

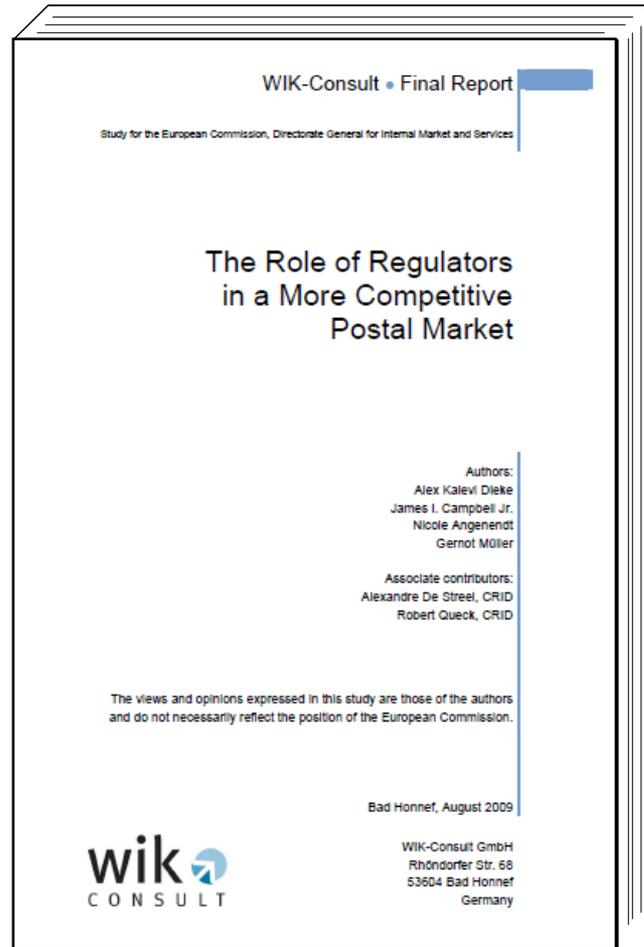
The Role of Regulators in a More Competitive Postal Market

Study for the European Commission, DG MARKT
3rd Public Workshop
Brussels, 22 September 2009

1. Introduction
2. Terminology: Regulatory Submarkets and Areas
3. Status of Regulation: Current Implementation of the Directive, Preparations for the Third Directive, Enforcement of the Competition Rules
4. Best Regulatory Practices
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Introduction

