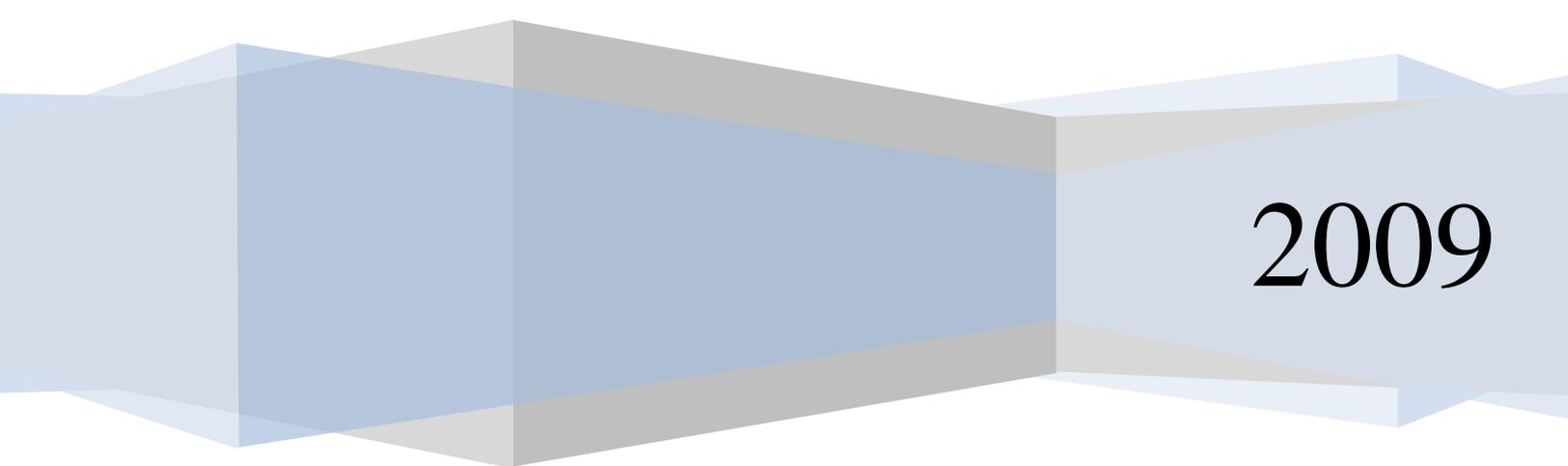




Implementation of EU Postal Legislation

A guide to the transposition of EC Directive 97/67/EC
as amended by Directive 2008/6/EC



2009

The purpose of this Guide

This document is intended to serve as an explanatory guide for company representatives who deal with postal regulation, or are involved in reviewing postal legislation within a specific European Union (EU) Member State. As such, it aims to:

- Explain the issues surrounding the final legislative step aimed at liberalising Europe's postal market
- Provide relevant argumentation and evidence which can assist in outreach to national ministries in order to protect the express delivery industry from unnecessary and harmful legislation
- Outline best practice examples to assist in presenting the case of the express industry

The texts of the three postal directives are included with this guide for your information.

The European Express Association (EEA)

The EEA represents the views of the global express operators, DHL, FedEx, TNT and UPS at a European level. The EEA's Competition and Market Reform Committee (CMR) is a key stakeholder in EU policy debates in relation to the liberalisation of postal markets within the EU.

The European Express Association's Competition and Market Reform Committee can be contacted in the following ways:

- Contact your European public affairs colleagues directly;
- Mark van der Horst, CMR Committee Chairman (mvanderhorst@ups.com);
- EEA CMR Secretariat: c/o APCO Worldwide, Rue Montoyer 47, Brussels, Belgium (ckindstrand@apcoworldwide.com).

Introduction

In February 2008, the European Union's 3rd (amending) Postal Directive came into force¹. As a result, most EU Member States will be required to fully open their markets by December 2010, although 11 Member States² have secured an extension up until December 2012.

