

Prices and Conditions of Access to the Postal Network: The Principle of Non-Discrimination



Til Rozman

1 Introduction

Access to an incumbent postal operator's (PO) delivery network is an instrument for promoting competition in the postal services market.¹ Competition should create more choices for postal users, reduce prices and improve quality.² However, compared to other network industries, the postal sector has numerous differences including low sunk costs,³ the questionable applicability of a "ladder of investment" theory,⁴ and a reduced risk of market failure.⁵ In addition, the letter market is declining and thus becoming less attractive for new entrants. Therefore, positive effects of (mandatory) access to the postal network should not be presumed. Access to the PO's network is not only provided to alternative postal operators but also to businesses, bulk mailers, consolidators and other entities that provide services involving mail preparation and/or carrying out part of the distribution process. POs often offer rebates, most typically based on volume and operational work-sharing and presorting activities.

This chapter does not necessarily reflect the views of the institution that the author belongs to.

¹Parcu and Silvestri (2017, p. 29). See also Recital 34 in the preamble to the PSD 2008/6/EC. See also the ERGP Report (2016, p. 3).

²See for instance the European Commission webpage http://ec.europa.eu/competition/general/overview_en.html (penultimate sentence in the first paragraph).

³Geradin (2015, p. 9).

⁴Ibidem, p. 3.

⁵Parcu and Silvestri (2017, p. 27).

T. Rozman (✉)

Agency for Communication Networks and Services of the Republic of Slovenia, Ljubljana, Slovenia

e-mail: Til.Rozman@akos-rs.si

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Promoting access-based competition may chill innovation and harm investment incentives; whereas, promoting mixed bypass competition may threaten the financial sustainability of universal service obligations (hereinafter the “USO”). Two alternative but not necessarily exclusive⁶ policy approaches, competition law (*ex post*) and sector specific regulation (*ex ante*), address access issues. The principle of non-discrimination is firmly embedded in the very core of the competition law and (postal-) sector specific regulation of access. In the EU, Article 102 Treaty on the Functioning of the European Union⁷ and Articles 11, 11a and 12 of the Postal Services Directive (hereinafter “PSD”)⁸ form the relevant legal bases. This chapter deals with the regulatory side.

From the perspective of the principle of non-discrimination, this chapter addresses the relation between access prices and rebate arrangements and associated conditions. Building on a legal analysis of the relevant EU jurisprudence, the aim of this chapter is to answer the following hypothetical question: Does the principle of non-discrimination oblige the PO to grant identical quantity and operational rebates for access-seeking operators⁹ (hereinafter “ASOs”) and business senders (hereinafter “BSs”), if they both deposit the same volume of equally pre-sorted postal items at the same access points?

This chapter is organized as follows. Section 2 explains the content of the principle of non-discrimination and highlights its importance as one of the general principles of EU law. Section 3 identifies, analyses and synthesizes relevant EU postal-sector specific parts of the legal framework to assess rebates. It distinguishes legal economic reasoning for granting quantity rebates from operational rebates. Section 4 shows three possible but mutually exclusive interpretations of the principle of non-discrimination and clarifies how to properly apply the principle of non-discrimination to ASOs. Section 5 explains why, instead of a mechanical application of the relevant jurisprudence, a *mutatis mutandis* approach recognizing necessary changes is advisable. This section identifies a non-exhaustive list of arguments supporting lower tariffs and/or more favorable associated conditions for either BSs or ASOs. Section 6 concludes that different interpretations of non-discrimination enable flexibility but should not lead to arbitrariness.

⁶Competition law and regulation address some of the same market problems and the use of one does not necessary exclude the application of the other (Dunne 2015, p. 56).

⁷OJ C 326, 26/10/2012, pp. 1–390.

⁸OJ L 15, 21.1.1998, p. 14, OJ L 176, 5.7.2002, p21, and OJ L 52, 27.2.2008, p. 3.

⁹For the purpose of this chapter, expression “access-seeking operator” refers to mixed-by-pass and access-based alternative postal operators.

