEER and ERGEG have installed eight common working groups (Energy Package, Financial Services, Regional Initiatives, Electricity, Gas, Customer, International Strategy, Energy Community), composed of technical experts from NRAs. They may be supported by task forces in charge of specific issues. Working groups have to report to the board of directors, the general assembly and the ERGEG plenary, and to publish their findings. The Commission is entitled to attend all their meetings.

CEER and ERGEG share a secretariat, which is provided by the Commission. It works under the responsibility of the board of directors. It is headed by a secretary, who is appointed by the general assembly on proposal by the president, exercises delegated powers and executes tasks assigned by the board of directors. The secretariat prepares and maintains the minutes of the meetings, and assists the general assembly, the board of directors and the expert groups.

Travel and subsistence expenses incurred by members, observers and experts are reimbursed by the Commission.

7.2.3.2 European Regulators Group for Electricity and Gas (ERGEG)

Additionally to the CEER, the Commission with its Decision 2003/796/EC of 11 November 2003 set up the European Regulators Group for Electricity and Gas (ERGEG).[412] ERGEG took duties on 14 November 2003 with the entry into force of the decision. Members are the heads (or their representatives) of the NRAs in the 27 EU Member States and the Commission. National regulators of some candidate countries (Croatia, Turkey) and of the EEA countries Iceland and Norway have observer status.

ERGEG has similar objectives as CEER and the purpose of promoting the consolidation of the internal energy market, and of guaranteeing the consistent application of legislative provisions of the directives and regulations in Member States. It is entrusted with the following tasks:

- In its priority role as advisory group ERGEG counsels and assists the Commission, in particular with regard to the preparation of draft implementing measures.
- It facilitates consultation, cooperation and coordination among regulatory authorities in Member States, and between them and the Commission.
- ERGEG consults with market participants, consumers and end-users by means of written consultations, public hearings, organisation of conferences and workshops for stakeholders and interested parties, and inclusion of the European electricity and gas forums. The Florence Forum (since 1998), the Madrid Forum (since 1999) and the London Forum (since 2008) are held once or twice per year, and also serve the purpose of providing advice and exchanging information.

Outputs of ERGEG's work, which is coordinated with CEER but executed independently, are legally non-binding plenary decisions, the 'Guidelines of Good Practice' and policy recommendations to the Commission. Annual national monitoring reports, reports and position papers on specific subjects, work programmes, annual reports, as well as fact sheets and online newsletters are published together with CEER.

The head of ERGEG is the chairperson elected rotationally among the members, and simultaneously serves as the chairperson of CEER. Plenary meetings are held quarterly. The Commission is present at debates with a designated high-level representative, but is not empowered to vote, and to legally, technically or functionally

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412 See also Herzmann, K. (2005): Zur Kooperation der Energieregulierungsbehörden in Europa – Ein Überblick und Vergleich mit dem Telekommunikationssektor, in: Zeitschrift für Neues Energierecht (ZNER), Vol. 9, No. 3, pp. 216-220.

supervise ERGEG. Representatives of other EEA countries and EU candidate countries are eligible to participate. Other experts and observers can be invited. Plenary sessions are held ‘back-to-back’ to the CEER general assembly. Decision-making is based on a qualified two-thirds majority (weighted votes as for the EU Council) if no consensus was achieved. Rules of procedure have to be adopted by consensus or in absence of consensus by a two-thirds majority vote (one vote per Member State), but are subject to approval of the Commission. Working groups and the secretariat are operated joint with CEER.

7.2.3.3 Future prospect: Agency for the Cooperation of Energy Regulators (ACER)

Even though the work of ERGEG is highly respected, ERGEG itself and sector stakeholders recognise that voluntary cooperation among NRAs should take place within a Community structure with clear competences and the power to adopt individual regulatory decisions in specific cases. Therefore, on 19 September 2007, the Commission adopted a proposal for a Regulation establishing an Agency for the Cooperation of Energy Regulators (ACER). Following the opinions of the Committee of Regions, of the European Economic and Social Committee and of the European Parliament at first reading, the Council adopted its common position on 9 January 2009. Subsequently, a compromise was negotiated between Parliament and the Council on the package of energy market legislation. This compromise, and thus the decision for creating ACER was adopted by Parliament at second reading on 22 April 2009 and by the Council on 25 June 2009..

ACER will become a Community body with legal personality. Members will be the 27 EU-Member States, but participation shall be open to third countries. It will have the purpose to assist the NRAs in exercising at Community level the regulatory tasks performed in Member States, and to enhance coordination of proceedings, in order to contribute towards the proper functioning of the internal markets.

Upon request or on its own initiative, ACER shall or may issue opinions and recommendations to transmission system operators, regulatory authorities, the European Parliament, the Council and the Commission. Concerning the European Network of Transmission System Operators (ENTSO), ACER will provide opinions to the Commission on draft statutes, list of members and draft rules of procedure of the ENTSOs; monitor and analyse execution of tasks of the ENTSOs (implementation of ENTSO network codes and Commission framework guidelines, submission of draft network development plans and draft annual work programmes); provide opinions to the ENTSOs on network codes, draft network development plans and draft annual work programmes; provide reasoned opinions and recommendations if work programmes and network plans do not comply with basic principles and legal provisions; submit and review draft framework guidelines; transfer network codes, or prepare and submit draft

network codes to the Commission; and monitor implementation of network codes, network development plans and regional cooperation of operators.

ACER will also be entitled to take individual decisions in specific cases:

- Regarding NRAs, ACER will adopt decisions on technical issues; make recommendations to assist authorities and market players on good practice; promote cooperation among regulatory authorities at Community, national and regional level; provide opinions at request of NRAs or the Commission on compliance of decisions taken by NRAs with relevant legal provisions; inform the Commission about defaulting of opinions by NRAs; and issue opinions in case of difficulties of NRA with the application of the guidelines.

- With respect to cross-border infrastructure, ACER shall have competence to decide only if NRAs have not reached an agreement within six months or if NRAs have requested intervention. Within six months, it will decide on terms and conditions for access to and operational security of networks (capacity allocation, revenue sharing, levy of charges).

- ACER will have some additional tasks, e.g. deciding on exemptions; providing opinions on decisions of NRAs on certifications; tasks not involving decision making powers.

In carrying out its tasks, particularly with regard to framework guidelines and network codes, ACER will have to consult with market participants, transmission system operators, consumers, end-users and, where relevant, competition authorities. The Agency shall inform the public and interested parties; make public agendas, documents and minutes of consultations and meetings of its bodies; monitor energy markets (retail prices, network access, consumers' rights); and publish an annual monitoring report. The Commission will have to prepare an evaluation report on ACER, assessing the results achieved and its working methods.

