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## MINUTES OF THE POSTAL DIRECTIVE COMMITTEE MEETING

**BRUSSELS, 15 DECEMBER 2009**

### **1. OPENING OF THE MEETING**

On behalf of the European Commission ("the Commission") Mr. Kamil Kiljanski ("the Chairman") welcomed members of the Postal Directive Committee ("PDC") and opened the meeting.

The Chairman also welcomed the Candidate Countries and EEA representatives who, he recalled, participate as observers and are subject to the same degree of confidentiality as Committee members themselves. Participants were also informed of the mechanism of the meeting being a formal Committee Plenary meeting and that it differs from that of the informal Working group meetings.

In his opening address the Chairman informed those present that travel expenses were to be reimbursed. The Chairman also informed participants that the Power Point presentations of the meeting will be sent electronically to all participants after the meeting.

### **2. ADOPTION OF THE AGENDA**

The agenda was presented by the Chairman and was approved without comments.

### **3. MINUTES OF THE LAST MEETING**

The Chairman reported on the two comments that had been made to the Minutes of the previous meeting of 27 April 2009, section 4.2 State of Play, by Estonia and Poland.

According to Estonia, it should be taken into consideration that Estonia has introduced full market opening on 1 April 2009 through the new Postal Act (entered into force 1 January 2009) and Estonia considers that it covers the requirements of the 3rd Postal Directive.

Poland recalls that in its presentation was "stated, among others a) that the principles underlying the new Postal Act are expected to be approved by the Polish Government by the end of 2009, b) that it is possible to conclude the legislative works on the act by the

end of 2010. So in the context of 2010 refers to the probable conclusion of legislative proceedings, not to the FMO. By derogation to article 2, Poland notified the Commission the intention to postpone the implementation of the Postal Directive until 31 December 2012 and nothing changed in this matter."

Having taken note of these two comments, the Minutes of the previous meeting were approved.

#### **4. IMPLEMENTATION OF THE 3<sup>RD</sup> POSTAL DIRECTIVE**

Mr Denis Sparas (DES) (European Commission, Directorate General Internal Market and Services, Postal Services Unit) presented the state of play regarding the Member States' implementation of the 3<sup>rd</sup> Postal Directive and the Commission's activities.

While one can observe progress in the implementation, there are still certain issues that pose a challenge, such as

- The scope of the universal service,
- Excessive licensing requirements, and
- Allocation of costs and separation of accounts.

As part of Commission activities aiming at facilitating the implementation process, a High Level Conference will be held on 29-30 April 2010, and two sector studies will be carried out: (i) one on the main developments in the postal sector for the period 2008-2010 and (ii) the other on the external dimension of EU postal policy. Furthermore, there have been many useful bilateral meetings taking place, which has also been confirmed by delegations intervening (e.g. ES and FI).

##### **4.1 EXPERIENCES AND THE ROLE OF THE NRAS IN THE IMPLEMENTATION**

Under this item of the agenda Dr Annegret Groebel (Head of Department, Federal Network Agency/Bundesnetzagentur, Germany) made a presentation under reference to Article 22, and recital 47, of the Postal Directive.

She explained that the German regulatory authority was established in 1998, is independent from the Government as well as from the postal operators, and is responsible for five sectors: the postal market, telecommunications, railways, energy and transport. The Agency has used the telecommunications regulations as the role model for postal market regulations with a legislative purpose to promote competition and to guarantee appropriate and adequate services nation-wide.

There are several important objectives set out in the German Postal Act and with an overall strategy to achieve end-to-end competition, but also to create legal certainty as a solid base for investment plans and for stability. Experiences show that without adequate regulations, the dominant operator will most certainly try to abuse its significant market power. As regards the NRA's decisions, they shall be complied with even while challenged through an appeal because any delay always profits the dominant operator.

Among the mechanisms to achieve the above mentioned objectives there are rates regulations, holding two models for the application of ex-ante approval of tariffs by the regulator. One is based on a price-cap procedure and the other is based on the costs of an efficient service provision. Hereby, the regulator replaces competitors and can ensure that a price decrease is passed on to the customers. Concerning the German access

regulations, this obliges the licensee with a dominant market position to co-operate with other service providers, if there is a demand for access to the network or to certain facilities such as PO boxes etc.

To ensure transparency and non-discrimination the German regulator holds the power to have all contracts on incidental services and/or on shared infrastructure submitted for information. Additional control of anti-competitive practices is carried out through an ex-post mechanism which allows the regulator to intervene before the anti-competitive effects arise (faster than the competition authority), through a decision which is subject to proportionality test. This prevents the market from "tipping back" into monopoly.

