



Brussels,
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Subject: Portuguese Draft Law under Public Consultation

The Portuguese Ministry for Public Works, Communications and Transports (MOPT) has published the draft Law transposing the Third Postal Directive in its website for Public Consultation in the last week of December. The Consultation period will last until 11 January. After that the draft Law will be revised, sent to the Council of Ministers and only then sent for the Parliamentary procedures. MARKT/E4 is meeting the MOPT in Lisbon on the 12 of January in order to discuss the details of the draft law, provide comments and clarify remaining open issues and questions.

The most important issues to be discussed are:

- Exclusive rights given to the designated operator
- Definition of sorting
- Scope of USO: bulk mail is outside of USO
- Prices: notified by the USP, agreed by the NRA
- Financing USO through Public Funding and Compensation fund: unclear in which cases and how these mechanisms will apply.
- Designation through concession contract: CTT Correios until 32/12/2025
- Timings and next steps

1. ART 2 - DEFINITIONS

- The draft law provides a definition of essential requirements seen as reasons of general (public) interest and being of non economic nature which can lead to the imposition of licence conditions on the postal service providers.
- The definition of sorting also raises some questions as it is defined as preparation of postal items, by a postal services provider, for its transport until the distribution centre of the area to which they are destined and it is not clear what implications this may have for mail preparation firms, which are traditionally treated as being outside the scope of postal *acquis* (separate relevant market).

Regarding the first definition, the Commission would like to clarify the scope of these conditions and criteria used to assess compliance with them.

On what concerns the definition of sorting the Commission would like MOPT to clarify, on the one hand to which exact activity does it refer to (sorting or mail preparation done before collection); and on the other hand if this definition means that a company providing mail preparation is considered to be a postal service provider.

2. ART 3 - EXCLUSIVE RIGHTS

The draft law foresees the reservation of exclusive rights to the designated provider. These rights entail: setting of mailboxes on the public way, issue and sell of stamps with the mention "Portugal" and provision of services of registered mail used in judicial or administrative proceedings, according to the national law.

The Commission is of view that the exclusive rights, if given at all, should be duly justified (Article 8 and Recital 20) and should not be given directly to the designated universal service provider. Conversely, it would be more transparent if it would follow a public procurement procedure. Additionally, Portugal should also justify the attribution of exclusive rights to a certain operator, in accordance to recital 20 (reasons of public order and public security).

In view of this, it would be useful to understand the definition of "designated provider" in the sense of this article (e.g. designated USP; separate designation).

3. ART 5E) – ESSENTIAL REQUIREMENTS

The article defines the safeguard of essential requirements in the provision of postal services. One of these requirements is the territorial organization, environment protection and patrimony.

The Commission is interested in understanding the reason behind adding this requirement in the article and its exact scope (e.g. conditions), as it is unclear and may lack transparency in view of the provision of the postal services.

4. ART 13 – SCOPE OF USO

The Portuguese draft law foresees a USO every week day at least once a day at the home premises of the recipient or in appropriate installations previously defined with the NRA. The universal service includes: letter post, books, newspapers, other periodical publications until 2 kg and postal parcels until 10 kg, as well as register mail and insured items. Postal parcels until 20 kg originated from other MS where these services are within the US, are also included in the US. The draft law excludes the following services from the US: direct mail, postal items which conditions are negotiated, postal items which provision obeys to special requirements, namely as to preparation conditions and presentation of sent items and/or delivery place for acceptance or in function of its quality.

Regarding the previous services the Commission would like MOPT to clarify in which exact conditions this case shall apply, if it refers to mail preparation activities and if, and when, this exclusion would assume that mail preparation would be within postal services activities.

5. ART 15 – PRICES

The USP must notify the prices of US to the NRA, including any modifications foreseen. The NRA has 15 days, in case prices don't comply with the principles of transparency, cost orientation, accessibility and non discrimination, to ask the USP to revise the prices. The NRA can determine, by reasons of public interest that the price of postal items below 50 g obeys are uniformed.

On what concerns the applicability of uniform pricing, the Commission would like that MOPT clarifies why in the draft law the possibility of applying uniform price is only referred to mail below 50g. Furthermore the Commission would like to remark that the deadline provided to the NRA for assessment of the prices may be too short in view of the scope of the assessment that needs to be carried out by the NRA.

6. ART 16 – ACCOUNTING

The draft law transposes article 14 of the Directive (number 1-3), additionally defining that in case other accounting systems are applied (according to number 4 of article 14 of the Directive) the NRA has a deadline of 60 days to approve them under the proposal of the USP.

In our view the deadline provided to the NRA might risk to be too optimistic, as understanding an accounting system proposed by an operator can be a lengthy and detailed task, which can also call for an independent outside expertise. Moreover, the Law does neither clarify which accounting system will be used not who and how will define it.

7. ART 18 – COMPENSATION OF THE NET COST OF US

The draft law indicates that the NRA has the competence to define what unfair financial burden is, giving it a period of 120 days after the entry into force of the Law to present this concept and define the methodology to determine it. Moreover, the Law requires the USPs to send the request for compensation to the Government and to the NRA, in case it determines the existence of net costs and of unfair financial burden. A period of 90 days is then foreseen for the NRA to pronounce its agreement or refusal. The NRA also defines the methodology applied in the calculation of net cost of USO within 120 days (Art 20).