Regarding the organisational structure, ACER will be composed of a board of regulators, a director, an administrative board and a board of appeal. All bodies will be obliged to act independently, impartially and objectively vis-à-vis producers, network operators, consumers, other national authorities or the Commission:

- The board of regulators shall consist of one senior representative (and one alternate) from each NRA and one non-voting representative of the Commission. It will elect a chairman and a vice-chairman from among its members and act by a two-thirds majority of its members present, with each member having one vote. The board's tasks will cover: delivering opinions to the director on all opinions, recommendations and decisions considered for adoption; providing

guidance to the director in execution of his/her tasks; delivering opinions to the administrative board on the appointment or removal of the director; and approving the work programme. Secretariat services will be provided by the Agency.

- The director shall manage and represent ACER. He/she will prepare and participate in the work of the administrative board; adopt and publish opinions, recommendations and decisions; prepare and implement the annual work programme; draw up a preliminary draft budget and implement it; and prepare the draft annual report. The Commission will assess the performance of the director, and the European Parliament and the Council may ask the director to submit a report on the performance of his/her duties.

- The administrative board shall be composed of nine members and their alternates, appointed by the Commission (two), the European Parliament (two) and the Council (five). It will appoint a chairman and a vice-chairman from among its members. The administrative board shall meet at least twice a year in ordinary sessions, on initiative of its chairman, as well as on request of its members or the Commission. The chairman of the board of regulators and the director will join, without the right to vote. Observers may be invited, and members may be assisted by advisers or experts. Decisions shall be adopted by a two-thirds majority of the members present, with each member having one vote. The administrative board will appoint and remove the director and the members of the board of appeal, appoint the members of the board of regulators, adopt the work programme, adopt and revise a multi-annual programme, exercise budgetary powers and decide on other sources of funding, exercise disciplinary authority over the director, draw up the staff policy, and adopt and publish the annual report on ACER's activities.

- The board of appeal shall consist of six members (and alternates) from NRAs, competition authorities or other institutions with relevant experience. It will designate a chairman. Decisions shall be adopted at least by a two-thirds majority. Appeals against these decisions may be lodged by any natural or legal person addressed or concerned. In general, appeals will not have a suspensory effect. The board of appeal shall decide upon the appeal within two months. It will exercise any power of ACER or remit the case to the competent body of the Agency. Decisions of the board of appeal or the agency, or proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice.

Revenues of ACER will be funded from the general budget of the European Union, fees paid to the agency for decisions on exemptions, voluntary contributions from Member

States or their NRAs, and other funding. Revenues shall balance expenditure composed of staff, administrative, infrastructure, and operational expenses.

7.2.4 Railways

Article 31 of the Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 stipulates that national rail regulatory bodies shall exchange information about their work, and on decision-making principles and practice to coordinate the principles of regulatory intervention. The Commission is obliged to support the national regulators to fulfil this assignment.

Legislative provisions had already been implemented at the end of the 1990s with the creation of the Task Force Rail Regulatory Bodies and the Working Group Rail Regulatory Bodies, following an initiative of the Commission. Members of the working group are the rail regulatory authorities in EU Member States, and in EFTA countries with a rail network (Norway, Switzerland), as well as the Commission (DG for Energy and Transport, DG for Competition). Representatives of NRAs in all EU Member States and in other third countries are eligible to participate in the meetings of the Task Force. A Commission Decision concerning objectives, activities, membership and organisation of the working group is planned to be adopted at the end of 2009.

Task force and working group are convened quarterly by the Commission. Meetings of the task force are held in Brussels, meetings of the working group take place in Brussels and in different Member States alternately. Task force sessions serve for the preparation of draft agendas for the working group assemblies. Round-table discussions of the working group unite one or more delegates of each regulatory authority (participation by one representative is reimbursed by the Commission), the Commission and stakeholders (companies, associations, other representations of interest). Sessions are chaired by the Commission. Meetings centre on a mutual exchange of expertise and experiences on aspects of topical interest as well as on decision-making maxims and practice of regulators, pertaining first and foremost to international rail transport. Finding best practices for harmonised regulatory approaches is of first priority. Results of the meetings are recorded in minutes. The working group

intends to pass legally non-binding recommendations as from the end of 2009 or the beginning of 2010.

In 2003, European ministers of transport also inaugurated the „International Group for Improving the Quality of Rail Transport in the North-South Corridor' (IQ-C) comprising delegates of NRAs in Germany, Italy, the Netherlands and Switzerland. Representatives of railway companies and interested third-parties are invited to join the meetings. The IQ-C serves the purpose to detect barriers to market entry and competition. It surveys the allocation of train paths, reports alleged discriminatory behaviour, and interprets undefined legal terms with the intention to find a common approach and to propose improvements to the Commission.

7.2.5 Conclusions from cooperation in other sectors

Cooperation among NRAs in the electronic communications and in the energy sector can be characterised as a two-tier approach of a voluntary not-for-profit association of regulators (IRG, CEER) and a group set up by the Commission (ERG, ERGEG). Members are the EU Member States. The Commission is a member of the ERG and ERGEG, and these two bodies are charged explicitly with advising the Commission. Some or all EFTA and candidate countries are members (to the voluntary associations IRG and CEER) or have observer status (at the mandatory organisations ERG and ERGEG).

The main objective of all organisations discussed in this chapter is facilitate discussion on best regulatory practice and harmonise regulation where appropriate, and promote the development of an internal market within the Community. This is accomplished by observing implementation and application of legislation as well as the evolution of the market, recommending new legal actions, advising and assisting members and European institutions, promoting discussion and exchange of experience, improving cooperation among regulators and between them and the Commission, and consulting other stakeholders. Decisions, common positions, conclusions, opinions, statements, guidelines and/or recommendations of the groups are legally non-binding, but implementation is monitored. Besides, they publish reports and position papers on

specific subjects, annual work programmes and annual reports on the regulators' activities.

In the energy and electronic communications sectors, the voluntary organisations IRG and CEER clearly consider themselves as bodies of independent regulators. At the outset, they have consciously limited memberships in the two organisations to independent NRAs, and have not accepted ministries. Indeed, limiting membership to agencies independent of policy makers is seen as a critical success factor by both organisations. The Commission's advisory groups ERG and ERGEG are likewise limited to independent agencies.