Since 1 January 2008 the German postal market is fully liberalised but without any designated universal service provider. All licensed postal operators contribute to the provision of the universal services. After abolishing a monopoly, competition does not develop by itself and Deutsche Post AG had an estimated 88,2 % of the market shares in 2009 (89,6 % in 2008).

Dr Groebel emphasized (i) the importance of the regulators' independence as they play a crucial role in implementing the Postal Directive, (ii) co-operation and exchange of experiences between NRAs and, (iii) a need for consistent regulation in order to promote competition and create legal certainty.

The Chairman pointed out that transposition is not only the implementation of law, but it has practical complications as well such as ensuring the universal service and creating competition. He wishes to see the NRAs as gate-keepers.

Mr Robert Pochmarski (RP) (European Commission, Directorate General Internal Market and Services, Postal Services Unit) referred to the PDC Working Group meeting of 1 April 2009 on the issue of decisions that shall stand even when appealed, as otherwise regulatory powers of NRAs would be, unjustified, extremely limited and this would be against the spirit and wording of the Postal Directive. He also reiterated that the framework for implementation, including secondary legislation shall be in place on time.

Spain asked Dr Groebel if there are more operators with a dominant position in parts of Germany?

Dr Groebel responded that Deutsche Post AG is the only dominant operator and that the regulator would have to analyze the market and the competition. Dominance is defined in articles 101 and 102 of the Treaty on the functioning of the European Union (ex Articles 81 and 82)

Ireland reported that the Irish regulator publishes its strategy every other year. For several reasons Ireland has refrained from using the telecommunications sector as a role model and also underlined that the regulator should not favour one business model to another, and be careful about prices related to efficiency.

Dr Groebel does find that there are many similar problems in the two sectors but of course, we have to be cautious and allow the postal market to develop, and maybe in a different way than foreseen. But there is not much difference between state-owned incumbents in the two sectors, and independent regulators are needed in both sectors, just as quality is more important than price.

Italy expressed interest in knowing more about the independence of the German regulator in relation to actions taken by the government.

Dr Groebel described the regulators independence, at federal level, under the Ministry of Economics, and how the regulator only has to comply with court decisions while not being subject to any political guidelines. The regulator's own decisions are collective decisions, taken in a special chamber by civil servants. On top of this, there are administrative procedures.

Germany made a comment on the strategy. Due to current uncertainties with regard to the developments in the German postal market, it is left open what kind of competition to promote.

Dr Groebel pointed out that the problem of high minimum wages in the German postal sector is outside the powers of the regulators. The legal disputes have yet not been settled and the current Ministerial Regulation expires on 30 April 2010. It has a very obvious effect on the labour market as it is a labour intensive industry where competitors have difficulties to reach a break-even point. Such an instrument, as an agreement on high minimum wages, acts against the opening of the market.

Belgium asked if the rates approval that is being applied, also includes discounts.

Dr Groebel replied that the German regulator in general monitors discounts, to make sure that they are justified and cost-based as discounts easily can be used in an anti-competitative manner.

The Chairman stressed the importance of regulators sharing experiences.

## **4.2 FEEDBACK FROM PDC WORKING GROUPS**

Following the presentation by Dr Groebel, the Chairman referred to the **Working Groups of the Postal Directive Committee** which were established by the PDC Plenary meeting of 7 April 2008. This was a new mechanism, designed to establish best practice amongst Member States' legislators and Postal Regulators and to give guidance on how best to implement the 3<sup>rd</sup> Postal Directive and to prepare for full market opening: together, i.e., with all Member States and the European Commission, and with the help of external experts and all Commission services concerned.

### FEEDBACK FROM PDC WG V (3 JUNE 2009)

Ms Kristin Hentschel (KH) (European Commission, Directorate General Internal Market and Services, Postal Services Unit) provided feedback from PDC Working Group V of 3 June 2009.

The meeting focused on market monitoring and customer protection. Under the first topic it highlighted in particular the importance of market information as an essential tool for **market monitoring**. Implementing Article 22a of the Postal Directive into national legislation will ensure the legal basis for the collection of relevant information from all postal operators on issues such as the provision of universal service, financial aspects, and statistics whenever requested by the National Regulatory Authority (NRA). In this context, the confidentiality of data is often mentioned as an obstacle, but it can not per se

be used as a reason to withhold information. Any competent authority requesting information is also responsible for protecting data of a confidential nature.