2 Non-Discrimination as a General Principle of EU Law

The principle of non-discrimination is not a postal-sector specific principle. It is a general principle of EU law.¹⁰ Therefore, to provide the “big picture” and to properly apply this (general) principle to the postal sector, we need to address the role of the principles as compared with the rules in the law (Sect. 2.1) and the content and significance of the principle of non-discrimination as a general principle of EU law (Sect. 2.2).

2.1 *The Role of Principles as Compared with Rules*

Most often, law is defined as a system of legal rules and legal principles.¹¹ Some of the rules and principles are codified, whereas others are developed through jurisprudence. From the perspective of this chapter, the most important difference between rules and principles is that rules should not conflict, whereas principles often do conflict.

The content of rules should be unambiguous and two conflicting rules cannot coexist since one of them is not valid.¹² In contrast, the content of principles is broad and equivocal. The role of principles is significant in the legal syllogism, *i.e.* the process of, first, assessing the facts of the case (minor premise) and the legal rule(s) (major premise) and, secondly, connecting the minor premise with the major premise, thus making a legal decision/conclusion. Legal rules should be interpreted and applied within the spirit of the principles. In other words, the principles play an essential part in the arguments supporting legal decision. The existence of two conflicting principles does not require a court’s declaration that only one of them is valid. The court and/or the National Regulatory Authority (NRA) weigh(s) the importance of potentially conflicting principles with flexibility, since the relative importance of principles changes.

2.2 *The Content and Significance of the Principle of Non-Discrimination as a General Principle of EU Law*

In the jurisprudence of the Court of Justice of the European Union (hereinafter the “Court”), non-discrimination has been established as a general principle of EU

¹⁰Craig and de Búrca (2015, pp. 564–566).

¹¹This understanding of law is prevalent in a legal theory and has strong backing in one of the most influential legal theorist, Ronald M. Dworkin. See *e.g.* Dworkin (1967).

¹²Interpretation rules decide which of the conflicting rules is not valid. The most commonly used interpretation rules include, *lex superior derogat legi inferiori*, *lex posterior derogat legi priori*, *lex specialis derogat legi generali* etc.

law.¹³ The EU legal framework and the jurisprudence of the Court have increasingly relied on equal treatment as a general principle of EU law.¹⁴ All EU laws and measures must be read in the light of the principle of equal treatment.¹⁵

The general principles are part of the primary EU legislation, meaning that, on the one hand, they sit below the constituent Treaties and can be used when interpreting particular Treaty Articles. On the other hand, they sit above secondary legislation and can be used not only to interpret such acts, but also as a ground for invalidation in case secondary legislation contravenes these principles. This significant role of the general principles of EU law derives from the jurisprudence of the Court.¹⁶

Since non-discrimination is a general principle of EU law, its content is the same in all (postal and non-postal) settings. Similar situations must not be treated differently unless such treatment is objectively justified, but different situations can be treated in the same way.¹⁷ It follows that prohibition of discrimination is not absolute. Infringement of the principle of non-discrimination is committed only when discrimination is not justified. Thus, discrimination may be justified and permissible.¹⁸

With regard to the postal sector, the principle of non-discrimination applies to all public authorities acting in the exercise of state authority (*iure imperii*), e.g. Article 11 PSD applies to the European Parliament and the Council, acting on a proposal from the European Commission and Article 11a PSD applies to member states (hereinafter “MS”). In addition, to applying to the state or to agencies of the state, the principle of non-discrimination applies also to treatments between private parties. As a private party and according to the fifth indent of Article 12 PSD, the PO is, when using special tariffs, obliged to apply them non-discriminatory.

The most challenging part of applying the principle of non-discrimination is to find whether two situations are comparable. To answer this question, the relevant factor for the comparison must be identified. If they both deposit the same volume of equally pre-sorted postal items at the same access points, an analysis of the relevant legal framework is necessary to determine any factor for comparing treatment of ASOs and BSs.

¹³Craig and de Búrca (2015, pp. 550).

¹⁴Craig and de Búrca, EU Law, Oxford, sixth edition, 2015, pp. 932.

¹⁵Case C-401/11 Blanka Soukupová v Ministerstvo zemědělství.

¹⁶A category of general principles of EU law was affirmed for the first time in the *Stauder v City of Ulm* (Case 29–69).