The transposition of the new Directive will require Member States to review their existing postal legislation and regulatory provisions. Faced with full market opening, it is probable that one or more Member States will substantially re-work their regulatory framework in order to meet the requirements of the new Directive.

Though, in principle, the new Directive does not change the regulatory basis for express services, it will be important to ensure that during the transposition process Member States do not go beyond what is foreseen in the Postal Directive. This is necessary to ensure that express services will not be exposed to burdensome regulation.

Most importantly, under the Postal Directive, express services must *not* be obliged to contribute to the financing of the universal service and may no longer be required to make a contribution to the operational costs of the National Regulatory Authority (the latter is a new provision). As regards provisions on consumer protection and the delivery of information, it is important that the principles and limits set by the Directive are properly respected.

A set of arguments that may be employed in national discussions on the transposition of the Postal Directive are outlined below. More details are provided in the Annex.

¹ EU Directive 2008/6/EC amending Directive 97/67/EC achieving full accomplishment of the internal market for Community postal service

² Poland, Romania, the Czech Republic, Hungary, Slovakia, Lithuania, Latvia, Malta, Cyprus, Greece and Luxembourg

(1) Regulation of express services should be justified

In principle, the Postal Directive does not prevent Member States from classifying express services as postal services and/or making express services subject to postal regulation. Nevertheless regulation should be properly justified to avoid burdensome regulatory measures.

According to the Directive (Article 9), Member States may require a general authorization for the provision of postal services, but only “*to the extent necessary to ensure compliance with the essential requirements*”. The introduction, for instance, of a general authorization in a Member State that has done without so far, may well be challenged (where no problem remediable through an authorization has actually occurred).

Moreover, the very fact that there are Member States that do without such measures (for instance, the United Kingdom, Netherlands, France, Sweden, Denmark) suggests that in general, regulating express services may actually be unnecessary.

(2) The limits set for regulating express services have to be respected

Where a Member State imposes postal regulation on express services, the constraints set by the Postal Directive in terms of what a Member State is allowed to regulate must be respected (in accordance with Article 9).

Since express services are not inter-changeable with the universal service (see point #3 below), only a general authorization may be required and the conditions that may be imposed can only concern “*essential requirements*” (confidentiality, data protection etc.).

Unlike services that are inter-changeable with universal services, express cannot be:

- made subject to an individual authorization (licence)
- required to contribute to funding the net costs (if any) of the universal service (compensation fund)
- required to contribute to funding the operational costs of the National Regulatory Authority

(3) Express services are not inter-changeable with universal services

According to the Postal Directive and relevant competition cases, express services are essentially distinct from universal services:

- The Postal Directive (Recital 18) expressly states that express services are “essentially distinct” from universal services through the value added perceived by customers, and reflected in the higher price they are willing to pay.
- In a series of competition cases the market for express services has been found to be distinct from the universal service given the added value and the higher price.
- Applying the concept of “inter-changeability” (as recommended by the new Directive, Recital 27), express services can be shown not to be “inter-changeable” with universal services:
 - Service characteristics:
(High speed, high reliability, tailor made solutions, etc.)
 - Intended use:
(time sensitive shipments, need for higher speed and reliability, etc.)
 - Prices:
(significantly higher than prices for universal services, etc.)
- Referring to Recital 27, the Commission has confirmed the essential distinctiveness of express services according to Recital 18 of the 1997 Directive and the “*consistent case law of the ECJ*” (Statement of the Commission 2008, outlined in the Annex, p.8).

(4) Express services should be explicitly distinguished from universal services

Postal regulations should explicitly determine that express services are services falling outside the scope of the universal service because they are not inter-changeable with universal services. Where, for instance, a compensation fund is installed, it has to be clarified who is obliged to contribute, and who is not obliged to do so.

In some cases, there may be services where the question of inter-changeability is not self-evident. However, in the case of express services, it is obvious that they are not inter-changeable (see above). Whenever a Member State installs a compensation fund,

it should – for reasons of legal clarity – explicitly determine that express services are not required to contribute to this fund.

