

Report of CERP Working Group Policy Issues: Project team - National Regulatory Authorities Phase Two report - Enforcement

Introduction

1. The terms of reference for the establishment of the project team on National Regulatory Authorities (NRA) were confirmed at the CERP Plenary in December 2005 (Turkey). The project team was asked to look at a number of common themes on the functioning of NRAs.
2. During **phase one** of the project, four common themes were examined:
 - 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.
3. The conclusions of the project team's work in phase one was submitted to the CERP Plenary in May 2006.
4. Three separate, but closely linked themes emerged from discussions by the project team that were not explored in phase one. The main one was enforcement, followed by appropriate levels of regulation, as well as clarity and experience in dealing with competition issues in a liberalising postal market.
5. The proposal for work in **phase two on enforcement** was agreed at the CERP WG1 Policy Issues meeting on 8 September 2006 (Paris). A project team meeting was held on 23 November 2006 (London). Representatives from 10 countries participated (including two by email). The project team conducted its discussion in the context of considering the scope for developing a risk-based, proportionate approach to regulation and enforcement in the postal market.
6. The findings of the NRA project team were submitted and confirmed by the CERP WG1 Policy Issues meeting on 17 April. It was agreed that the report on phase two of the project team should be submitted to the CERP Plenary in May 2007.

Phase two: Common Themes on existing enforcement arrangements

7. NRAs have a range of sectoral powers to establish regulatory policies and rules for the postal market and to take action to enforce those rules and to resolve disputes.
8. At Annex A there is a summary comparison table showing the existing enforcement powers and activities in 10 countries and the changes that individual members of the project team think may be needed in a liberalised market.

Legislation

9. The review began by examining the existing legal framework for enforcement powers and activities in each country and how this works in practice. Although all NRAs in the European Union have the same legal basis for regulation in the postal market through the current European Postal Directive, in practice this has been transposed differently into national legislation.
10. In most, but not all countries, it is a criminal offence to operate in the postal market without a licence or other similar conditions in accordance with the relevant postal legislation. The enforcement powers of NRAs range from those with investigative authority, including employing investigation officers with the power of search and seizure, to those where investigations can only be carried out by other organisations such as the police or National Competition Authority. Some NRAs conduct investigations in the first instance but pass on the results to another organisation for enforcement.
11. Common features are the ability to impose a fine for breach of licence or for operating without a licence. Some NRAs do not have any legal powers to back up their decisions and face every decision they make being appealed through the courts system, which can be a lengthy and costly process.
12. **The project team concluded that there is significant disparity between countries in respect of how the Postal Directive is transposed into national legislation and this has implications for the enforcement powers of NRAs. This difference in legislative powers can make sharing of best practice between NRAs difficult.**
13. **The team also concluded that the availability of effective sanctions in the legislative system were critical to NRAs achieving good regulatory outcomes in respect of protecting the universal service and developing the postal market. Monitoring and policy development alone are not sufficient to achieve the objectives set out in legislation. It is necessary to be prepared and able to take action to enforce those rules.**

Licensing /authorisation

14. The review identified that not all countries had existing licensing regimes. Where a licensing framework existed it was found that it could be used in addition to the legislative framework to regulate and enforce decisions. Licences were also identified as a useful tool to specify the universal service obligations that are usually outlined in only general terms in national legislation. Those that did not have a licensing framework relied on legislation which can be less flexible and is often slow to respond to the needs of postal users and changes in the postal market.
15. Licences can be used to place conditions on postal operators in addition to or in support of the legal process. Breaches of a licence can result in a fine (usually with a

maximum limit) and for the most serious breaches of licence conditions there is the power to revoke a licence.

16. The review found that there are differences in the fees/charges levied by NRAs. In some countries operators are charged for a licence and in others they are not charged (or only a small charge). In one country there is no fee for licences however a levy must be paid for regulation and another country also has a levy for financing the NRA in addition to a licence fee. One country charges an initial application fee and subsequent annual charges.
17. **The project team concluded that the experience of those countries that have a licensing regime in place and operating is that it is a useful enforcement tool that can be used more flexibly and effectively than legislation alone. However, the project team also considered that it is important not to introduce a licensing system that could present a barrier to entry, for example because of the scale of fees/charges.**
18. **The project team noted that the draft postal directive includes provisions (Chapter 4: Articles 9 -11a) that allow Member States to develop an appropriate form of licensing for a liberalising postal market.**