¹⁷Case 117/76 and 16/77 *Albert Ruckdeschel and Others v Hauptzollamt Itzehoe*, paragraph 7. See also Case, C 441/12 *Almer Beheer BV and Daedalus Holding BV v Van den Dungen Vastgoed BV and Oosterhout II BVBA*, paragraph 47.

¹⁸From the economic point of view, nondiscriminatory (monopoly) prices can harm consumers more than do discriminatory prices.

3 Relevant EU Legal Framework

The relevant EU postal-sector specific legal framework to assess the meaning of the non-discrimination principle in this context comprises PSD (Sect. 3.1.) and the leading judgments of the Court (Sect. 3.2.).

3.1 *Articles 11, 11a and 12 PSD*

General

The aim of universal service (hereinafter the “US”) is to make all users able to easily use the postal network, especially through a sufficient number of letter boxes and post offices and by ensuring satisfactory conditions with regard to the frequency of collections and deliveries.¹⁹ Postal items may be deposited with the postal network by senders.²⁰

Three Articles in the PSD are relevant for our assessment. Article 11 governs downstream access, Article 11a deals with access to the elements of postal infrastructure and provides a non-exhaustive list of such elements, whereas Article 12 sets out tariff principles applicable to each of the services forming part of the US.

Downstream Access

Article 11 PSD governs downstream access and permits adoption of harmonizing measures necessary to ensure that users and postal service providers have transparent and non-discriminatory access to the postal network concerning access to the delivery network. Such measures have not been adopted by the EU; therefore, regulation of this issue is subject to MS discretion.²¹

Access to the Elements of Postal Infrastructure

Article 11a PSD provides an instrument for MS to ensure that transparent and non-discriminatory access conditions are available to the elements of postal infrastructure or services provided within the scope of the US. The aim of this Article is to ensure that all MS assess whether some elements of the postal infrastructure or certain services generally provided by the POs should be made accessible to other

¹⁹Recital 12 in the preamble to the PSD 97/67/EC.

²⁰Point 3 of Article 2 PSD.

²¹Okholm et al. (2012, p. 229).

operators providing similar services, in order to promote effective competition, and/or protect all users by ensuring the overall quality of the postal service.²²

Tariff Principles

Article 12 PSD sets out tariff principles applicable to each of the services forming part of the US and requires, *inter alia*, that tariffs and special tariffs granted by the PO must be provided in a transparent and non-discriminatory way. The aim of the tariff principles is to guarantee financial equilibrium of the USO and to limit market distortions. The US prices must reflect normal commercial conditions and costs and can depart from them only when necessary to protect public interests. For example, this Article allows MS to maintain uniform tariffs for single piece mails and for some other mail items to protect access to culture, participation in a democratic society (freedom of press), or regional and social cohesion.²³

For the provision of services for all users, including businesses and consolidators, the PO enjoys more price flexibility in line with the cost-orientation principle. Tariffs should take account of the avoided costs, as compared to the standard service where all steps in the postal delivery chain (*i.e.* clearance, sorting, transport and distribution) are provided by the PO.²⁴

Synthesis of Articles 11, 11a and 12 PSD

Reading Article 11 in combination with Article 11a PSD leads to the conclusion that the former leaves it to the MS to decide whether to regulate downstream access, whereas the latter obliges MS to ensure transparent and non-discriminatory access to elements of postal infrastructure or services provided within the scope of the US (whenever necessary to protect the interest of users and/or to promote effective competition).

As regards Article 12 PSD, combined reading of the fourth and the fifth indent leads to the finding that both types of tariffs, *i.e.* the ‘tariffs’ and the ‘special tariffs’, must comply with the principle of non-discrimination. Consequently, from the perspective of this principle, subsumption of the tariff under either the fourth or the fifth indent of Article 12 PSD is not relevant. However, only the fifth indent explicitly stipulates that non-discrimination (and transparency) apply not only to the (special) tariffs but also to the associated conditions. In addition, fourth indent applies only to the US, whereas fifth indent applies to the PO.

At this point, we can conclude that, at least to a certain extent, all three Articles prohibit discrimination between ASOs and BSs. Article 11 PSD stipulates that “/. . ./

²²Recital 34 in the preamble to the PSD 2008/6/EC.

