

Report of CERP Working Group Policy Issues: Project team - National Regulatory Authorities

Introduction

1. The terms of reference of the Project team on National Regulatory Authorities (NRA) were agreed at the CERP Working Group (WG) Policy Issues meeting in November 2005 (Dublin) and confirmed at the CERP Plenary in December 2005 (Turkey). During the WG Policy Issues meeting participants were asked to prioritise the common themes identified from the questionnaire on the functioning and tasks of NRAs.

2. The **terms of reference** of the project team attempt to take into account the concerns of the regulatory regimes in all CERP member countries – however, they also reflect the fact that the development of NRAs has been chiefly in relation to the requirements of the European Postal Directive. The terms of reference of the project team are as follows:

- (i) Review the current organisation, functioning and tasks of National Regulatory Authorities in a liberalised postal market;
- (ii) Share experiences to achieve the objectives of the current regulatory regime (Postal Services Directive);
- (iii) Consider what, if any, additional duties and powers might be needed to achieve the objectives of the regulatory regime (Postal Services Directive);
- (iv) Improve the efficiency and effectiveness of National Regulatory Authorities.

3. As this is a considerable body of work a set of four priority areas were identified for the first phase of the work of the project team. The four priority areas are:

- **Clearer definition of the universal service**
- **Customers unaware of their rights**
- **Enforcement of decisions with incumbent and other licensed operators**
- **Lack of clarity in competition roles.**

Setting the scene

4. The project team began its work by considering the overall context in which the current generation of NRAs is working and what they need to be effective.

5. The project team concluded that National Regulatory Authorities (NRA) can only be fully effective where the regulatory regime or framework sets clear objectives and gives NRAs the necessary powers or “tools” to achieve them. This may seem obvious but at present the flexibilities in the Postal Services Directive are often translated into ambiguities in national law. This lack of clarity in roles and powers means that there is no single, simple model among CERP NRAs and it can be difficult to make progress on the objectives of the Postal Directive.

6. If the intention is for NRAs to have a major role in pursuing the objectives of the regulatory regime (Postal Services Directive), then the independence of the NRA from day to day political interference is a key foundation for NRAs to be effective. This is important because the effect of shorter term political priorities is most often to push difficult regulatory decisions into the future even where there is evidence to the contrary. An independent NRA is expected to take account of the interests of all stakeholders and to demonstrate the reasons for their decisions based on evidence rather than political preference. The current Postal Services Directive only requires the NRAs to be “legally separate from and operationally independent of the postal operators”. Independence and freedom from political interference has to be supported by the necessary powers and transparent financing arrangements.

7. If the intention is that NRAs should have only a narrow role in respect of the objectives of the regulatory regime (Postal Services Directive) then this should be clarified along with the respective roles of the Ministry and Competition Authority.

8. The lack of consistency in the objectives and powers of the present generation of NRAs responsible for postal services has implications for their ability to share best practice on regulatory tasks and to provide a European wide network. For example, access to information is vital to regulating a market effectively, but some NRAs do not have this basic tool.

9. Conclusion: if NRAs are to be effective in relation to national and cross-border postal issues, then regulations (particularly the Postal Services Directive) need to be more precise concerning their independence, role and powers.

Clearer definition of universal service

10. Lack of clarity about the definition of the universal service has an impact on the ability of NRAs to pursue the objectives of the regulatory regime (for example, as set by the Postal Services Directive). This is because lack of clarity and consistency about what is meant by the universal service can lead to disputes which the NRA may not be empowered to tackle. If the NRA is expected to communicate to the sector what is meant by the universal service and what is expected of the universal service provider (USP) then it must also have the ability to investigate disputes and enforce decisions.

11. The gradual reduction in the reserved area means that it is increasingly important to define what is meant by the universal service in order to ensure its provision. This does not necessarily mean the same definition in every Member State (the Postal Services Directive outlines a minimum level of entitlement) simply that there must be a detailed definition that is clear and is communicated to the sector. The Directive may not be the best legal instrument for determining a definition of the universal service. The CERP project team recommended that the NRA was best placed to be responsible for ensuring that the detailed definition of the universal service reflects the needs of customers. It is also vital that the meaning of the

universal service is kept under review and that it changes over time in response to the needs of users and the types of services offered by the market.

12. Conclusion: the gradual reduction in the reserved area means that it is vital for individual Member States to have a clear and detailed definition of the universal service for the NRA to protect and enforce.