As a second topic the meeting addressed **Full Market Opening and Customers** and referred to Article 19 of the Postal Directive. Under this article all the postal service providers are obliged to deal with postal users' complaints under transparent, simple and, inexpensive procedures to be monitored by the NRAs. Easily accessible information e.g. on the Internet, shall be provided to make users aware of their right to complain.

#### FEEDBACK FROM PDC WG VII (12 OCTOBER 2009)

This was followed by Ms Ana Peralta Baptista (APB) (European Commission, Directorate General Internal Market and Services, Postal Services Unit) who provided feedback from PDC Working Group VII of 12 October 2009.

Under the topic of **Allocation of costs and Separation of accounts** the meeting covered all the important aspects that constitute the need for cost accounting. If the regulator shall be able to monitor, and establish that tariffs for the provision of the universal service are cost-based and non-discriminatory, there needs to be separate accounts for universal services and non-universal services, as well as for reserved services and non-reserved services. Moreover, in order to ensure that prices are geared to costs, accounts should be separated for each of the reserved services. Under the principles of cost accounting, attention should be paid to respecting the principle of causality and origin of costs. Additionally, when allocating the costs the same method of cost accounting should be used for all services. It was demonstrated during the meeting that the NRAs have numerous tasks under the postal acquis and it is essential therefore to provide sufficient resources, in order for them to efficiently carry out their tasks. Very often there is insufficient data provided by the postal operators and no common definitions for types of costs which results in different cost allocation exercises.

Cost accounting is an essential source of information, not only for the regulators' monitoring, but also for assessing if the universal service obligation is a burden or not. However, a number of issues remain to be handled in applying the tariff principles and the cost accounting principles laid down respectively in Articles 12 and 14 of the Postal Directive, such as the lack of a system of accounts, lack of separation of accounts, and a lack of knowledge concerning the real costs.

The Netherlands informed the meeting that a paper with information on cost allocation is being prepared for the next Rutgers conference on regulated markets.

### **4.3 STATE OF PLAY – MEMBER STATES TOUR DE TABLE**

With the aim of having a better picture of the state of play regarding the implementation of the Postal Services Directive, the Chairman asked Member States, including EEA and Candidate countries, to indicate progress and planning towards the transposition of the 3<sup>rd</sup> Directive.

Austria informed the Committee that the new postal law has come into force, however with issues concerning post offices and post boxes in residential houses, still to be resolved. This is done with the assistance of the Commission.

Belgium drafted its new postal law in early 2009 which then was subject to public consultation. The Government has since revised the proposed law and the legislative procedures will take place in 2010.

Croatia has adopted a postal law which came into force on 3 November 2009 implementing the Postal Directive. Barriers to entry have been reduced. Changes have been carried out to the scope of universal service, excluding money orders, courier services and hybrid mail. Amendments have also been made to the licensing and registration regime. There are two types of individual licences: individual licences given to the designated operator and individual licence given to operators that provide services within the scope of USO. Non universal services, with exception of money orders, will be provided under notification regime. Only the USP can provide universal services.

The Czech Republic is implementing the 3<sup>rd</sup> Postal directive through amendments to the existing postal law. Seminars are being organised to cover topics such as quality issues, as well as on universal postal service. A bilateral meeting with the Commission is envisaged by the Czech Republic.

Denmark envisages Full Market Opening by 1 January 2011. The Minister for Transport will discuss exactly how it will be achieved.

Germany is in the process of amending its postal law to the provisions of the Third Postal Directive but as it is only small corrections, it does not cause any political debate. Through the new rules the regulatory provisions will be reinforced. Further, some fiscal advantages are being foreseen as all providers of universal postal service will be subject to a new tax (the current fiscal provisions for DP will be suspended).

Estonia abolished the reserved area through legislation that came into force on 1 April 2009 and reports that the Third Postal Directive has been implemented. The new law is available in English at the Ministry's website.

Ireland, represented by the national regulatory authority ComReg, reported that there will be a strategy document published every other year ensuring a transparent regulatory policy. The consultation that took place in 2008 is now making way for the new legislation which is being prepared (current legislation dates from 1908).

Lithuania indicated that they had a work group set up in September 2009, which is expected to present a draft law in April 2010. Full Market Opening is envisaged for 2013, at the latest. There are discussions on possibility to start earlier but it is not probable.

Latvia's new postal law was approved by Parliament in July 2009. Regulation on the compensation for the net cost of the universal service is planned to be in place by the end of 2012.