We would like to request MOPT to clarify the reasons for the submission of the information on the net costs and unfair financial burden by the USP to the Government as this information will be primarily for the NRA to assess. This is even more the case from the point of ensuring the independence of the NRA and the separation of regulatory functions from the exercise of the ownership control.

In addition, once again we question whether the period of 90 days given to the NRA to confirm the existence of unfair financial burden, is not too short.

8. ART 20 – FINANCING USO

Public Funding and compensation fund are both defined in the draft law as mechanisms that can be used to finance the net costs. It is the competence of the Government to define which mechanism is to be used (e.g. one of them; both). The Compensation fund can be financed both by USPs and postal service providers as well as by users, with the compensation criteria to be defined by the Government. The fund is to be managed by the NRA or another independent entity designated by the Government and under the supervision of the NRA. A period of 30 days has been defined for the payment of the compensation to the USP.

The Commission would like that MOPT clarifies the compensation method to be used and the co participation criteria to the fund, that are to be defined by the Government, including where and when this information will be published. Moreover, we raise the possibility of the NRA to provide these definitions instead of the Government. The inclusion in the draft Law of the possibility of an independent entity, aside from the NRA, to manage the fund also raises some questions to Markt/ E4. Finally, the deadline given for the payment might once again be too short, especially taking into account the time framework for the assessment of State Aid notifications by DG COMP. Additionally, Portugal must also take into account that as competition within the scope of USO is almost inexistent there is a big chance that the biggest part of the financing of the USO costs will be done by public funding, thus giving price regulation a crucial role.

9. ART 22.3 – GENERAL DISPOSITIONS

The provision of postal services is subject to individual license or general authorisation, according to the type of services offered (within the US or outside the US). In addition, the law mentions that the entity that intends to provide postal services in Portugal for more than one year must establish a permanent representation and comply with the Portuguese Law on registries.

The Commission would like to understand why this mention is included in the draft law and clarify if it represents a non-compliance with the Services Directive.

10. ART 23- UNIQUE COUNTER

This article envisages that all communications and notifications foreseen in this section of the law are to be made electronically, through the counter for unique electronic services (Art 6 of Decree-Law 92/2010 of 26 July).

We would like to understand the scope and meaning of this provision of the draft Law.

11. ART 25 – REQUIREMENTS FOR THE ATTRIBUTION OF AN INDIVIDUAL LICENCE

Included in the requirements defined in this article are: a) entities which constitute a commercial society, whose social object includes the provision of postal service as economic activity; b) entities that dispose of technical and human means which are adequate to the accomplishment of the obligation related to the activity, namely those which assure the respect for the requirements defined in article 5 and the rights of the users.

We find that the definition of nature of commercial society is unclear and that the wording used in Art 32 for the same concept is clearer and more complete. We suggest changing it. Additionally, the Commission thinks that the requirement described in b) is very unclear and can lead to misinterpretation and would need to be further clarified either in the explanatory memorandum to the law or in the secondary legislation.

12. ART 29 – PERIOD AND RENOVATION OF LICENCES

Licences are given for a period of 15 years and its renovation can be authorized by the NRA for the same periods.

We would like to understand if the issuance of individual licences in the scope of this article refers to the designated UPS or to other operators operating within the scope of USO. Furthermore, the Commission would like MOPT to clarify why the period chosen to attribute a license is 15 years.

13. ART 31 – TRANSMITTING LICENCES

This article declares that licences can be transmitted prior to authorization by the NRA.

The Commission would like to request MOPT to clarify this concept.

14. ART 33 – PROCEEDINGS

Authorizations will not be given to i) entities which have been given an authorization or a licence, but the respective titles have been suspended or cancelled and ii) entities which directly or indirectly own, or participate in entities in the previous position.

The Commission would like to clarify the reason behind these restrictions and ask whether this is not too restrictive in the licensing process to limit the licence for indefinite period in case of a breach.

15. ART 35- RIGHTS OF POSTAL PROVIDERS

Amongst several rights of postal service providers there is the celebration of contracts with third parties in order to maintain operations which include the postal services they provide, namely transport and distribution of postal services.

We would like to clarify the meaning of this right and understand if it has any link with mail preparation operations and indication that the latter *de facto* represent postal services.

16. ART 37 – ACCESS TO POSTAL NETWORK

This article defines that agreements which have been concluded by the universal services providers to ensure access to its networks should be communicated to NRA on its request and within 10 days. The NRA can (i) determine that the USPs publish the network's access terms and conditions, including the prices or (ii) determine the access to the US network and the terms of conditions, in case of failure of agreement between the parties.

The Commission is of view that the agreements should be directly communicated to the NRA, without the need for request by the latter. It further thinks that the terms and conditions of network access should be published without the need for request from the NRA, and that the designated US operator should have a template contract of the terms and conditions of access to the network (transparency and legal certainty).

17. ART 44 – FEES

Several activities, such as issue, modification or renovation of a licence, inscription in the registry of postal services providers are subject to payment of fees. The amounts of the referred fees are to be fixed by the Government, according to costs associated to administrative, technical and operations tasks related with supervision and to be included as revenue of the NRA.

We think that this information should be more clear and transparent.

18. ART 53 – CONCESSIONARY

Portugal maintains the designation of the current concession company CTT Correios until 31 December 2025. The quality and price agreement will stay into force until the approval of art 14 (nr. 1) and art 15 (nr. 3). CTT Correios should inform the NRA, within 30 days after the entry into force of this draft law.

The Commission thinks that this article should also include a mention on the exclusive rights given to the designated operator.

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