The organisational structure of the groups typically consists of

- A board (with a president / a chair and deputies) responsible for management (budget, submission of work programme, supervision of secretariat) and external representation;
- A plenary/general assembly, inter alia adopting decisions to fulfil the objectives and regarding personnel, admitting and excluding Member States, amending statutes, and approving the budget, for which detailed voting rules apply (consensus or qualified majority; representatives of the Commission are present but do not have voting rights);
- Working groups composed of experts analysing specific subjects; and a secretariat.

According to political progress made in the first half of 2009, ERG and ERGEG will be replaced by two new institutions. BEREC will operate as a body of the NRAs responsible for the regulation of the electronic communications markets. BEREC will not have the status of an agency, and will thus be an 'extended ERG'. Its competences will broadly resemble ERG's responsibilities but the tasks of the Board of Regulators and the new office (secretariat) will be defined more clearly. By contrast, an EU agency will be established for the energy sector: ACER. In addition to the current assignments of ERGEG', ACER will be responsible for monitoring network operators, provide opinions to them, prepare and submit framework guidelines and network codes, and take binding decisions with respect to cross-border issues. The organisational structure will consist of a board of regulators, a director, an administrative board and a board of appeal.

Cooperation among regulators in the railway sector lags behind the accomplishments in the other network sectors as far it concerns competences, activities and organisation, but developments point in the same direction as for the electronic communications and energy sectors.

Coordination of competition authorities is somewhat different, but does also encompass an informal (ECA) and a formal (ECN) version. The ECA is primarily a discussion forum for debating issues, and exchanging information and expertise, but without any organisational structure except for the working groups. Under a Council regulation, the ECN has a clear legal mandate, and maintains working arrangements and cooperation mechanisms with separate responsibilities (allocation of cases, announcement of decisions, coordination of investigations, mutual assistance, exchange of matters of fact or law), but has no stand-alone legal personality and competence.

In the energy and electronic communications sectors, associations of independent regulators have been created since the late 1990ies: IRG and CEER. In both sectors, the Commission has created formal advisory groups that work closely with the former organisations: ERG and ERGEG. This institutional setting has facilitated extensive exchange of ideas and best practices among NRA. This cooperation is widely regarded to have resulted in improved regulatory performance, and greater transparency.

A trend towards more harmonisation was initiated by the Commission proposing EU regulatory agencies for both sectors. In the energy sector, there is wide consensus about the need for such agencies and the agency, ACER, is expected to be established soon. In the electronic communications market, there was more controversy about the creation of an agency, and a political compromise was achieved recently to create a body of regulators with extended competences (BEREC) rather than an EU agency.

7.3 Recommendations for enhanced cooperation

This section discusses the need for enhanced cooperation among NRAs, the benefits that may be expected from such cooperation, and regulatory tasks arising from the Third Postal Directive which better cooperation can usefully address.

7.3.1 The need for enhanced cooperation

This survey of current NRA practices strongly supports the need for enhanced cooperation among NRAs. Three primary factors lead to this conclusion.

First, postal NRAs — like NRAs in other regulated industries — are charged with a number of highly technical tasks that require extensive technical expertise. Many regulatory challenges are similar in all Member States, and NRAs can learn best practices from each other. Consequently, cooperation can help improve the quality of regulation and make better use of the finite resources in the Community available for postal regulation. Indeed, CERP has recognised the need for NRAs to cooperate in promulgating best practices.[413] In light of the limited resources of some Community NRAs, the potential benefit of more cost-effective regulation is a major advantage.[414]

To this end, a primary task for a new organisation of NRAs would be to define best practices on technical issues. In the electronic communications and energy sectors,

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413 'Successful implementation of the third postal directive will require continued and pro-active cooperation between NRAs to identify and establish best practice. However the signs are that the current methods of cooperation need to be reviewed to improve the sharing of information and to make the implementation of the directive a reality'. Report of CERP Working Group Policy Issues: Project team - National Regulatory Authorities, Phase Three report (2008), p. 2. Report available at www.cept-cerp.org/cerp/pdf%5CReport%20NRA%20Phase%20III.pdf

414 Cost-effective regulation can mean either that better regulation is achieved with the same resources, or that same results can be achieved with less resources. At present, it appears very unlikely that cooperation would allow many member States to economise on the resources spent on postal regulation. As chapter 3 of this report finds, many NRAs are currently not implementing all provisions of the Postal Directive effectively. In this situation, cooperation rather appears a way to help NRAs to improve regulation, and address the new challenges of the Third Postal Directive, while limiting the additional resources needed for this project.

such benefits of cooperation have motivated NRAs to create voluntary organisations (IRG and CEER, see sections 7.2.2.1 and 7.2.3.1 above). In the postal sector, NRAs have not formed a similar voluntary organisation to date. One reason may be that Member States have pursued postal liberalisation at different speeds. While Sweden was the first Member State to fully liberalise in 1993, 10 Member States have negotiated a two-year exemption in the Third Postal Directive because they did not feel ready to liberalise by the end of 2010. Consequently, the challenges of postal NRAs differed among Member States. However, common interests are emerging since the Third Postal Directive has set a definite date for full liberalisation in all Member States.

Second, cooperation among NRAs will help to ensure consistent application of the Postal Directive and harmonise regulatory practice, where appropriate, among different Member States. While there will likely not be 'one-size-fits-all' regulatory approaches that are appropriate for all Member States, there are clear benefits of harmonisation. Many postal operators today provide services in different Member States,[415] and different regulatory frameworks increase complexity for these operators. Harmonisation of regulatory practice thus can contribute to the development of an internal market for postal services and provide benefits for consumers in the whole Community.

As NRAs are primarily responsible for national markets, they do not necessarily have a strong interest in harmonisation. Therefore, the Commission should be able to propose subjects for the organisation of NRAs to address. In other words, the Commission should be able to seek advice from NRAs on possible areas of harmonisation. Indeed, the expertise of the NRAs appears indispensable in order to achieve progress towards a more harmonised good practice. In other sectors, the Commission has sought advice from NRAs by creating formal advisory groups (ERG and ERGEG). These models are widely considered successful by NRAs. They have created considerable transparency about regulatory practices and fostered continuing improvement of regulatory practice.