Appeals process

19. The review found that most NRAs have not established a formal dispute resolution service. One country offers a resolution service for disputes between the universal service provider and bulk mail customers or a licence holder and in another country the NRA can mediate between postal operators regarding access to postal boxes owned by other operators.
20. In two cases the universal service provider can refer every decision the NRA makes to the court. In practice there have been very few decisions made by the NRA that were brought to court as the operators tend to adjust their activities in accordance with the conclusions of the NRA. This method of appealing can take up to three years and limits the NRA's ability to enforce their decisions.
21. **The project team concluded that countries need to establish appeals procedures and that pending the outcome of the appeals the NRA's decision should stand to prevent nuisance or delaying appeals. The same enforcement powers should apply to all operators, but in practice applying a risk based assessment should provide guidance for direction and supervisory measures.**
22. **The project team noted that the draft postal directive includes a provision (Chapter 9: Article 22) on establishing appeals procedures. The proposed provision could be helpfully clarified as the draft does not specify who can dispute the NRA's decision which could result in dispute from more than one party.**

Gathering information/ investigation

23. The review found that most NRAs are currently limited in what information they can request from the universal service provider and other operators. One NRA can request information from anyone who may have information that is necessary for them to carry out an investigation. Another NRA can ask for information (other than for statistical reasons) if this is necessary to carry out its tasks under postal legislation. In cases where information is requested but not supplied some NRAs have found that although the obligation can be linked to a licence and a fine imposed, they have no ability to legally enforce the request in the case of non-compliance.
24. It is important that requests for information are proportionate. Organisations should not have to give unnecessary information, nor have to give the same information twice. To ease the administrative burdens on operators and NRAs, there is an obligation on NRAs to regularly consider whether all of their information, data and reporting requirements are necessary.
25. There are some concerns that if a regulator is asked to justify every request for information this might be used as an obstructive or delaying tactic. There needs to be a balance so that no operator or organisation can use this approach to manipulate the provision of data to its own advantage, whilst preventing the NRA from meeting its regulatory objectives in respect of the universal service and postal market.
26. **The project team concluded that it is vital to the effective operation of the postal market for NRAs to be able to gather dependable and accurate information about developments in the market and the impacts on the universal postal service.**
27. **The project team notes that the draft postal directive includes a provision (Chapter 9a: Article 22a) to give the NRA power to request information to ensure conformity with the Directive and for “clearly defined statistical purposes”. However, the project team believes that it is important that challenges to requests for information are not allowed to act as a barrier to the efficient working of the NRA. This is particularly true in cases of anti-competitive activity where the NRA or Competition Authority may have to protect sources in order to investigate cases.**

Regulation and enforcement in a multi operator liberalised postal market

28. The review looked in particular at the duties and powers necessary for NRAs to regulate and enforce in a fully liberalised postal market where there may be multiple postal operators. The following issues were identified in discussion:

Licensing ...

- In the early stages of market opening, experience shows that a stronger licensing regime is required in respect of the dominant operator(s) and a lighter touch regime for small or niche operators. This would help ensure the NRA has the ability to take

measures to protect the universal service and the interests of customers through enforcement of licence conditions on the main universal service provider. A lighter touch regime on other operators reflects the fact that they are not dominant in the market and tend to deal with their customers through individual contracts. Licensing for operators coming into the postal market needs to be clear and appropriate as unnecessary and disproportionate obligations on new entrants could be a disincentive to enter the market.

Universal service obligations ...

- In respect of the universal postal service, obligations on all operators should be clear and transparent. In a fully liberalised market, each country needs to be clear what the universal service obligations are for operators. The universal service is made up of those services which are thought to be common and necessary for all citizens and directly help achieve the regulatory objectives of the postal directive.

Defining the universal service ...

- The definition of the universal postal service should be clearly set out at national level. It would be also helpful if individual Member States sought the views of postal users and reviewed the definition of the universal service and associated quality of service standards on a regular basis (e.g. annual customer surveys) to establish their needs in relation to the universal service and how these are changing over time. Member States, through their NRAs and Competition Authorities need to take a more proactive role in monitoring and supporting the postal market during the early stages of liberalisation.

Judicial challenges ...

- The project team concluded that in a multi operator postal market measures are needed to ensure an efficient judicial mechanism for the enforcement decisions of NRAs. Judicial challenges are lengthy processes and use valuable resources. The project team believes that there are other, less burdensome approaches to appeal.

Addressing anti-competitive activity ...

- In a multi operator liberalising postal market, NRAs need to be able to take a view and act to address anti-competitive activity by the dominant operator and other operators. The NRA or a national competition authority needs specific powers under competition law to investigate complaints or concerns about anti-competitive conduct in the postal services market – particularly at the early stages of development.