²³*Ibidem*, Recital 38.

²⁴*Ibidem*, Recital 39.

users and the postal service provider(s) have access to the postal network under conditions which are transparent and non-discriminatory.” Further, Article 11a PSD applies the “/ . . /interest of users and/or [promotion of] effective competition / . . /” when obliging MS to ensure that transparent and non-discriminatory access conditions are available to elements of postal infrastructure or services provided within the scope of the US. Finally, according to Article 12 PSD, when applying special tariffs and associated conditions, the PO is not allowed to discriminate neither between “/ . . / different third parties. . .[nor]. . .between third parties and universal service providers supplying equivalent services.”

3.2 Court’s Judgments

The interpretation of the principle of non-discrimination relating to the PO’s rebate schemes was the cornerstone of two Court’s judgments, namely *Vedat Deniz v Bundesrepublik Deutschland*²⁵ (hereinafter “Vedat Deniz judgment”) (see section “Vedat Deniz Judgment”) and *bpost SA v IBPT*²⁶ (hereinafter “bpost judgment”) (see section “bpost Judgment”).

Vedat Deniz Judgment

In the *Vedat Deniz* judgment, handed down in a preliminary ruling, the Court considered the following question: Is a PO that grants special tariffs to business customers that deliver postal items to the sorting office pre-sorted obliged to apply those special tariffs to other entities that collect postal items from the senders and give them pre-sorted for the postal network at the same access points and on the same terms and conditions as business customers?

The Court explained that the principle of non-discrimination requires that, if the PO applies special tariffs, they must be applied equally to third parties. The fact that certain postal services were reserved for the PO was considered as irrelevant because the PO granted its business customers, in an even more liberal way than required, access to its postal network at points other than the traditional access points and agreed special tariffs for them on that basis. Thus, in line with the principle of non-discrimination, consolidators are entitled to enjoy the same tariffs under the same conditions. In other words, PSD does not oblige the PO to apply any special tariffs but if the latter does apply them, it must apply them equally, in particular between third parties.²⁷

²⁵Case C-292/06 *Vedat Deniz v Bundesrepublik Deutschland*.

²⁶Case C-340/13 *bpost SA v IBPT*.

²⁷*Vedat Deniz* judgment, paragraphs 28, 30, 41–42.

bpost Judgment

In the bpost case, it was not disputed that the PO applied quantity rebates based on turnover generated individually by each sender. Consequently, handing over equivalent volume of mails resulted in different quantity rebates for senders and consolidators. The latter received lower quantity rebates since the rebates were calculated according to the volumes generated by each sender (and not according to the sum of volumes generated by all of the senders using consolidators' services). The question referred for a preliminary ruling was whether the principle of non-discrimination in postal tariffs laid down in Article 12 PSD must be interpreted as precluding a system of quantity rebates per sender.

The Court reconfirmed its interpretation of the essence of the principle of non-discrimination, finding that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified.²⁸ The Court reasoned that the objective of the quantity rebates is to stimulate demand for postal services, to exploit economies of scale. The Court found that senders are the only ones in a position to increase demand since they are responsible for originating postal items. It also stated that when the consolidators hand over mail already collected from different senders to bpost this does not have the effect of increasing the overall volume of mail. It follows therefrom that senders and consolidators are not in comparable situations as regards the objective pursued by the system of quantity rebates per sender, which is to stimulate demand. Consequently, the different treatment as between those two categories of clients does not constitute discrimination.²⁹

Synthesis of the Vedat Deniz and bpost Judgments

Both cases dealt with the principle of non-discrimination regarding tariffs applicable to senders and consolidators. In both cases, the PO refused to treat both categories equally. Comparison of the Court's outcome leads to the conclusion that pre-sorting/work-sharing activities provided by either senders or consolidators generate equal cost savings (Vedat Deniz judgment), whereas handing over the same volumes of mail does not reflect equal cost savings (bpost judgment). In this context, senders and consolidators are similar with regard to operational rebates but different with regard to quantity rebates. Consequently, in the first case, the PO's different treatment constitutes discrimination, whereas, in the second case, the PO's different treatment did not constitute unjustified discrimination. Although all three analyzed Articles are relevant for our hypothetical, only one (Article 12 PSD) directly obliges

²⁸This interpretation of the principle of non-discrimination has become settled case law, *e.g.* see Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v Commission, paragraph 55; Case C-356/12 Wolfgang Glatzel v Freistaat Bayern, paragraph 43; see also bpost judgment, paragraph 2.