Third, cooperation of NRAs is needed in order to ensure effective monitoring and, where appropriate, regulation of cross border mail. This need is most obvious for any regulation needed to ensure interoperability among postal operators. For example, some Member States find it necessary to require domestic operators to identify the postal carrier on each mail piece, so customers know who has handled the item and to whom to complain if need be. In this case, it seems clear that the NRA has the same objective for all items handled in the country including incoming cross-border. To avoid that cross-border operators face inconsistent rules on carrier identification in the country of origin and destination, consultation of NRAs appears useful. Similarly, the treatment of undeliverable mail which must be returned to the sender requires cooperation among

415 For example, TNT and Deutsche Post have operations in several other member States, and Norway Post's subsidiary Bring operates in Denmark and Sweden.

postal operators and possibly raises questions about remuneration for this service. Where cross border mail is concerned, the allocation of regulatory competence is unclear. In this area, an organisation of NRAs could help develop rules for allocation of cases or complaints. Moreover, the Commission has direct authority over quality of service targets for cross border mail and has traditionally reviewed terminal dues agreements (REIMS).[416] Given the close relation of these subjects to domestic quality of services measurement, and domestic price control, the Commission may benefit from advice by NRAs in this area.

In order to facilitate harmonisation of regulatory practice for cross border mail, cooperation between NRAs and the Commission will be needed in addition to cooperation among NRAs. Creation of an advisory group of NRAs appears as the best way to address this need. In some other regulated sectors, EU agencies have been created to facilitate Community-level regulation because cross-border services cannot be regulated by national authorities effectively. An example is the establishment of ACER in the energy sector, or EASA, the European Aviation Safety Agency. In the postal sector, it is not obvious that cross border aspects of regulation are as important as in, for example, the energy sector. It appears that most of these cross border aspects of regulation could be addressed through cooperation between NRAs and the Commission (in the body recommended in section 7.3.3. below). Therefore, we do not see strong reasons for creating a EU agency for the postal sector at present, i.e. before the opportunities of enhanced cooperation among NRAs have been explored in practice.

416 See discussion of Commission Decision of 23 October 2003, Case 38.170 (REIMS II renotification) in chapter 4.

7.3.2 Areas for cooperation among NRAs

With respect to the implementation of the original Postal Directive, this report has identified substantial variation among Member States and serious shortcomings in several Member States (see chapter 3). In addition, there are early indications (judging from draft laws in some Member States) that the Third Postal Directive may not be implemented as effectively in all Member States (see chapter 6). If NRAs in the postal sector had cooperated more effectively in implementing the original Postal Directive, it seems that many problems might have been avoided, and the recent progress in regulatory practice in some Member States might have been achieved earlier.

Given this experience, more substantive coordination between NRAs and the Commission is indispensable in order to achieve effective implementation of the Third Postal Directive. In particular, cooperation among NRAs and coordination between NRAs and the Commission will help to improve regulatory performance with regards to three objectives:

- First, cooperation will allow NRAs to assist each other and foster best practices. Cooperation appears most needed for complex technical issues (see list below) and emerging challenges related to implementation of the Third Postal Directive or changes in the market.

- Second, cooperation will lead to more harmonised regulatory practice and thus promote the development of an internal market. This seems most important for areas where current regulatory practice varies substantially (without clear cause) or where certain provisions of the Postal Directive appear to be interpreted very differently by Member States and there is a lack of a common understanding.

- Third, a body of NRAs could facilitate coordination, and improvement, of the regulation of cross border mail and advise the Commission in this area.[417] These functions are needed where the responsibility for regulating cross border mail is not allocated clearly or coordination between national authorities and the Commission is necessary.

The following paragraphs list a number of specific areas where the results of this study suggest that enhanced cooperation among NRAs could improve overall regulatory practice. We suggest that these subjects should be considered for the work programme of the European Regulators Group for Postal Services that this study recommends to establish (see section 7.3.3 below).

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417 At present, as this report finds, cross border aspects of postal regulation are hardly addressed at all by regulatory in many Member States, see section 3.4.4 above.

1. Separation of accounts. This study finds that implementation of the accounting separation required by the Postal Directive remains a work in progress (see section 3.6 above). Overall, the range in accounting practices suggests that NRAs have adopted substantially different approaches to implementing the Directive. Our survey of NRAs confirms that the overall level of satisfaction with the separation of costs presented by regulatory accounts is only moderate.[418] With cooperation, NRAs should be able to develop a common understanding of the requirements of the Postal Directive on accounting separation and establish best practices for implementing these provisions more effectively.

2. Allocation of cost. At present, many NRAs do not appear able to allocate costs according to the four broad categories prescribed by the Directive (although there some notable exceptions). There is clearly a lack of transparency about principles used for cost allocation in the Member States, and only a few Member States have published cost allocation rules.[419] To this end, CERP's recommendations of best practice for cost accounting appear to have had little effect so far.[420] As the survey conducted for this study reveals, NRAs' overall level of satisfaction with the cost allocation data available to them is only moderate (see section 3.6 above). Under the Postal Directive, NRAs in all Member States are charged with reviewing the cost allocation of universal service providers, and this task raises very complex technical questions. Therefore, cooperation of NRAs with the objective of effectively establishing best practices appears highly desirable.

3. Price regulation. Price regulation in Member States varies substantially with respect to the scope of services regulated, the methods used to regulate prices, standards used to determine whether prices are cost-oriented, and competence for regulating prices (NRA or ministry). Even though different circumstances in the Member State (e.g. with respect to the degree of competition) may justify different approaches, establishment of best practices would appear very useful in this area.

4. Regulation of terminal dues and other aspects of cross-border mail. International postal markets continue to be distorted by a number of practices unique to international

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418 This finding confirms a results of a CERP report on cost accounting practices in 2006. This report had stated the 'the use of cost accounting rules differs from country to country and the situation nowadays is far from being a common approach'. CERP, Working Group Economics, PT Cost Accounting and Price Control Systems, Report 'Cost Accounting and Price Control' (2006), p. 1. Report available at www.cept-cerp.org/cerp/pdf%5Creport%20cost-price.pdf

419 The cost allocation rules published by French ARCEP following public consultation give the most prominent example of such rules. See ARCEP : Décision n° 2008-0165 relative aux règles de comptabilisation. Available at http://www.arcep.fr/uploads/tx_gsavis/08-0165.pdf

420 CERP had originally published best practice for cost allocation in 2002, updated in 2004 and 2009. See CERP (2002): 'Recommendation on best Practices for Cost Accounting Rules', CERP (2004): 'Recommendation on best Practices for Cost Accounting Rules II', and CERP (2009): 'Recommendation on best Practices for Cost Accounting Rules III'. All reports available at http://www.cept-cerp.org/cerp/144.html

postal affairs (restrictions on remail and ETOEs, restrictive use of IMPC carrier identification codes, and special customs rules for some operators). It appears the NRAs have generally not implemented the provisions on terminal dues set out in the Postal Directive (Article 13). With respect to monitoring and regulating cross border mail, cooperation between NRAs and the Commission and coordination between NRAs appears warranted to ensure effective implementation of the Postal Directive.