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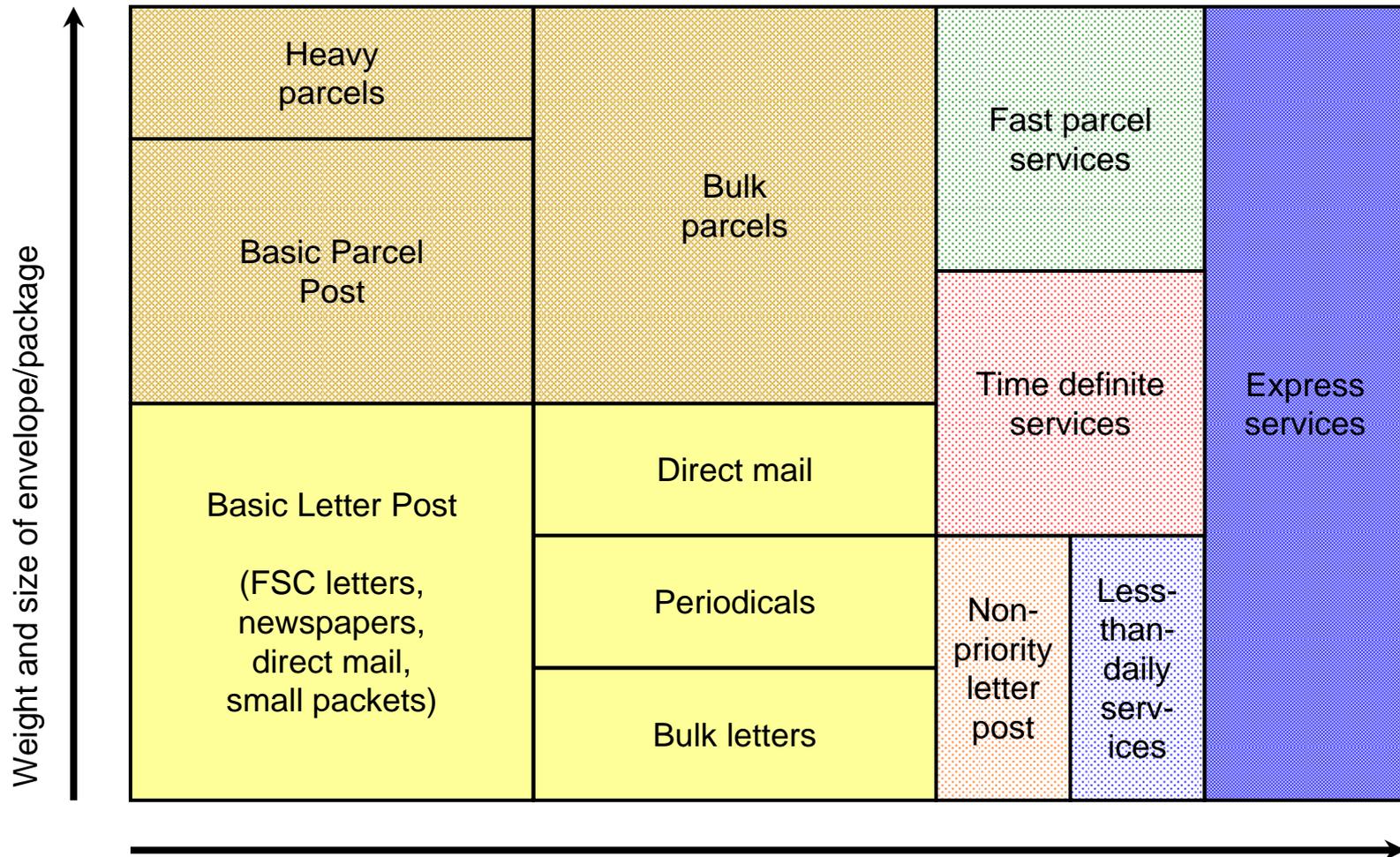
Introduction

Purpose of Study

- To identify appropriate next steps for the regulators of postal services -- NRAs, NCAs, ministers, legislators -- 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'. Specifically --
 - Reviewing implementation of current Postal Directive
 - Describing preparations for implementing the Third Postal Directive
 - Identifying 'best practices' in the regulation of postal markets
 - Identifying potential gains and appropriate mechanisms for cooperation

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Terminology Postal Submarkets



- Universal services
 - E.g., access, geographic scope, rates, quality of service
- Universal service providers
 - E.g., special tariffs, terminal dues, accounting.
 - Second Dir: a postal operator designated as a USP
 - Third Dir: (i) a postal operator relied upon to provide universal services and notice to the Commission under Art 4(1). (ii) FMO implies limiting some regulation to USPs with significant market power
- Postal service providers
 - E.g., user protection, access to postal infrastructure, statistics

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Status of Regulation Implementation of 2d Directive

- Positive regulatory developments
 - Significant commitment to regulation in many MS
 - 57 percent of EU/EEA market is liberalised
- Room for improvement in many MS
 - Separation of NRA, policy making, ownership of public operator
 - Level of resources of NRA
 - Regulation of USP's accounts and price regulation
 - Monitoring and regulation of cross border markets
 - VAT and non-postal laws

Status of Regulation

Application of Competition Rules / EC

- Key Commission competition cases since 2000
 - Art. 81 (price fixing)
 - Reims II Renewal (2003)
 - Art. 82 (abuse of dominant position):
 - British Post Office v. Deutsche Post II (2001)
 - Hays v. La Poste Belge (2001)
 - United Parcel Service v. Deutsche Post AG I (2001)
 - Art. 86 (state measures)
 - Consorzio Risposta+1 v. Italy (2000)
 - Snelpd v. France (2001)
 - BdKEP v. Germany and Deutsche Post AG (2004)
 - Slovakian postal law (2008)
- State aid: Altmark (ECJ, 2003)

Status of Regulation

Application of Competition Rules / NCAs

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
* Entries based on survey responses from NCAs, and analysis of press reports. Not necessarily a complete summary of NCA cases.	