²⁹Bpost judgment, paragraphs 33, 36–38, 47 and 48.

the PO not to unjustifiably discriminate. Therefore, the Court focused especially on the interpretation of the principle of non-discrimination as set out in Article 12 PSD.

4 Non-Discrimination Between Access-Seeking Operators and Business Senders

4.1 Different Interpretations

Building on the findings of the Sects. 2 and 3, the following Section clarifies how to properly apply the principle of non-discrimination, particularly as set out in Article 12 PSD, to ASOs.

The fourth and fifth indents of Article 12 PSD stipulate that the PO's (special) tariffs shall be non-discriminatory. Two mutually exclusive interpretations are possible. According to the first interpretation, both categories, *i.e.* ASOs and BSs, must be subject to identical (access) conditions and (special) tariffs. The opposite view, *i.e.* that the two categories are not similar, implies that lower tariffs or more favorable conditions must be given to the ASOs compared to the BSs, or vice versa. What is the difference (if any) between the fourth and the fifth indent of Article 12 PSD (Sect. 4.2) and which of the three possible interpretations is the correct one (Sect. 4.3)?

4.2 Subsumption Under Fourth or Fifth Indent of Article 12 PSD?

As regards the subsumption of the operational and quantity rebates under Article 12 PSD, the Court recognizes operational rebates as a special tariff under the fifth indent of Article 12 PSD. On the other hand, it avoids giving a clear answer about the quantity rebates. In the *bpost* judgment, the Court took the view that since the fourth and the fifth indents of Article 12 PSD stipulate (one and the same) the principle of non-discrimination, the subsumption of the (per sender) rebate scheme assessed there under either the former or the latter indent is not crucial.

Though this is correct, it creates a certain level of uncertainty whether special tariffs refer only to pre-sorting/work-sharing activities, as indicated in the Opinion of the Advocate General (AG) in the *bpost* case or whether they also refer to the savings from economies of scale. Unlike the fourth indent of Article 12 PSD governing (non-special) tariffs, the fifth indent of Article 12 PSD governing special tariffs explicitly requires non-discrimination with regard to both (special) tariffs and associated conditions. Consequently, the subsumption of a specific PO's pricing strategy under either the fourth or the fifth indent of Article 12 of PSD is not just

theoretical. Furthermore, the first, the second and the fourth indents apply to the US, whereas the third and the fifth indent apply to the PO (and not solely to the US).

Though the bpost judgment could be interpreted as implicitly recognizing quantity rebates as special tariffs,³⁰ the Court explicitly avoided giving clear answer on this question. Therefore, we follow the opinion of the AG in the bpost case and the judgment in the Vedat Deniz case, which both stated that special tariffs refer only to operational rebates and not to quantity rebates. In these two cases, special tariffs were found to differ from ordinary tariffs in that the former “/. . ./ take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, sorting, transport and distribution of individual postal items.”³¹

Special tariffs apply to pre-sorting/work-sharing activities, which take into account cost savings from which the PO benefits. Pre-sorting/work-sharing activities require downstream access to the postal network, particularly to the sorting or delivery facilities of the PO.³² Special tariffs apply only for carrying out preparatory work with mail and seeking access to the postal chain under conditions and at points different from those that apply to the traditional service.³³ Consequently, non-discriminatory special tariffs prohibit the PO’s practice of treating different categories of customers differently with regard to the operational rebates. Special tariffs and associated conditions apply regardless of the identity of the customer.³⁴

Unlike pre-sorting/work-sharing activities, large volumes of mails do not lead to cost avoidance but rather cost savings for the PO in the form of economies of scale. Handling and distribution of larger volumes of mails enable the PO to benefit by spreading fixed costs over a greater number of mail items. However, avoided costs relate to the third parties carrying out part of the postal handling chain. Since economies of scale do not reflect such cost avoidance, quantity rebates do not fall within the concept of special tariffs.³⁵

4.3 Application of the Court’s Reasoning to the Situation of Access-Seeking Operators

As indicated above, the bpost and Vedat Deniz judgments explain the similarities and differences between senders (businesses, bulk mailers etc.) and consolidators. With regard to operational rebates, the Vedat Deniz judgment clarified that both categories are sufficiently similar that the principle of non-discrimination requires

³⁰See Bpost judgment, paragraph 12.