Resources of NRAs ...

- NRAs need to be adequately staffed and resourced to the levels in the telecommunications sector in order to fulfil their duties especially in the early stages of market opening. In all countries, except the United Kingdom and Slovakia, the NRA is part of a multi-sector agency, responsible for postal services, telecommunications, and in some instances other sectors. In all countries the ratio of staff working on postal regulation is far lower than those in telecommunications.

This could become a problem when dealing with the issues raised by the development of a multi-operator postal market. Until such a time when there is effective competition in the postal market, NRAs need to be adequately resourced.

Common infrastructure arrangements ...

- In a liberalised postal market, NRAs need to be able to address any difficulties arising from common infrastructure arrangements between operators. The ideal scenario is for operators to work together to agree the best way, for example to deal with redirected mail. However, where this does not happen, it is important for the NRA to be able to play an active role in directing arrangements to protect the interests of customers and secure the universal postal service. Although, the draft postal directive provides a better definition of postal infrastructure, NRA's need a clearer regulatory model to be able to impose access to the network.

Risk based approach...

- NRAs should over time develop a risk based approach to monitoring compliance with licence conditions that helps deliver a light touch regime and supports the enforcement process. A risk based approach to managing compliance to licence conditions, enforcement decisions/actions should be designed to ensure that enforcement is appropriate and proportionate to the breach. Enforcement needs to be swift and effective with a range of penalties suitable to the offence. The remedies need to be clear to all. The burden of proof needs to be shared between the NRA and postal operators.

29. **The project team concluded that it would be helpful if individual Member States through their NRAs sought the views of postal users on a regular basis (e.g. annually) to establish their needs in relation to the universal postal service and how these are changing over time. The NRA should be sensitive to the concerns of customers about what happens to their mail in a multi-operator postal market and respond in the way that it regulates and enforces.**
30. **The project team also concluded that in a multi operator liberalised market there is a need for common infrastructure arrangements to deal with mail handled by different operators. If procedures are not in place, managing infrastructure issues could become unsustainable as more operators enter the market and could, to an extent, undermine the value of the postal service for users. Procedures for managing infrastructure provide an important safety net for both senders and receivers of mail. Some of the operational issues that can occur in a multi-operator environment include; misposted mail, miscollected mail, misdirected customer enquiries and redirections.**
31. **The project team notes that the draft postal directive includes a provision (Chapter 9: Article 11a) on the areas needed to promote the smooth running of a multi-operator postal market – the project team concludes that this should be an “open list” because new issues may emerge over time that are necessary as the postal market develops.**

Annex A

CERP - NRA COMPARISON TABLE

REGULATOR	ENFORCEMENT POWERS	ENFORCEMENT ACTIVITIES	CHANGES - LIBERALISED EUROPEAN MARKET
BIPT - Belgium	<ol style="list-style-type: none"> 1. Empowered to commandeer any information within set time period for breaches of postal legislation. 2. Establishment of breaches remains difficult. 3. Licence revocation 4. Imposition of financial penalty up to 1% on USP for breaches in provision of Universal Service 4. Criminal offences -investigators have legal powers to obtain information and seize documents. Investigators can apply public force. 	<ol style="list-style-type: none"> 1. Suspension of operation of the network. 2. Licence revocation. 3. Financial penalty not exceeding 1% turnover for breaches by the USP in context of provision of Universal service. 	<ol style="list-style-type: none"> 1. More universal service providers 2. Greater resources for regulator 3. Extended Powers to gather information
ENCB - Estonia	<ol style="list-style-type: none"> 1. Issuing a precept 2. Conduct investigations for contraventions of the Postal Act 3. Supervision over compliance with legislative requirements 	<ol style="list-style-type: none"> 1. Initiate contravention proceedings 2. Issue a precept 3. Impose financial penalty – max 639 euros 	<ol style="list-style-type: none"> 1. NRA independent from political views (Ministry) 2. Clearer definition of products/services falling within regulated market
ARCEP - France	<ol style="list-style-type: none"> 1. Warning 2. Reduction of licence period by one year 3. Suspension of licence for maximum of one month 4. Withdrawal of licence 5. Financial penalty proportionate to contravention 	Settlement of disputes for: <ol style="list-style-type: none"> 1. Bulk Mailers or USP departing from universal service 2. Access to facilities 3. Referral to Competition Commission 4. Collection of information from USP 	<ol style="list-style-type: none"> 1. Need extended powers as they only relate to the provision of universal service 2. Focus should be on regulating the open market
Federal Network Agency - Germany	Article 49 Administrative fines Provisions <ol style="list-style-type: none"> 1. Financial penalty not exceeding one million Deutschmarks 2. Financial penalty not exceeding one hundred thousand Deutschmarks 3. Revocation of licence 	<ol style="list-style-type: none"> 1. Fines due to non provision of information: 120 2. Fines due to licence provision: 10 3. Withdrawal of licences: 10 	<ol style="list-style-type: none"> 1. Enforcement powers should be kept at the same level. 2. Welcome the new directive under Art 22a enabling regulators to collect necessary data