- Different levels of NCA activity in different Member States
- NCAs increasingly take action against four major types of abuse:
 - Loyalty or fidelity rebates to customers, or tying
 - Discrimination (and intransparent pricing)
 - Predation / prices below cost
 - Price fixing / cartels

Status of Regulation Preparations for the 3d Directive

Time period (reported by MS)	Percent of EU/EEA	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, NO
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

- Little attention to issues key to implementation of the 3d Directive, such as --
 - Non-postal barriers to entry (VAT, customs, etc.)
 - Objective use of market forces/designation/procurement mechanisms
 - Orderly phase out of the reserved area
 - Access to infrastructure and interoperability
 - Cross border postal issues (terminal dues, remail, ETOEs, IMPCs)

Status of Regulation Model of Postal/Competition Regulation

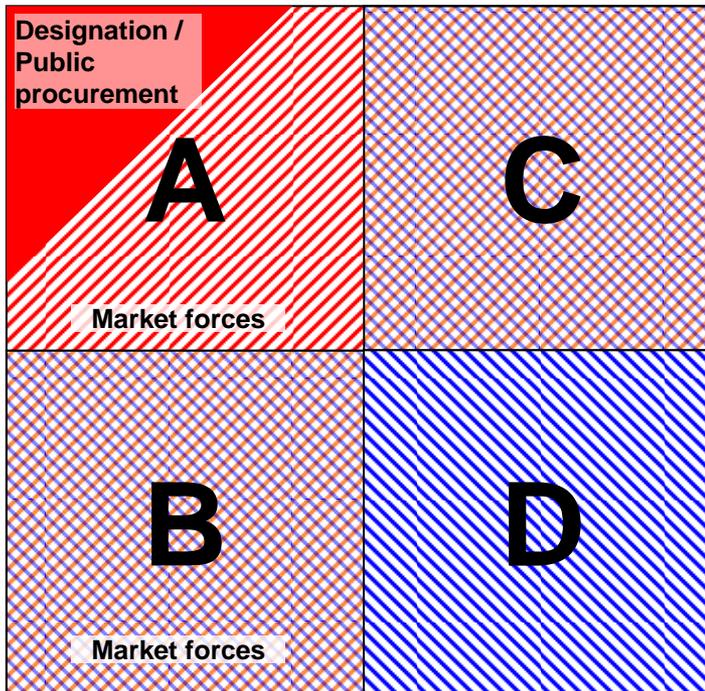
NRA

Significant
market
power

Effectively
competitive

Universal
service

Non-Universal
service



NCA

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- 4-part description of best practice
 - Best practice
 - Reasoning
 - Examples of best practice
 - Practices of concern
- 32 “best practices” in 5 areas:
 - Establishment and operation of NRAs
 - Striking a balance between USO and market opening
 - Ensuring universal service
 - Ensuring full market opening
 - Protecting rights of users

Best Practices

Definition of Best Practices

- Practices are considered “best” if --
 - Comply with requirements of 3d Directive or
 - Are necessary to fulfill 3 objectives of 3d Directive
 - Ensuring universal service;
 - Achieving full market opening; and
 - Protecting users of postal services.
 - Taking into account --
 - Ongoing changes in postal markets
 - Generally accepted economic analyses
 - Community norms for good administrative procedure

Best Practices

Establishment and Operation of NRAs

1. Allocation of regulatory authority

- Best practice: Regulatory authority should be allocated among 4 institutions: (1) policy ministry, (2) agency that exercises ownership rights, (3) NRA, (4) NCA
- Examples of best practice:
 - Allocation of regulatory authority to NRA: UK, CY, RO
 - Separation of policy making and ownership: NL, MT, HU
 - Allocation of authority to enforce competition rules: 13 MS
- Practices of concern:
 - Too much authority to Council of Ministers or ministry
 - Mixture of policymaking/ownership
 - No role for NRA in applying competition rules

2. Independence of NRA

- Best practice: NRA should be independent, impartial, with multi-sector jurisdiction
- Examples of best practice: FR (good practices in several other MS)
- Practices of concern: NRA not separated from ministry

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. In medium-sized or smaller national postal markets, a reasonable estimate is €1.2 m per year and 9 persons. In the six largest markets, €6.7 m/40 persons.
- Examples of best practice: large markets: UK; others: EL, HU, IE, PT, SE
- Practices of concern: Overall, MS need to increase expenditures for postal regulation by about 75 percent (very rough)