³¹Recital 39 in the preamble to the PSD 2008/6/EC.

³²Opinion of the AG in the bpost case, paragraph 15.

³³*Ibidem*, paragraph 35.

³⁴*Ibidem*, paragraph 41.

³⁵*Ibidem*, paragraphs 41–57.

that the PO grant equal operational rebates and associated conditions. With regard to quantitative rebates, the bpost judgment clarifies that both categories are not similar, since only senders generate more volume with lower prices and, consequently, higher returns due to economies of scale. Different treatment is thus not discriminatory.

Reasoning from the bpost and Vedat Deniz judgments is applicable to the situation of ASOs. With regard to quantity rebates, the relevant factor is stimulation of demand for postal services. With regard to operational rebates, the relevant factor is cost avoidance resulting from work-sharing activities. Since ASOs are not responsible for originating postal items, they do not stimulate demand for postal services, which is the justification for quantity rebates. Consequently, ASOs and BSs are not sufficiently similar. On the other hand, if ASOs and BSs undertake identical preparatory work-sharing activities, then the PO avoids identical costs. Consequently, identical operational rebates should be granted to both categories. In other words, with regard to both types of rebates, quantity and operational, the Court's reasoning in the Vedat Deniz and bpost judgments can be applied to ASOs. In addition, consolidators and ASOs are similar in that they are the PO's but not BSs' competitors.

5 Arguments for Departure from the Court's Reasoning

The argument that "one interpretation fits all specific situations" seems oversimplified and incorrect. Instead of the uncritical application of the above reasoning to the situation of ASOs, all relevant facts and circumstances must be taken into account. Depending upon specific circumstances, departure from the application of Vedat Deniz and bpost reasoning to the situation of ASOs may be justified. In general, there are arguments supporting lower tariffs and/or more favorable associated conditions for BSs as compared with the ASOs (Sect. 5.1) and in the opposite direction as well (Sect. 5.2). The following four arguments are identified, two in each direction.

5.1 Arguments Supporting Lower Tariffs and/or More Favorable Associated Conditions for Business Senders as Compared with the Access-Seeking Operators

Prevent Cherry-Picking and Safeguard the Financial Sustainability of the USO

Uniform US tariffs for low-cost and high-cost delivery areas and uniform (*e.g.* "retail minus") access prices create opportunities for (mixed-by-pass) ASOs to use the PO's network only for delivery in high-cost areas at low prices. For delivery in low-cost

areas, the operator would use its own network, thus enabling delivery (in low-cost areas) at prices lower than the PO's (uniform) prices. In order to prevent cherry-picking and to safeguard the financial sustainability of the USO, (mixed-by-pass) ASOs should be charged more under different conditions as compared with the BSs.

Access-Seeking Operators are Not Users of the US

Article 3 PSD obliges MS to ensure that users enjoy the right to the US, whereas Article 2 defines such users as “any natural or legal person benefiting from postal service provision as a sender or an addressee”. It follows that the US is reserved for users, *i.e.* senders and addressees. Since ASOs are neither senders nor addressees, they do not have the right to the provisions of the US. Instead, they have the right to access the postal network. Articles 11 and 11a PSD governing the access do not stipulate the cost-orientation principle, contrary to the second indent of Article 12 PSD governing prices of the US. Consequently, access prices and the US prices may be subject to different tariff regimes. The former are not necessary cost-oriented, whereas the latter shall be cost-oriented. For instance, in Spain, this reasoning was recognized as a sound argument for higher tariffs and less favorable conditions for ASOs as compared with the BSs, although the Spanish NRA ruled otherwise in February 2018.³⁶