Where a definition of express services is provided, one would legitimately expect that the definition reflects market reality and the findings and observations made in relevant cases. The European Commission Notice of 1998 provides a definition that sufficiently summarises these findings (see annex p.8). The introduction of more restrictive definitions would be unnecessary.

Indeed, there are examples of Member States who have “copied” the Commission’s Notice definition (for instance, Spain, Greece or Hungary). As such they explicitly classify express services as non-universal services, meaning they do not fall under the respective universal postal regulation (contribution to a compensation fund, service requirements etc.).

(5) Consumer Protection

The Postal Directive obliges Member States to ensure that postal service providers have appropriate procedures available for dealing with complaints. As commercial operators, the express industry should already have these measures in place.

(6) Information duties

The Postal Directive introduces specific obligations for postal service providers to deliver information to the National Regulatory Authority. Member States may therefore be expected to impose specific obligations on service providers to provide information.

The Directive however also establishes principles regarding the information that may be required (only information related and proportionate to the tasks entrusted to the Regulatory Authority). It also determines that the Regulatory Authority must provide reasons justifying a request and ensures confidentiality (where applicable and appropriate).

Given the sensitive nature of the issue, it would be legitimate to request that national governments respect the limits set by the Directive when introducing specific obligations for service providers.

ANNEX:

Postal Directive, Main provisions relevant for express services

Express services and postal services

The Postal Directive does not explicitly define express services as postal services, nor does it distinguish express from postal services (though it makes a specific distinction between express and *universal* services). Therefore, one can say the Directive does permit – but does not require – Member States to classify express services as postal services, and make them subject to postal regulation.

The distinction between services within and services outside the scope of the universal service (Article 9, 1997 as amended)

Member States are allowed to make the provision of postal services subject to an authorization and to impose specific requirements “*to the extent necessary*” to either ensure compliance with the “*essential requirements*” and/or to “*safeguard the universal service*”.

In this respect and since the 1st Postal Directive of 1997, a fundamental distinction applies for *services outside* and *services within the scope of the universal service*. This distinction is fundamental because the regulations a Member State may impose on a service provider regarding the services it provides, depends on the category the services in question fall into:

- For the provision of *services outside the scope of the universal service*, a Member State can only require a *general authorization*, meaning that no explicit or prior permission is needed in order to provide the service. The *conditions* that can be imposed through the authorization are limited to the “*essential requirements*”, i.e. Confidentiality of correspondence, security (transport of dangerous goods), respect of terms and conditions of employment, social security scheme, data protection, environmental protection and regional planning.
- For the provision of *services within the scope of the universal service*, a Member State may require a *general* or an *individual authorization* with an explicit or prior permission. And on top of the “*essential requirements*” a Member State can impose:

- Requirements re: quality, availability and performance
- An obligation to make a financial contribution to a compensation fund (for the universal service)
- An obligation to make a financial contribution to the operational costs of the National Regulatory Authority.

Express services are essentially distinct from universal services (Recital 18, 1997)

Though not giving a more detailed definition of express services, the EU's original 1st Postal Directive (1997) establishes that express services fall under the category of services that are outside the scope of the universal service. It explicitly determines the essential distinctiveness of express services from universal services as value added services:

“Whereas, in view of the fact that the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers, the most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay, without prejudice, however, to the price limit of the reserved area which must be respected.” (Recital 18)

In this respect it is noteworthy that the so-called 2nd and 3rd Postal Directives are in reality simply amending directives to the original Postal Directive of 1997. This implies that the provisions of the latter that have not been amended continue to apply. Accordingly, Recital 18 (of the 1997 Directive) remains valid.