Best Practices

Establishment and Operation of NRAs

4. NRA authority to gather information and enforce its orders

- Best practice: NRA should be authorised to obtain data and enforce decisions.
- Examples of best practice: CY, DE, EL, PT, SK, UK
- Practices of concern: Lack of adequate authority

5. Procedures of the NRA

- Best practice: NRA should comply with EU administrative norms in judicial proceedings.
- Examples of best practice: Many NRAs.
- Practices of concern: Failure to affected parties an opportunity to comment on proposed actions, or a written justification for decisions that indicates the relevant facts and legal basis.

6. Public consultation by the NRA

- Best practice: NRA should consult openly with operators, employees, users, and public in policy making.
- Examples of best practices: UK, IE, FR
- Practices of concern: no publication of decisions taken by the NRA, or annual reports of activities.

7. Consultation between NRA and NCA

- Best practice: NRA and NCA should consult regularly and formally.
- Examples of best practices: FR, DE
- Practices of concern: No obligation to share information. No regular consultations between agencies (about two-thirds of MS).

Balance Between USO and Market Opening

8. Range of services within the USO

- Best practice: Range of services in USO should be limited to the minimum range required to protect public interest and consistent with the Third Postal Directive.
- Examples of best practice: NL, UK
- Practices of concern: Extending USO to products provided in effectively competitive markets such as direct mail, periodicals, basic parcel post, and bulk parcels.

Balance Between USO and Market Opening

9. Uniform rate requirements

- Best practice: MS should not require uniform tariffs unless they are consistent with the Third Postal Directive and required by a demonstrated and substantial public need.
- Best practice: DE, HU, IE, SK
- Practices of concern: Member States which require uniform rates for unreserved bulk commercial postal services such as bulk letters, direct mail, and bulk parcels.

Balance Between USO and Market Opening

10. Reliance on market forces to ensure universal service where feasible

- Best practice: US should be ensured by relying upon market forces where appropriate.
- Example of best practice: DE
- Practices of concern: Designation of one USP for entire national territory where only a small portion of the population faces a significant risk of a lack of universal service by the operation of market forces.

Balance Between USO and Market Opening

11. Designation and public procurement to ensure universal service

- Best practice: Where necessary, designation and public procurement procedures should be introduced in a manner that is transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion.
- Example of best practice: DE
- Practices of concern: Appointment by designation or public procurement of a by a procedure that is not transparent, non-discriminatory, fair, and consistent with the principles of proportionality and least market distortion.

Balance Between USO and Market Opening

12. Separation of designation and authorisation procedures

- Best practice: If a postal service provider is designated as a USP, then obligations should be imposed in the designation procedure and not as conditions attached to an authorisation.
- Examples of best practice: DE, RO, See also New Zealand.
- Practices of concern: Authorisation procedures which also impose universal service obligations.

Best Practices

Balance Between USO and Market Opening

13. Authorizations for services within the universal service area

- Best practice: 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.
- Examples of best practice: Forbearance from authorisation procedures: CZ, DK, NO. General authorizations for universal service: NZ, IE.
- Practices of concern: 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.

Balance Between USO and Market Opening

14. Conditions on authorisations

- Best practice: Conditions on authorisations should be introduced only if consistent with the Directive and with the principles of proportionality and least market distortion, taking into account the multiple objectives of the Postal Directive.
- Examples of best practice: SE, UK
- Practices of concern: Authorisation conditions which are intended to protect universal service by restricting competition. Conditions which exceed the scope of conditions permitted by the Third Postal Directive, e.g., conditions relating to financial guarantees, and technical expertise.