OPTA - Holland	<ol style="list-style-type: none"> 1. Legal power to enforce Quality of Service requirements on USP 2. Price control – power to enforce decision 		<ol style="list-style-type: none"> 1. Ability to impose and enforce ex-ante obligations in order to promote effective competition.
Hungarian Communication Authority	<ol style="list-style-type: none"> 1. May apply sanctions for breaches of Act including operating without a licence 2. Impose financial penalty between 0.2 – 0.5% of sales revenue for specified breaches. 3. Licence revocation 4. Market surveillance 5. Regulated data supply obligation for both US and non-US providers (less data required from non-US providers) 6. Power to ask information for investigation complaints of customers against the service provision or/and complaint investigation performed by the service provider 	<ol style="list-style-type: none"> 1. Assessing fines 2. Licence revocation 3. Issue a warning for non-compliance 4. Market surveillance (inspection, decision-making, taking measures or initiating actions) 5. Collecting information both US and non-US service providers 6. Report for Government about the sector's performance, market conditions and supervisory activity 7. Revising the separated accounting documentation 	<ol style="list-style-type: none"> 1. Greater resources for the NRA 2. Clearer definition of products/services falling within the regulated market 3. Focus should be on regulating the open market 4. Information exchange between the NRAs
ComReg - Republic of Ireland	<ol style="list-style-type: none"> 1. Empowered to prosecute for operating without a licence, (maximum fine 3k euro) 2. Issue 'Directions' for non-compliance by an operator to obligations (does not apply to Quality of Service) 	<ol style="list-style-type: none"> 1. Burden of proof is strict 2. Process is slow and complex 3. Penalties are not proportionate 	<ol style="list-style-type: none"> 1. Obligations and remedies should be precise and unambiguous 2. A range of penalties appropriate to the offence
PTS - Sweden	<ol style="list-style-type: none"> 1. On request access to information and to obtain documents needed for postal supervision. Assistance from Enforcement Services when needed. 2. Access to areas where postal activities are carried out. Assistance from enforcement services when needed. 3. Issue orders necessary for compliance with Postal Services Act and the licence terms and conditions 4. Issue a warning for non- 	<ol style="list-style-type: none"> 1. Issue orders 2. Issue warnings 3. Revocation licenses 4. Issue default fine 	<ol style="list-style-type: none"> 1. Overall level of enforcement powers seem to be appropriate. 2. Need to establish a more comprehensive supervisory approach including exchange of information between NRAs.

	<p>compliance</p> <p>5 Licence revocation</p>		
APEK - Slovenia	<ol style="list-style-type: none"> 1. Issuing binding decisions with universal service/dispute resolution 2. Carrying out inspections (responsibility shared between Ministry and Agency) 3. Issuing decisions in line with powers, (not only Postal services Act related) 	<ol style="list-style-type: none"> 1. Issuing a statement of compliance for USP cost accounting system. 2. Determining whether USP has a dominant position in market for unaddressed items. 3. Inspections of all postal services providers in compliance with legislation. 	<ol style="list-style-type: none"> 1. Would need modifications in postal legislation for greater independence between Ministry and Agency. 2. Clarification of provisions relating to extent of competition powers 3. National postal legislation is developed with close cooperation with NRA.
POSTCOMM - United Kingdom	<ol style="list-style-type: none"> 1. Powers to investigate and prosecute for operating without a licence, (Section 6 Postal Service Act 2000) 2. Power to request information/data 3. Power of search & seizure, (only in relation to investigating Section 6 offences) 4. Implied duty to investigate & prosecute for mail interference offences 5. Revocation of licences 6. Financial penalties up to 10% of operator turnover 	<ol style="list-style-type: none"> 1. Financial penalty for licence breach 2. Investigation and prosecution of individuals for mail interference offences 3. Investigations into anti-competitive behaviour 	<ol style="list-style-type: none"> 1. Overall enforcement powers appropriate 2. Need to develop risk based approach to monitoring and enforcing compliance to licence obligations.