5. Calculation of net costs of universal service. Annex I was added by the Third Postal Directive in 2008 and provides a framework for calculating the net cost, if any, of universal service. This framework raises complex technical issues, most importantly with regards to the identification of services or customers that would not be served if there were no USO. There are no established best practices for these calculations — that take account of the directive's annex — to date, but it is clear that such net cost calculations, or review of net cost calculations by NRAs, will turn out to be complex and controversial exercises. Therefore, cooperation of NRAs and the establishment of best practices could offer significant benefits in this area.

6. Financing of universal service. Net costs of the USO, if any, are financed today primarily through cross-subsidies from the reserved area. With the end of reserved areas, other sources of financing may become necessary, and the Postal Directive provides for two methods of financing: public funds or a compensation fund. Cooperation of NRAs offers the opportunity to discuss domestic experiences in this regard and establish best practices.

7. Access to postal infrastructure. The Third Postal Directive requires Member Sates to ensure, where appropriate, transparent and non-discriminatory access to certain elements of postal infrastructure such as postcode systems, address databases, post office boxes, delivery boxes, information on change of address, re-direction service, or return to sender service. Only in a minority of Member States, NRAs have implemented such procedures to date. Cooperation would offer the opportunity for NRAs to develop appropriate approaches to this subject, and could thus contribute to the cost-effectiveness of regulation.

8. Interoperability. To date, few NRAS have considered the problems of interoperability in a multi-operator market (with three notable exceptions). In this area, cooperation of NRAs could be a way to ensure cost-effective development of regulatory practices. Moreover, problems of interoperability arise very similarly for cross border mail. For example, identification of postal carriers appears equally important for domestic and incoming cross border mail, and rules for customer complaints or return to sender procedures should likewise not be limited to domestic mail. In this regards, coordination among NRAs and harmonised practices appear highly desirable.

9. Scope and methods for measuring quality of service. While virtually all Member States set and monitor quality of service for basic letter postal service, there is substantial variation as regards the measurement of quality of service for other products. Cooperation could facilitate an approach towards the necessary scope of performance measurement. At the same time, this could help to limit measurement to those areas where measurement is strictly necessary and thus help limit resources needed for this exercise. Moreover, NRAs may be able to give advice to the Commission on the regulation of quality of service for cross-border mail based on their domestic experience.

10. Market statistics. Many NRAs, though not all, are regularly preparing reports on the development of postal markets in their Member States. On a Community level, the Commission, too, regularly reports on market development in its application reports. At present, transparency and accuracy of market statistics are diminished by a lack of common understanding about key vocabulary. For example, the interpretation of terms like ‘correspondence’, ‘letter’, ‘universal service items’, and ‘direct mail’ appears to differ between Member States. In order to monitor market development in the Community more effectively, the establishment of a common understanding of those terms would appear useful. A body of NRAs could be well placed to facilitate such a common understanding.

11. Authorisation procedures. To facilitate development of regional postal service providers serving multiple national markets, it would be desirable for NRAs to develop simplified and more uniform authorisation procedures.

7.3.3 An advisory group of postal regulators

The review of models from other industries reveals that cooperation of NRAs can take three forms:

- First, voluntary organisations of NRAs have been created in some sectors to facilitate exchange and discussion of best practices in regulation. In the postal sector, NRAs have, perhaps unfortunately, not formed a similar voluntary organisation of NRAs since the adoption of the First Postal Directive in 1997. Even though creation of such an organisation has been discussed among postal regulators occasionally, it is not clear that these current efforts will be more successful than similar attempts in the past.

- The second model for cooperation among NRAs is an advisory group to be created by the Commission. We have identified a clear need for enhanced cooperation among NRAs (in section 7.3, above) and for coordination between NRAs and the Commission on regulatory issues related to cross border mail. Therefore, we recommend that the commission should establish such an advisory group.

- A third model would be the creation of an EU agency with its own competences for Community-level regulation that would cooperate with NRAs. This option was pursued by the Commission in sectors where there is a clear need for Community-level regulation of cross-border services, and experience with cooperation among NRAs through advisory groups has shown that this did not address these cross-border issues sufficiently. In the postal sector, the cross border aspects of regulation appear less important than, for example the energy sector or in aviation safety. Therefore, we recommend that existing problems in the regulation of cross border mail should be addressed through enhanced cooperation among NRAs, and between NRAs and the Commission, in an advisory group. At this stage, we do not recommend creation of an EU agency for the postal sector.

The following paragraphs specify our detailed recommendations for the creation of an independent advisory group of regulators for the postal sector. An advisory group can be established by a formal decision of the Commission.[421] As a short reference for this proposed organisation, we use the name ‘European Regulators Group for Postal Services’, or ‘ERGP’.

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421 Similar decisions were taken to create the ERG (Decision 2002/247/EC amended by 2004/641 and 2007/804) and the ERGEG (Decision 2003/796/EC).

- We recommend that such a decision should be taken as soon as possible, with the objective that the ERGP could take up operations by the end of 2010, the date of full liberalisation prescribed by the Postal Directive.

- The ERGP should be composed of the heads of the independent NRAs of all Member States or their representatives and a representative of the Commission. For practical reasons, we recommend only one independent NRA from each Member State should be admitted to the organisation.[422] It appears very important to ensure that NRAs are represented by their heads because lack of high-level representation is a key shortcoming of current NRA cooperation in CERP and in light of the experience in the energy and electronic communications markets.

- The group could be extended to NRAs of the EEA and possibly candidate countries. These NRAs could have an observer status. More generally, the ERGP should be able to invite other experts and observers to its meetings, as may be appropriate.

- The aims of the ERGP should be stated clearly in a Commission decision establishing the group. We recommend that these objectives should include (i) to advise and assist the Commission in promoting the development of an internal market for postal services, and in preparing draft implementing measures and (ii) to facilitate consultation, coordination and cooperation of national regulatory authorities, contributing to a consistent application of the Postal Directive.

- The ERGP should have a right to determine the subjects on which it will advise the Commission. In addition, the Commission should be able to request expert advice and recommendations from ERGP on specific subjects. We recommend that the Commission should provide a secretariat for the group.