Balance Between USO and Market Opening

15. Scope of regulated accounts

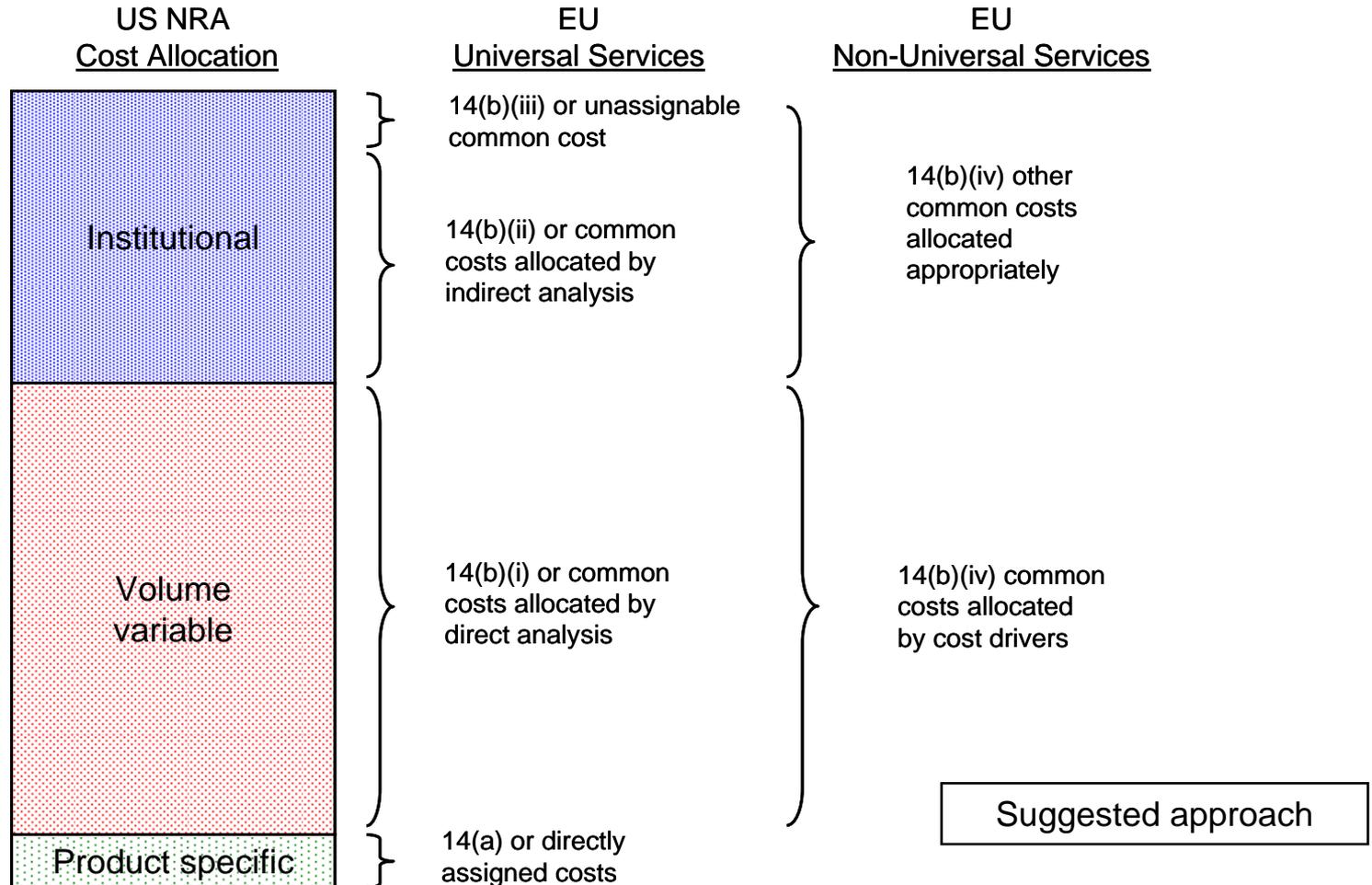
- Best practice: In general, the NRA should ensure that postal operators that provide universal services with significant market power maintain cost and revenue product accounts for (i) each universal service or other postal service provided pursuant to a designation or public procurement contract and (ii) each non-universal service that is produced jointly with a service covered by (i)
- Example of best practice: UK
- Practices of concern: Nine NRAs report that they have conducted no review of the allocation of common costs to non-universal services.

Balance Between USO and Market Opening

16. 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.
- 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.