This is supported by the statement given by the European Commission in the context of the adoption of new 3rd Directive, where they affirmed the applicability of Recital 18 and its distinction between express and universal services:

“The Commission confirms that in accordance with Recital 18 of Directive 97/67/EC and the consistent case law of the European Court of Justice (e.g. Case C-320/91 [Corbeau]), express and courier services constitute specific services that are characterized by being essentially different from universal service.” (Commission Statement Re Recital 27(COM (2007) 695 final))

The concept of inter-changeability (Recital 27, 2008)

A more general, conceptual approach for delineating services outside and services within the scope of universal services is provided by the 3rd Postal Directive. This is the concept of “inter-changeability”. Services are considered to fall *within* the scope of the universal service if they are from the **consumer’s perspective** substitutable to the universal service by reason of the **service characteristics** (including value added features), the **intended use** and the **price**:

“In order to determine which undertakings may be required to contribute to a compensation fund, Member States should consider whether the services provided by such undertakings may, from a user’s perspective, be regarded as services falling within the scope of the universal service, as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service, such as daily delivery or complete national coverage.” (Recital 27)

A closer look tells that the distinctness of express services from universal services established in Recital 18 (above) has been basically built upon the concept of inter-changeability: express services as from the customer’s perspective are regarded as value added services which is reflected in the higher price customers are prepared to pay.

Definition of express services (Case Law, 1989 onwards)

The concept of inter-changeability has not been invented for the purposes of the Postal Directive, but originates in the application of the competition rules where it serves for defining the relevant product market. Findings regarding the delineation of markets in competition cases are thus transferable to the Postal Directive.

Express services have been dealt with in a series of mergers and acquisition cases during the 90s and the first half of the 2000s, as well as in decisions by the European Commission in 1989/1990, under Article 86 of the EC Treaty (abuse of a dominant position, now known as Article 81). These cases have constantly confirmed that express services are essentially distinct from universal services. Moreover, a set of features characterizing express services (as compared to universal services) has been identified, to form a definition, so to speak.

Express services are found to be essentially distinct (as compared to universal services) through:

- Greater speed and reliability in collection, distribution and delivery and;
- some supplementary service features (see below) and;
- the extra price customers are willing to pay for the service.

Exemplarily, the definition given by the European Commission in the 1998 “Notice on the application of the competition rules to the postal sector” can be quoted:

“Express mail services”: a service featuring, in addition to greater speed and reliability in the collection, distribution, and delivery of items, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and addresses in transit; confirmation to sender of receipt of the item dispatched; monitoring and tracking of items dispatched; personalised service for customers and provision of an à la carte service, as and when required. Customers are in principle prepared to pay a higher price for this service.

Consumer Protection, Reporting/Information duties

There are a few provisions in the Postal Directive that apply irrespective of the category a service falls into (i.e. within or outside the universal service) and that would apply to express services if classified as postal services and subject to postal regulation.

- Consumer Protection, Complaint Procedures (Article 19, 2008)

The 1st Postal Directive required Member States to ensure that the (designated) universal service providers had appropriate procedures for dealing with customers’ complaints. With the 3rd Postal Directive, such complaint procedures have become mandatory for *all* postal service providers for *all* postal services which they provide:

“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), without prejudice to relevant international and national provisions on compensation schemes. Member States shall adopt measures to ensure that the procedures referred to in the first subparagraph enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation.” (Article 19 (1)).

Member States will therefore have to take measures to ensure that service providers have appropriate complaint procedures in place. However, the Postal Directive in no way implies that a Member State must set up an independent body (“ombudsman”) with a compulsory membership for postal service providers.

- ***Reporting requirements (Article 22a, 2008)***

The 3rd Postal Directive introduces explicit powers for Member States and National Regulatory Authorities to request information from postal service providers:

- Member States have to ensure that postal service providers provide all the information required by National Regulatory Authorities in order to ensure conformity with the Directive and for clearly defined statistical purposes (Article 22a (1))
- Postal service providers have to provide such information “promptly on request and in confidence, where necessary, with the timescales and to the level of detail required...” (Article 22a (2))

However, the information a National Regulatory Authority may require has to be “proportionate to the performance of its tasks”. And the Authority is bound to “give the reasons justifying its request for information” (Article 22a (2)). Requests “should be proportionate and not impose an undue burden on undertakings” (Recital 51).

Furthermore “confidentially” must be preserved where information is classified accordingly by the Authority, in accordance with Community and national business confidentiality rules (Article 22a (4)).