Customers unaware of their rights

13. NRAs see themselves as having an important role in protecting and promoting the interests of users. However, NRAs report confusion among users about their role in relation to complaint handling and how this interacts with the roles of other responsible bodies such as the USP, other operators, consumer bodies, Competition Authorities and the courts (even the European Court). This confusion means that the limited resources of the NRAs to pursue the objectives of the Postal Directive in relation to the market may be diverted to complaint handling issues which are not their responsibility.

14. A well functioning postal services market needs a fair and transparent complaint system which ensures that the interests of users are protected. If the complaint system is to be effective and thereby promote confidence in the postal market then it is important for there to be clarity in the roles of all of the bodies involved. Users want a simple, transparent and consistent complaints procedure with targets for handling complaints. It is also necessary for the arrangements to be communicated to users to ensure that they are aware of their rights and of the correct channels for these to be pursued. The current arrangements for cross-border complaints and redress mechanisms are not clear and need to be addressed as the market develops. Cross-border issues are becoming an increasingly pressing enforcement role for NRAs.

15. Conclusion: the role of the NRA and other relevant bodies should be clarified in respect of complaint and redress procedures and this should take account of the development of cross-border issues.

Enforcement of decisions

16. If the NRA is to be effective in pursuing the objectives of the regulatory regime (the Postal Services Directive) then it needs a range of effective enforcement tools. This is particularly important where the market is beginning to open and the NRA needs to be able to take action in respect of activity by the USP and other operators. If the NRA or another authority is not seen to act or is seen to be ill-equipped to enforce its decision then users will gradually lose confidence in the postal market. If the NRAs decisions are systematically contested or there is over or misuse of the possibility to appeal against the NRA then this also reduces the power of an NRA to take rapid action in its area of competence.

17. The licensing regime should not be a barrier to entry or an unnecessary burden on the USP. That said, at the early stages of liberalisation the licensing/authorisation regime and associated enforcement powers are needed to protect the user and address the dominance of the USP. The licence/authorisation arrangements need to address issues such as the USP's

prices and performance targets for quality of service and what happens if these targets are not achieved. As the market begins to open the licence/authorisation arrangements also need to provide safeguards for the protection of mail and mail users.

18. Conclusion: in the light of the gradual reduction of the reserved area it is important that the regulatory controls (licensing/authorisation) allowed by the regulatory regime (Postal Services Directive) provide sufficient powers to the NRA to secure the universal service and promote the interests of users.

Lack of clarity in competition roles

19. The European Postal Directive seeks to set clear overall objectives towards the achievement of the internal market for postal services. It is important that the roles of the NRA, Ministries and Competition Authorities are clear in respect of which authority is responsible for achieving the Internal Market for postal services. In practice it is a matter for national governments of Member State whether they want to include the promotion of user/customer choice as an objective of the NRA.

20. Evidence suggests that NRAs are more effective at the early stage of market opening in promoting choice in the interests of customers and tackling anti-competitive activity. This is because competition law is only really effective in a fully opened market and is not sufficient to sustain the threat of competition. Once the internal market for postal services has been achieved then the role of the NRA might be to monitor the effects of liberalisation. The achievement of the Internal Market for postal services is therefore best served when the NRA is given the role of promoting user/customer choice in respect of prices and quality of service.

21. Conclusion: the successful establishment of the internal market in the postal service sector can only be achieved where there is clarity in the roles of the NRA, Ministries and Competition Authorities.

Financing of National Regulatory Authorities

22. The independence of NRA and their ability to pursue the objectives of the regulatory regime (Postal Services Directive) are reliant on the nature and extent of their financing. First and foremost, it is important that the funding arrangements are transparent and free from political and other pressures. Secondly, the basis of the funding arrangement needs to take account the degree to which the NRA is expected to be proactive or to tackle abuses by the USP or other operators.

23. An effective sector specific NRA must be in a position to monitor and act on technically complex regulatory issues. This means building up the knowledge and expertise needed to understand the sector and to tackle problems where, for example, there is a monopoly. This sector specific knowledge enables NRAs to act more quickly than a Competition Authority to resolve disputes and to prevent market abuse which might damage the development of the postal market. The more pro-active the NRA is expected to be then the more staff and resources it will need to call on as the market opens.

24. Conclusion: it is important to establish some common rules/principles to achieve minimum uniformity in terms of financing arrangements so that they are transparent and free from political and other pressures.

Next steps

25. In the light of the discussion at the CERP Plenary in May 2006, the CERP Working Group Policy Issues will confirm the recommendations of this paper and direct the NRA project team to propose a new work programme.

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