- The ERGP should be transparent about its work and should consult with market participants and users. To ensure transparency, the ERGP should, at a minimum, publish its work programme, recommendations, and prepare annual reports on its activity.

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422 The Postal Directive allows for the possibility to designate several NRAs in one Member State. In practice, however, there clearly is one 'primary NRA' even in the few countries where different organisations share regulatory functions and limitation of the ERGP to one NRA per Member State should thus not be problematic. The ERG in the electronic communications sector uses a similar notion of a 'primary NRA' ('the independent national regulatory authority established in each Member State with primary responsibility for overseeing the day-to-day operation of the market').

- The Group shall elect a chairperson from among its members and adopt its own rules of procedures in order to organise the work, e.g. by establishing expert working groups. The rules of procedure should ideally be adopted by consensus, or in absence of consensus, by at least two thirds of all member NRAs.

We recommend that postal NRAs should cooperate more closely with each other and with the Commission. There are three important reasons why enhanced cooperation among NRAs would be beneficial: First, cooperation would allow NRAs to further develop regulatory practice and implement the Postal Directive more effectively through mutual assistance and by establishing best practices. Cooperation is needed most for complex technical questions such as control of accounting separation and the appropriate measures for regulating a multi-operators market. Second, cooperation would lead to more harmonised regulatory practice and thus promote the development of an internal market. Third, a body of NRAs could facilitate coordination of the regulation of cross border mail and advise the Commission in this area.

To facilitate cooperation among NRAs, we recommend that the Commission should establish an advisory group of independent regulators for the postal sector. This group could be called ERGP, European Regulators Group for Postal Services.

More substantive coordination between NRAs and the Commission appears indispensable in order to achieve effective implementation of the Third Postal Directive. Important areas where NRAs should coordinate relate either to subjects that are technically complex — and therefore mutual assistance is warranted to improve overall knowledge and performance — or to regulation of cross border mail. In particular, we recommend the ERGP should facilitate coordination in the following areas: separation of accounts, allocation of cost, price regulation, regulation of terminal dues and other aspects of cross-border mail, calculation of net costs of universal service, financing of universal service, access to postal infrastructure, interoperability, scope and methods for measuring quality of service, market statistics, and authorisation procedures.

8 Conclusions and Recommendations

This chapter sets out overall conclusions and recommendations. In this chapter, we summarise and prioritise the foregoing analyses into the nine high level issues that are, in our view, the most critical or urgent tasks for the Commission, Member States, and national regulatory authorities to address in order to ensure efficient regulation of postal markets in the competitive postal market embraced by the Third Postal Directive. Six tasks pertain to the substance of regulation. Three tasks address institutional arrangements. The chapter concludes with final observations on the evolution of the role of postal regulators and postal markets.

8.1 Key regulatory tasks

To implement the Third Postal Directive effectively, we believe that the Commission, Member States, and NRAs must focus first on the following six overarching regulatory tasks.

1) *NRAs must develop accurate and appropriate regulatory accounts for postal services jointly produced by a postal service provider that possesses significant market power in the provision of universal postal services.*

While the Third Postal Directive sets many specific tasks for the national regulatory authority, one of the most important is the development of regulatory accounts that accurately reveal the costs of postal products without undercutting the ability of regulated postal operators to manage their businesses in liberalised markets. Appropriate regulatory accounts are needed for many purposes under the Third Postal Directive:

- to ensure that prices of universal services are cost-oriented, non-discriminatory, and, at least where produced by a postal service provider with significant market power, not abusive;
- to ensure that, at least where a postal operator has significant market power in the provision of some universal services, prices of jointly produced competitive products are not unfairly underpriced; and
- to inform evaluations of the net costs of the universal service obligation, if any.
- to evaluate the effect of legal privileges in the operation of postal services (e.g., VAT exemptions, special customs treatment, etc.).

Development of regulatory accounts is the most technically challenging of the specific tasks set by the Postal Directive. It is also the task that is least well implemented by NRAs as a group so far. Today only a handful of NRAs appear to have made definite progress towards implementation of Article 14. The role of accounting needs to receive greater emphasis because of its unique challenges and key role in the successful implementation of the directive.

2) *Member States and NRAs must periodically evaluate and adapt the best postal regulatory practices developed by other industrialised countries.*

This study indicates that, in the realm of postal regulation, no country or regulator has a monopoly on the supply of sound ideas and good practices. A wide range of countries and regulators have developed approaches that are worthy of consideration by all. At the same time, few Member States and regulators have developed a process for

regularly evaluating and adapting the best practices of other countries. Such a process should be incorporated into the regulatory approaches of all Member States.

3) *Member States and national regulatory authorities must develop a new view of their role as regulators of the postal services market, one that is both broader and more limited*.

In the Third Postal Directive, three policy instruments — universal service obligation, full market opening, user protection — are closely interrelated. Full market opening will increase the quality and variety of postal services. Universal service will be ensured through transparent and proportionate reliance on market forces supplemented by designation of universal service providers and/or by public procurement of necessary services. Growing specialisation and cooperation among postal operators — already evident in the market place — will increase the need for a user protection regime that covers all postal service providers. Key elements of the national (and international) postal infrastructure will be made available to all operators 'whenever necessary to protect the interest of users and/or to promote effective competition'.[423]

Postal regulators must broaden their focus accordingly. The scope of regulatory controls must be sufficient to allow the regulator to accomplish the three interdependent objectives of the Third Postal Directive: universal service, full market opening, and user protection. The scope of regulatory controls can no longer be equated with the scope of the universal service obligation (if it ever was). From regulating specific indices of universal service, national regulatory authorities must turn their attention to protecting and promoting — and only where necessary and proportionate, controlling — the operations of the broader postal services market. As the Third Postal Directive declares, in pursuing this enlarged mission, national regulatory authorities will need to work closely with national competition authorities to anticipate and resist any barriers to entry that could arise after the end of the reserved area. And they will need to coordinate with national consumer protection authorities to ensure users' rights are appropriately safeguarded.

In adopting a broader regulatory focus, however, we believe that national regulatory authorities will also need to develop a reasoned doctrine of 'forbearance', that is, non-use of regulatory controls even though they are authorised. While the Third Postal Directive calls for a broader set of regulatory controls over postal markets, it also continues the evolution of Community postal policy towards greater reliance, where feasible, on market forces and effective competition. There is a tension between these trends. A market shaped by a regulator is not a market that relies on market forces or effective competition. The solution is for postal regulators, like regulators in other

423 Third Postal Directive, Article 11a.

sectors, to develop reasoned criteria that identify circumstances in which regulatory controls should not be exerted even though they may be available.