Balance Between USO and Market Opening



Balance Between USO and Market Opening

17. Verification and transparency of accounting regulation

- Best practice: The NRA should ensure that at least annually (i) cost accounting practices of USPs are verified by the NRA or its consultant; (ii) a statement of compliance is published; (iii) a summary of the regulated product accounts is published; and (iv) cost methodology is published.
- Examples of best practice: NO (only MS that ensures all four measures of transparency). Also, UK (publication of summaries of regulatory accounts); FR (transparent methodology for cost allocation).
- Practices of concern: Lack of any outside review of the USP's accounts or review by an USP's auditor. Lack of statement of compliance. Most MS do not publish summary of accounts or cost methodology.

Balance Between USO and Market Opening

18. 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 Directive.
- Examples of best practice: SE, UK.
- Practices of concern: 16 NRAs report that the government has not undertaken a study of users' needs for universal services.

Best Practices

Balance Between USO and Market Opening

19. Exceptions to the delivery frequency and quality of service of USO

- 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.
- Example of best practice: EL
- 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.

20. Price control of universal services

- 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.
- Examples of best practice: UK, DE, SE, See also the United States.
- Practices of concern: Six NRAs apparently do not base price regulation on costs.

21. 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 MS, the NRA in the destination MS should ensure that operators with SMP comply with Art 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.
- Example of best practice: IE
- Practices of concern: There are several sources of unreasonable price and service discrimination in the provision of intra-Community cross border postal services.

22. Financing of the net cost of universal service (if any)

- Best practice: Methods of financing the net cost of universal service (if any) should conform to the principles of proportionality and least market distortion and, in any case, create no greater market distortions than existed prior to transposition.
- Example of best practice: NO.
- Practices of concern: Member States which have granted the USP financial support for universal services — either in the form of a reserved area or payment of funds — without ensuring that the value of the support provided does not exceed the net cost of universal services provided.

23. Phasing out of the reserved area

- Best practice: MS 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.
- Examples of best practice: UK, DE.
- Practices of concern: None of the 11 Member States 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.

24. 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.
- 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. Appropriate preparations are now urgently required from national authorities as well as the Commission.

25. Access to national postal infrastructure

- Best practice: 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.
- Examples of best practice: EE, FR, SE.
- Practices of concern: Failure to grant access to the postal infrastructure in cases in which MS force wasteful deliveries to incorrect or invalid addresses by denying private operators access to the database of valid addresses and in cases in which MS distort competition and inconvenience users by not allowing private operators to deliver to post office boxes for a reasonable fee.

26. Access to elements of the international postal infrastructure

- Best practice: 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.
- Examples of best practice: None. 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.

27. Valued-added tax

- Best practice: MSs should apply VAT to public and private postal services in a manner that creates the least market distortion while conforming to the requirements of Community law.
- Examples of best practice: SE, FI, SI
- Practices of concern: (i) Differential application of VAT laws on letter post markets may thwart full market opening. (ii) Differential application of VAT laws in competitive markets such as bulk postal services and express services appears unjustifiable as a matter of public policy.

28. Customs laws

- Best practice: MSs 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.
- Examples of best practice: United States (in law only). Good practices include MS (DE, DK, ES, LU, LV, NO, SE) which limit unequal customs treatment to postal items conveyed in the universal service.
- Practices of concern: MS 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.

29. 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.
- Examples of best practice: UK. Good practices: DK, FR, LT, SE.
- Practices of concern: At least ten NRAs 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.

Best Practices

Ensuring Full Market Opening

30. 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.
 - Examples of best practice: United Kingdom, United States.
 - Practices of concern: Very few MS appear to have undertaken a systematic study of how to provide for the equal application of laws to all postal operators under similar circumstances.

31. 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.
- 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 not verified in practice, e.g.: bulk letters, direct mail, and bulk parcels. Most NRAs rely upon consultants to the USP to monitor quality of service performance. Nine NRAs report that quality of service is not monitored at least annually for all universal services.

32. 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.
- Examples of best practice: IE, LT, PL, UK.
- Practices of concern: Three MS appear to lack any mechanisms for user protection. In at least 8 MS, the NRA does not approve the USP's procedures for protecting users. In only a few MS does the 'competent national authority' have the power to award monetary damages to a user or order the USP to provide omitted services where justified. In at least 5 MS, the USP does not publish an annual report on user protection as required by the Postal Directive.