5.2 Arguments Supporting Lower Tariffs and/or More Favorable Associated Conditions for Access-Seeking Operators as Compared with the Business Senders

Saved Marketing and Other Costs

Even absent end-to-end competition, the PO may market or promote access to its network, even though doing so would reduce demand for upstream services that compete with the ASOs. However, if facing access-based competition, the PO's marketing activities would focus on the promotion of its full range of postal services, *i.e.* clearance, sorting, transport and distribution. The PO would target (especially business) senders that it could attract from ASOs, while saving costs by not marketing to ASO' clients that would not use the PO. In addition, the PO may save some other costs for handling postal items from ASOs as compared with the costs of handling postal items from BSs. For the former, the PO acts as a subcontractor of the ASOs. However, the PO does not incur costs (in money or time) of dealing with their senders, for instance building and maintaining business relations,

³⁶Spanish NRA's Decision of 15 February 2018 put ASOs and BSs on equal footing. [<https://www.cnmc.es/en/node/367009>].

handling senders' complains, etc., since these senders are not theirs but rather ASOs' clients.

Incentives for Investments in Postal Infrastructure

Lower tariffs and/or more favorable associated conditions for ASOs allow them to accumulate capital and then invest these savings in building alternative network(s). As compared with ASOs, Bs are in a different economic situation, as they do not invest in the development of their own distribution network and they do not compete with the PO operator for distribution services.³⁷ To promote competition between postal operators, lower tariffs and more favorable associated conditions for ASO as compared with the tariffs and/or conditions for BS could facilitate the eventual development of competing distribution networks.

6 Conclusions

EU law and the PSD have established the principle of non-discrimination, meaning comparable situations must not be treated differently. The application of this principle to the situation when consolidators and business senders provide the same volume of equivalently pre-sorted postal items at the same access points, has been addressed in the Court's jurisprudence. When comparing both categories, the Court based its decisions not on the nature of the subject (*i.e.* consolidator *v.* sender) but rather on the economic rationale for lower prices (*i.e.* avoided costs resulting from the preparatory/work-sharing activities and taking advantage of economies of scale). It follows that pre-sorting/work-sharing activities provided by either senders or consolidators generate equal cost savings (Vedat Deniz judgment), whereas handing on same volumes of mail by one and the other category does not reflect equal cost savings (bpost judgment).

The above reasoning should be *mutatis mutandis* applicable to the situation when an ASOs hand on same volumes of equally pre-sorted postal items at the same access points as a BS. However, a cautious approach is recommended and national specific circumstances, if they exist, should be taken into account. This chapter identified four arguments that are capable of preventing full application of bpost and Vedat Deniz judgments to the situation of ASOs. These arguments are contradictory. Two arguments support lower tariffs and/or more favorable associated conditions for ASOs and, vice versa, two arguments support lower tariffs and/or more favorable associated conditions for BSs.

³⁷This interpretation is presented as a possible one in the ERGP Report on recommendations and best practices in regulation for access to the postal network of the incumbent operator (in terms of competition, prices and quality of service) 2017, p. 24.

In some MS, such arguments can support *mutatis mutandis* application of the Court's reasoning to the situation of ASOs. But at the same time, these arguments might be seen as wrong in other MS. The ERGP report confirms that the principle of non-discrimination as set out in the EU postal legal framework can be subject to different interpretations.³⁸ Considered from a national perspective, they are all correct.³⁹

Since non-discrimination is a legal principle, it affords NRAs/national courts greater flexibility of interpretation. In case the promotion of competition and the sustainability of the USO are conflicting, the interpretation of the principle of non-discrimination with regard to the question at issue is most likely subject to NRA's prioritization of one of the conflicting principles. To avoid arbitrariness, it is crucial that NRAs' and national courts' decisions are well understood and that predictability of law remains unquestionable, since legal certainty is fundamental.

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³⁸ERGP Report on the application in access regulation of the principles of transparency, non-discrimination and proportionality as incorporated in the postal services directive (2018, pp. 44–45).

³⁹These words were used by the Advocate General Nils Wahl in his opinion of 20 June 2018 in the ongoing case C-256/17 (Sandd BV v ACM) to describe different MS interpretations of PSD concepts.