4) *Member States and NRAs must develop analyses and procedures that will allow them — in a manner that is transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion — to ensure universal service by reliance upon market forces where feasible and appropriate and to employ designation procedures or public procurement to supplement market forces where necessary to supplement market forces.*

As discussed in chapter 6,[424] in accordance with the Third Postal Directive and the principles of sound administrative practice, Member States should rely upon market forces — i.e., the commercial self-interest of postal service providers — to ensure universal service where it is feasible and appropriate to do so. Where it is not feasible and appropriate to rely on market forces, Member States should introduce designation procedures and/or public procurement contracts. Each decision with respect to ensuring universal service should be taken in a manner that is transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion.

From this study, it is apparent that most Member States and NRAs — with the notable exception of Germany — have not developed the analyses and procedures needed to translate this three-pronged approach towards ensuring universal service into practice. Greater reliance upon market forces and a more reasoned use of designation and public procurement hold great promise for stimulating a more flexible, adaptive, and efficient Community postal sector. Member States and NRAs should address implementation of this element of the Third Postal Directive as a matter of priority.

5) *Member States and NRAs must develop the analyses and procedures necessary to ensure that the scope of the universal service obligation is aligned with the changing needs of users and the evolving technical, economic, and social environment of the postal services market.*

Where postal markets are open to competition and universal services are ensured in the first instance by the commercial self-interest of postal service providers ('market forces'), the function of the universal service obligation must be — as provided in the original Postal Directive[425] — to establish a *floor* for service quality. If the voluntary offerings of postal service providers fall below this floor, then government must step in, by designation or public procurement, with the money and authority required to bring service quality up to this minimum level. The level of this service floor must, as stated in

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424 See section 6.3.3 and 6.3.4, above.

425 See Directive 97/67/EC, Recital 11: 'a universal postal service encompassing a minimum range of services of specified quality to be provided in all Member States at an affordable price for the benefit of all users, irrespective of their geographical location in the Community'.

Article 5 of the Postal Directive, 'evolve in response to the technical, economic and social environment and to the needs of users'.

To implement this principle, NRAs must know what users need and have authority to fine tune the definition of the universal service obligation. A well considered process of adjustment appears especially necessary in the present period of rapid and fundamental changes in postal markets. For the foreseeable future, the needs of users and the capabilities of postal service providers may be expected to develop significantly under the pressure of increased competition and developing information and transportation technologies. As a necessary first step, NRAs must regularly evaluate the current and future needs of users. Then they must be given sufficient authority by Member States to adjust the universal service definition in an impartial and objective manner. While some NRAs have systematically investigated the needs of users and introduced corresponding revisions in the definition of the universal service obligation, most NRAs do not yet have the capacity or authority to do so.

6) *The Commission, Member States, NRAs must ensure that postal and non-postal laws do not create barriers to entry that are inconsistent with the requirements or objectives of the Third Postal Directive.*

The Third Postal Directive is a plan for modernising the Community's postal sector and allowing it to adapt to the rapidly changing circumstances of the early twenty-first century. A core element of this plan is creation of an open, undistorted Community market for postal services. Under the Third Postal Directive, competition and potential competition are — where feasible and effective — the primary means for ensuring a modern, efficient universal postal service adapted to the needs of the Community and for protecting the rights of users of postal services.

The transition to workable competition in the postal sector will not be easy. Economies of scale and scope, traditional patterns of behaviour, declining use of letters, and the present unfavourable economic environment all conspire to create considerable natural obstacles for any new entrant. If competition and market forces are to assume the roles envisioned in the Third Postal Directive, it is imperative that Member States eliminate all legal measures that might reinforce these natural obstacles to new entry and prevent new legal barriers from being introduced.

Some of these existing or potential legal barriers to entry may be grounded in postal laws. For example, authorisation requirements or conditions that go beyond what is strictly necessary to protect a basic universal postal service and hinder genuine competition must be considered incompatible with successful implementation of the Third Postal Directive. 'Gold-plated' definitions of the universal service obligation — which can only be fulfilled by the incumbent public postal operator — must be resisted unless there is clear evidence of a public need for such extensive standards of universal

service. Terminal dues and other regulations of the international postal service must be revised so that they are competitively neutral. If the reserved area is not prohibited outright, the Member States must reduce the reserved area to the absolute minimum required to sustain universal service after taking into account the support for universal service provided, or potentially available, from public funds or other compensation programs.

Similarly, non-postal laws must be carefully reviewed to ensure that they apply equally to all postal service providers under similar circumstances. In particular, 'full market opening' will require Member States to address anti-competitive effects stemming from value-added taxes and customs laws that apply differently to a designated universal provider and to other providers of postal services. Preferences with respect to the placement of place public collection boxes, the operation of vehicles, or other legal privileges should be eliminated. Sector-specific labour laws must be considered inconsistent with the Third Postal Directive if they are designed to impair new entrants by imposing on the entire sector the inflexible working conditions adopted by public postal operators.

8.2 Key institutional reforms

Effective and appropriate regulation of postal markets depends upon effective and appropriate governmental institutions. As Member States prepare to implement the Third Postal Directive, it is timely, indeed necessary, for the Member States to reconsider, and where appropriate, reform the institutional arrangements for regulation of the postal market. To this end, we believe that Member States and the Commission should focus on three key institutional issues.

1) *Member States must allocate responsibility for the regulation of postal services among separate institutions in a manner that ensures objective and impartial policies and regulation*.

The first step in developing an effective institutional framework for regulation of postal services is an appropriate definition of the roles of the agencies involved. As discussed in chapter 6,[426] in order to promote impartial and objective regulation of the postal sector, regulatory authority should be appropriately allocated among four separate institutions: (1) a ministry that determines public policy for the postal sector; (2) a ministry or agency that exercises the ownership rights of the government in the public postal operator, if any; (3) an independent regulator of the postal sector; and (4) a national competition authority. In most cases, institutional separation is explicitly required by the Third Postal Directive. Specific provisions that will ensure institutional separation are well understood and exemplified in the laws of many Member States.

We believe, therefore, that Member States should reconsider the manner in which regulatory authority is allocated among government agencies in light of the experience in regulating postal markets to date, the best practices found in other industrialised countries, and the specific requirements of the Third Postal Directive. Where needed, institutional reform should be a high priority for the Member States and the Commission.

2) Member States must specifically reconsider the role, resources, and independence of the national regulatory authority in light of the Third Postal Directive.