Cyprus is working on the provisions of the postal law and is concerned about the financing of the universal service, access rules and monopoly abolishment, as the Parliament will vote on the draft law. The transposition will take place by the end of 2011.

Italy stated that its postal reform is subject to consultation and that an implementation date of 31 December 2010 is foreseen and this has been communicated to the commission. There will be a public consultation process and legislative text will be

presented to the EC. Italy envisages that there will be 6 months left to the Government to complete the transposition.

France, represented by the national regulatory authority ARCEP, described that stock-taking exercises are carried out and drafts aimed at improving the legislation are being prepared. Aspects of the universal service and compensatory measures such as taxes are issues to be solved.

Spain reported on transposition during Q1, 2010 and also mentioned the Ministry's close cooperation with other member States.

Greece is, during its work with a draft law, launching a market survey on consumer needs.

Poland is preparing a draft new law and holding public consultations. Full Market Opening is being delayed and foreseen for 2013.

The Netherlands, represented by OPTA, introduced FMO on 1 April 2009 through a new Postal Act. A well-functioning market monitoring is in place. Cost-oriented rates are among the important topics being discussed and a case concerning employment conditions is pending in court. Some problems are: (i) OPTA didn't receive enough information from the incumbent to set cost oriented prices and (ii) the law foresees that employees of postal competitors should be employees and not entrepreneurs, fact that poses difficulties to many competitors in the Dutch market.

Malta reported on Full market Opening by January 2013. A bill for amendments of the postal law was presented in the parliament in November 2009.

Hungary indicated that a postal strategy is being formulated and decisions are to be taken on which financing mechanism to choose.

Luxemburg is preparing for Full Market Opening in January 2013. A working group has been appointed which will propose a draft law. There are still no texts available.

United Kingdom, represented by Postcomm, indicated that the postal bill was dropped in July 2009. There will be elections in 2010 and thus, some uncertainty regarding what will happen. In May 2010, they will be consulting on some issues, such as cost transparency, affordability and definition of USO.

Sweden referred that the consultation period for the proposed amendments to the postal law is over and that a Government bill will be presented to Parliament in March 2010.

Finland indicated that a working group has been discussing issues such as: definition of USO, financing, cost accounting. The deadline for amendments is February 2010. The draft law will be given to the Parliament before summer 2010 and new legislation to be in place by autumn 2010. The main issues are the definition of universal service and the financing of any net costs of universal service, together with designation. Finland thanked the Commission for participating in the seminar that was organized in Helsinki early December 2009.

Slovenia is preparing to open the postal market to competition by 1 January 2011. Both a new postal law and secondary legislation is being prepared.

Slovakia started its implementation process in 2008 with studies on the scope of the Universal Service, financing mechanism etc. Legal changes regarding hybrid mail will be presented to Parliament in July and in September 2009. FMO is envisaged for 1 January 2013.

Romania reported that it has the aim of implementing the 3<sup>rd</sup> Postal Directive as soon as possible through a new postal law.

Portugal informed the Committee that ANACOM is preparing a memo for the Government on what concerns the new postal legislation and that a meeting with the Commission already has taken place. They indicated that market opening is foreseen for January 2011.

The Chairman concluded that the Tour de Table shows that obviously a lot has happened since the previous Committee meeting and that both primary and secondary legislation is being prepared in Member States. He also extended his thanks to Member States for hosting bilateral meetings.

## **5. APPLICATION OF VAT IN THE POSTAL SECTOR**

Mr. Denis Sparas (DES) informed the Committee about the latest developments concerning VAT on postal services. Since the Committee meeting in April 2009 there have been a Council Working Party meeting in July when the Swedish Presidency resumed negotiations on the pending proposal for amendments to the 6<sup>th</sup> VAT Directive 77/388/EC.

The three infringements that the Commission launched in 2006 against Germany, Sweden, and the UK cover the whole range of applications of the exemption for postal services in the VAT Directive.

As interpreted by the Court of Justice of the European Union (ECJ) in its decision in the case C-357/07 – TNT Post UK (23 April 2009) the VAT exemption should have a strict interpretation and apply to universal postal service but not to agreements that have been individually negotiated. A large number of Member States will have to change their legislation on VAT.

As the notion of supplies for which the terms of agreement have been individually negotiated, is unclear and the views on this differ among Member States, four different options have been introduced by the Commission (DG TAXUD) in a working paper. This paper covered the following issues: (i) the scope of the exemption, (ii) the notion of the term "undertaking" and finally (iii) the notion of the term "individually negotiated terms". There were so far only limited results from the Council Working Party and the status of the proposal is still unclear. An ECOFIN meeting took place in December 2009 concluding that the next Presidency should follow up on the work previously done and a document of "guidance" will be prepared for the next meeting in May 2010.