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Cooperation among NRAs

The Need for Enhanced Cooperation

- Third Directive requires that NRAs ‘shall work in close collaboration and shall provide mutual assistance in order to facilitate’ (Recital 50, Art. 22)

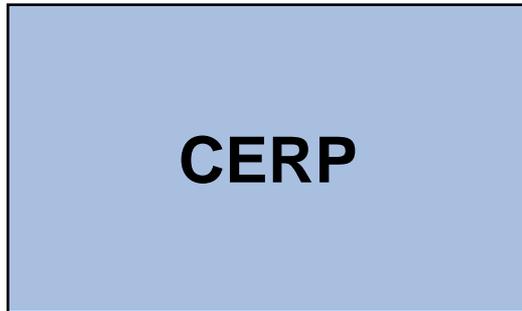
Three prime reasons for closer cooperation among NRAs

1. Cooperation and mutual assistance allows to tackle complex technical tasks better, improve regulation, and regulate more cost-effectively
2. Cooperation helps to ensure consistent application of Postal Directive, and leads to more harmonised regulatory practice
3. Cooperation needed to monitor and regulate cross border services more effectively, where appropriate (e.g. quality, interoperability issues), and to improve cooperation with the Commission on cross border issues

Cooperation among NRAs

Current Forms of International Cooperation

Present forum for
international cooperation
among NRAs (and ministries)



Other forms of cooperation

Informal bilateral
meetings

Postal Directive
Committee (some
NRAs represented)

Twinning Projects
(bilateral)

Cooperation among NRAs

Lessons From Other Sectors

- IRG and CEER (eCom/energy) consider themselves as bodies of independent NRAs
 - Clear rule: No ministries allowed!
 - Limitation to independent NRAs seen as critical factor for success
- Regular high-level representation ensures relevance of work for national regulation (heads of NRAs)
- Benchmarking is relevant: All NRAs today consult international practice before taking decisions (whether mandatory or not)
- Commission decisions to create advisory groups (ERG/ERGEG) added relevance
- EU level agencies: necessary iff community level regulation needed (e.g. ACER in electricity markets)

Cooperation among NRAs

An Advisory Group of Postal Regulators

- Three possible form of enhanced cooperation
 - Voluntary organizations (did not emerge in the postal sector)
 - Advisory group to be established by the Commission (e.g. ERG, ERGEG)
 - EU level agency (e.g. ACER)
- Recommendation: 'European Regulators Group for Postal Services' (ERGP)
 - Commission should establish the advisory group as soon as possible, before implementation of the 3rd Postal Directive
 - ERGP should consist of heads of independent NRAs from all EU Member States (observes from EEA and candidate countries)
 - Recommended objectives of ERGP: (i) to advise and assist the Commission in promoting internal market, and draft implementing measures; (ii) facilitate consultation, coordination and cooperation of NRAs
 - ERGP should determine subjects for advising the Commission. Commission should be able to request expert advice and recommendations from ERGP
 - ERGP should be transparent, consult with market participants and users. ERGP should publish work programme, recommendations, and annual reports

Cooperation among NRAs

Priority Areas for Cooperation

1. Separation of accounts
2. Cost allocation
3. Price regulation
4. Regulation of terminal dues and cross-border mail generally
5. Calculation of net costs of universal service
6. Financing of universal service
7. Access to postal infrastructure
8. Interoperability
9. Scope and methods for measuring quality of service
10. Market statistics
11. Authorisation procedures

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Conclusions

Key Regulatory Tasks (1)

1. 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.
2. 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.
3. 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.

Conclusions

Key Regulatory Tasks (2)

4. 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.
5. Member States and NRAs must periodically evaluate and adapt the best postal regulatory practices developed by other industrialized countries.
6. 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.

Conclusions

Key Institutional Tasks

- 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.
- Member States must specifically reconsider the role, resources, and independence of the national regulatory authority in light of the Third Postal Directive.
- To implement the Third Postal Directive effectively, the Commission and national postal regulators need to develop an efficient mechanism for consultation and coordination.

Conclusions

Role of Regulators in Perspective

*Turn where we may — within, around —
the voice of great events is proclaiming
to us, 'Reform, that you may preserve'*

(Thomas Babington Macaulay, 1853)

Technological advances offer the traditional postal sector two long term choices: reform or obsolescence. Third Postal Directive is enlightened way forward – but not the end of postal history.



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