In particular, it is necessary and appropriate to reconsider the establishment of national regulatory authority in light of the Third Postal Directive. In mid-1990s, the idea of an independent regulator of the postal market was a relatively novel concept in many Member States. As the Postal Directive has evolved over the last decade, the role of the postal regulatory authority has come into clearer focus. Amendments to the Postal Directive have increased reliance on the impartiality and expertise of the regulator as the guarantor of universal service, enforcer of fair competition, and protector of users' rights.

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426 See section 6.2.1, above.

In reviewing the institutional arrangements for the NRA, Member States need to consider authority, independence, and resources. The authority of the NRA should encompass all tasks which, according to the Postal Directive or good administrative practice, should be discharged transparently, non-discriminatorily, objectively, and proportionately. Enforcement powers should be adequate to ensure the effectiveness of regulatory decisions. Institutional arrangements should foster the independence of NRA from both public postal operators and political direction. Key features of institutional independence include procedures for appointment and dismissal of NRA heads, freedom from review or reversal by the postal minister, and procedures for approval of NRA budgets. At the same time, Member States must ensure that NRAs have adequate financial resources, skilled personnel, and access to external consultants. Currently, only about one third of NRAs appear to have sufficient authority and resources to do their jobs.

3) To implement the Third Postal Directive effectively, the Commission and national postal regulators need to develop an efficient mechanism for consultation and coordination.

As described in chapter 7, effective implementation of the Third Postal Directive will depend upon more substantive coordination between NRAs and the Commission. Enhanced coordination would allow NRAs to improve regulatory practices through mutual assistance and promulgation of best practices, especially with respect to the most technically challenging aspects of postal regulation (e.g., regulation of accounts, facilitation of a multi-operator market). Better coordination will also create a more harmonised regulatory environment for Community postal services and thus promote development of an internal market. In particular, enhanced cooperation should improve regulation of cross border services. To achieve better coordination among postal regulators, the Commission should establish an advisory group of independent postal regulators — a 'European Regulators Group for Postal Services (ERGP)' — as soon as possible. An ERGP should be functioning well before the end of 2010, the date of full liberalisation prescribed by the Postal Directive.

8.3 Evolution of the role of regulators in perspective

For twenty years, the dominant theme in the European postal sector has been change. The economic, technological, and social context of postal services has shifted dramatically. The regulatory framework has evolved in response. The Postal Directive has been amended twice. Member States have revised primary and secondary postal legislation repeatedly. Postal administrations have been reorganised as normal corporations owned by government and then, in several cases, sold partly or wholly to private owners.

To date it has been usual to view these shifting legal requirements from the perspective of the postal operators. How will the universal service providers adapt to liberalisation? Can they maintain a sound financial equilibrium? Will they be able to maintain their universal postal services? This perspective reflects in part the heavy reliance which the original Postal Directive placed upon designation of universal service providers as the preferred mechanism for ensuring universal service, albeit stimulated by first steps towards liberalisation.

This study makes clear that evolution of the market and the regulatory framework will now require a parallel and equally fundamental evolution in the role of postal regulators. With implementation of the Third Postal Directive, the Community will complete a fifteen-year phase out of the reserved area as the primary means of ensuring and financing universal postal service. In line with broader Community programs codified in the Lisbon Strategy of 2000 and its progeny, the Community is placing increased emphasis on full market opening and user protection as additional instruments which — with the universal service obligation — will help to foster social cohesion, secure the rights of users, and enable a single European market in postal services. The public postal operator, if any, is evolving — and must evolve — into a normal commercial actor, leaving the NRA as the primary instrument for administering government policy in postal markets.

In the wake of the Third Postal Directive, national regulatory authorities will need to address a range of new policy issues associated with liberalisation and a multi-operator environment. In many respects, national regulatory authorities in all Member States must now move down the path travelled the UK regulator, Postcomm, as it sought to implement the liberalisation engendered by the Postal Services Act 2000. In other respects, implementation of the Third Postal Directive, will present national regulatory authorities with regulatory approaches and options first set out in the German Post Law of 1997. For the most part, with some notable exceptions, it seems to us that Community regulators — postal, competition, and other — have barely begun to consider the new regulatory challenges posed by the Third Postal Directive. On the other hand, regulators are not starting from scratch either. They can draw on and adapt from a broad spectrum of best practices, innovated by a surprisingly diverse cast of Member States and other countries.

In the United Kingdom, an independent policy review commission chaired by Richard Hooper recently concluded that it would be impossible to sustain universal postal service with existing policies and the current organisation of Royal Mail. In a report entitled 'modernise or decline', the Hooper Commission recommended immediate and fundamental changes in both Royal Mail and the national regulatory authority. To those who would prefer to continue the status quo, the Commission declared bluntly, 'the status quo is untenable'.[427]

Peering further into future, we believe that the policy choice is even more stark than portrayed by the Hooper Commission. It seems evident that the full implications of the Information Revolution for society are still unfolding. Some of today's most powerful and ubiquitous manifestations of the Information Revolution were barely imaginable in 1997. In sum, these technological advances present the postal sector with only two options: reform or obsolescence.

The Third Postal Directive offers the Community and Member States an enlightened way forward, but it is not the end of postal history. The role of postal services in society will continue to grow as the friction of distance declines. At the same time, the nature of postal services will continue to change fundamentally. In the not-too-distant future, it appears possible, even probable, that the Community will need to examine again some of foundations of the Postal Directive, including the content and scope of universal service and appropriate functions of regulatory controls. Although we doubt that full market opening and user protection will be abandoned, adjustments may become necessary in light of more experience in the functioning of liberalised postal markets.

In our view, implementation the Third Postal Directive should proceed with this longer term perspective in mind. To preserve the best of the long tradition of national postal systems into the future, Member States will need to implement the Third Postal Directive not with reluctance and half-measures but with an appreciation that the Third Postal Directive is a necessary step is an extended effort to adapt postal markets to the — still unknowable — demands of the twenty-first century society. In the early nineteenth century, a British politician pleaded with opponents who sought to preserve a governing system that could no longer be preserved in words that seem apt here as well:

> Turn where we may — within, around — the voice of great events is proclaiming to us, 'Reform, that you may preserve'.[428]

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427 Richard Hooper, Deirdre Hutton, Ian R. Smith, *Modernise or Decline: Policies to Maintain the Universal Postal Service in the United Kingdom* (2008), p. 64.

428 Thomas Babington Macaulay, *Speeches, Parliamentary and Miscellaneous* (1853), Vol. 1, p. 25.