Ireland referred to the requirement for unanimity in the case of VAT and that it is very hard to reach. At the same time, there is a need for harmonised measures in a liberalised postal market. A definition of the term "individually negotiated agreement" can be found in the Treaty. Also to be noticed is the lack of postal experts in the VAT Working Group.

The Chairman (Mr Robert Pochmarski, European Commission, Directorate General Internal Market and Services, Postal Services Unit, during this part of the Committee meeting) informed the Committee that DG MARKT, Unit E4 had taken the floor during the VAT Working Group meeting. He expressed some optimism with regard to tax harmonisation and the creation of an Internal Market.

## **6. INTERNATIONAL POSTAL DEVELOPMENTS**

### **6.1 FEEDBACK FROM PDC WG VI (15 SEPTEMBER 2009)**

Under this item of the agenda Mr Denis Sparas (DES) (European Commission, Directorate General Internal Market and Services, Postal Services Unit) provided feedback from PDC Working Group VI of 15 September 2009 which focused on the external dimension of EU postal policy. Presentations were made on a number of topics related to this headline.

Concerning **the interface between UPU and Community Law** some provisions were highlighted as they adopt different, and sometimes even inconsistent, approaches to the key legal principles. Such principles are e.g. the independence of regulators, ensuring universal service, and government aid to enterprises and sectors. The PDC WG was also informed about **the main issues for the CA Plenary** meeting in November 2009, and of the work done by the various project groups under Committee I. Cross border mail and increased competition world wide requires an intergovernmental organisation such as the UPU. In order for members to have any influence over the UPU Congress in Doha in 2012, the European governments and regulators should engage in the work of the CA now. Preparations for the UPU meeting in Nairobi in 2010 and for the next Congress have already started. These issues are also being discussed in the CERP Project Team Policy.

DES also informed the Committee about the study that the Commission is launching on the external dimension of EU postal policy and about the public workshop on 25 January 2010.

Mr Dammann/CERP raised the issue of new areas that the UPU is entering into and he gave the example of the top domain .post which he would think is for governments to offer to companies.

Ireland informed the participants about the information notice on terminal dues that was prepared by ComReg and will be published on its website.

### **6.2 UPU/COUNCIL OF ADMINISTRATION PLENARY MEETING, NOVEMBER 2009 IN BERN**

Mr. Egil Thorstensen (Ministry of Transport and Communications, Norway) made a presentation on the UPU and the Council of Administration (CA). In the Terms of Reference, which can be found on the UPU website, is stated that the CA e.g. shall supervise the activities of the Union between Congresses, ensure compliance with the decisions taken by Congress, study questions with respect to governmental policies on postal issues, and take into account international regulatory developments related to trade and competition.

As for the work of Committee I, it deals with Governance Issues and the many important tasks performed by the following project groups (i) Reform of the Union, (ii) Acts of the Union, (iii) Universal Postal Service, (iv) Interconnectivity, and the issues project group Terminal Dues Governance. The project group Reform of the Union, chaired by Belgium, is studying a possible new model for the restructuring of the Union and an *ad hoc* group will look into a questionnaire on the reform. To bear in mind is that Committee I deals with issues that have an impact also on new market players. On the agenda is thus the future role of UPU and a lot of the discussion is dedicated to extra-budgetary activities. Another project group of certain importance to European countries is the Terminal Dues group.

Mr Thorstensen concluded by saying that the UPU is needed as long as there is cross-border mail. In almost two a half years the next UPU Congress in Doha will take place, from 25 September to 15 October, 2012. In order to influence the future decisions of the UPU

The Chairman thanked everyone who had made contributions in the meetings of the Working Groups.

## **7. AOB**

The Chairman informed the Committee about the following.

- The kick-off meeting for the Commission's two new studies will be held on 25 January 2010.
- The dates for coming PDC Working Group meetings were announced (*COM's comment: please notice that the next PDC WG meeting has been rescheduled for 22 March 2010*).
- Commissioner Michel Barnier will host the Commission's second High Level Conference on postal services, which is being organised together with the Spanish Presidency, and it will take place in Valencia, Spain on 29-30 April 2010.

## **8. CONCLUSIONS**

The Chairman thanked everyone and confirmed that the Minutes of this plenary meeting will be circulated to participants for comments.

Kamil KILJANSKI and  
Robert POCHMARSKI  
Chairmen of the Committee

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