

Protecting Consumers Using Postal and E-Commerce Delivery Services in Competitive European Markets

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1 Introduction

Consumer protection in two separate, but related, markets is considered in this paper. The two markets are the traditional postal services, generally focused on letters and small packets, and e-commerce delivery services focused on the delivery of goods purchased on the internet and other electronic media. State-owned, or recently privatized, companies, designated as USP's (Universal Service Providers), remain the dominant providers of the traditional postal services. On the other hand e-commerce delivery services are provided by a wide range of companies in competition with each other and the USP's. Prior to the adoption of the EU's Postal Directive (1997), consumers using postal services had few rights to reimbursement and/or compensation in the event of loss, theft or damage to items they had sent or which they expected to receive. The reasons for this are described in Sect. 2.

Section 3 describes how from the 1970s onwards there was a transition to a more commercial customer focused approach. The CJEU (European Court of Justice), in the "Corbeau" case, distinguished between the traditional postal services and the more innovative and customer focused products that were emerging, and noted the greater consumer rights offered by the latter services. Section 4 tells how, following this judgment, the Postal Directive (1997) required countries to draw up transparent, simple and inexpensive procedures to deal with postal users' complaints, and to enable disputes to be settled fairly and promptly with provision for a system of reimbursement and/or compensation.

This paper represents the personal views of the authors and should not be taken to represent the policy of ComReg, CERP, or any other organization.

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Changes in the technical, economic and social environment have been significant since the Postal Directive was enacted almost 20 years ago. Consumer use of postal services to send and receive letters of importance to them is no longer significant. Furthermore, many of the postal service providers now offer services well beyond the scope of the traditional postal services. The changes are described in Sect. 5, which concludes that the consumer protection measures introduced by the Postal Directive (1997) are sufficient to protect the interests of users of the traditional postal services, although there is scope for greater harmonization. Issues such as the provision and scope of the universal service may however become a problem in the coming years.

As noted in Hearn (2016), e-commerce is evolving very rapidly and the boundaries between the various sales channels are becoming blurred. Postal and other home delivery options are no longer the automatic preference of consumers. For many the ability to collect the goods from a local store or from a parcel locker accessible 24/7 is more desirable. The use of big data to personalize and localize the offers of retailers blurs the distinction between domestic and international markets. There is a variety of players active in B2C delivery and this presents many challenges regarding consumer protection.

As a consequence of the Consumer Rights Directive (2011), consumers contract exclusively with the seller (the e-retailer), and title to the goods purchased only passes when the goods are received by the consumer. This has significant implications for consumer protection in the context of e-commerce delivery. The liability of service providers is exclusively to the e-retailer, and inevitably prices and service specifications are the subject of commercial negotiations between these parties. Section 6 concludes with the view that there is a need to establish an information campaign to inform consumers about the implications of these changes and to inform e-retailers and delivery service providers of their mutual obligations.

2 20th Century Consumers Had Few Rights. WHY?

Since the introduction of postage stamps in the middle of the 19th century, postal services were generally provided on the basis of a state monopoly. Until relatively recently this invariably was under the supervision of a government minister. The legal doctrine of “Sovereign immunity”, or “crown immunity” (under which the state is immune from civil suit or criminal prosecution) therefore applied to the provision of postal services. The terms and conditions for using the postal services were normally set out in primary and/or secondary legislation. The costs incurred in provision were a charge on the national treasury. The charge for use of the services was a tax, “postage”, which often bore no relation to the costs of service provision. Such services were focused primarily on the delivery of written communications, including books and newspapers.

This doctrine was also extended to international postal services. The UPU (Universal Postal Union) was established in 1874 as an inter-governmental organization to ensure the provision of international postal services and its regulations exclude liability to senders and receivers of postal items—see Table 1.

Table 1 The universal postal union convention

Article 23
<i>Liability of designated operators. Indemnities</i>
Designated operators shall not be liable for items other than registered items, ordinary parcels and insured items
Article 24
<i>Non-liability of member countries and designated operators</i>
Member countries and designated operators shall not be liable in cases of force majeure, when loss or damage has been caused by the fault or negligence of the sender or arises from the nature of the contents; when the sender’s actions may be suspected of fraudulent intent, aimed at receiving compensation, etc.
Article 25
<i>Sender’s liability</i>
The sender of an item not acceptable for conveyance shall be liable for injuries and damage to postal officials, equipment and other postal items
Article 19
<i>Inquiries</i>
Must be made within six months
Article 26
<i>Payment of indemnity</i>
Indemnity shall be paid by designated operator of origin or destination, to sender or if agreed by sender to the addressee
Article RL 163
<i>Period for payment of indemnity</i>
Normally within 3 months

Both sender and addressee had an interest in a postal item and therefore the postal service was an intermediary between the sender and the addressee. There are two different sets of rules that apply to this unusual legal status.

Under international law, the postal service is an agent of the sender of a postal item. Article 5.1 of the Universal Postal Convention provides that “A postal item shall remain the property of the sender until it is delivered to the rightful owner” and Article 5.2 provides that “The sender of a postal item may have it withdrawn from the post or have its address altered or corrected”. Therefore if a postal item is lost/stolen or damaged in the course of transmission by post it was the sender that bore any financial or consequential loss. In cases of dispute between sender and addressee the sender had to prove that the postal item was received by the addressee, which necessitated the provision of “registered post” services. Most countries observe these rules in their national legislation.

However, forty-eight countries, principally common law jurisdictions including the UK and Ireland, have signed a protocol to the UPU Convention stating that the principles of international law do not apply in their jurisdictions. Under the common law the postal service providers in these countries which accept items for transmission by post become irrevocably the agent of the addressee immediately upon the posting of the item, and the postal item must be delivered to the addressee. If a postal item was lost, stolen or damaged in the course of transmission by post it

was the addressee that bore any financial or consequential loss. In cases of dispute the sender only had to prove that a letter/notice was posted and the courts would assume that the postal item was received by the addressee “in due course of post”.

All these characteristics—the postal monopoly; state provision; the lack of a legal contract between the postal service and its users; the distinction between both users’ interest in the delivery of a postal item and its legal ownership; and the role of the postal service as an agent or intermediary—meant that consumers using such services had few rights to reimbursement and/or compensation in the event of loss, theft or damage to items they had sent or which they expected to receive. These very restricted rights are still enshrined in the Universal Postal Union Convention.

For so long as the postal services provided high quality services which met the needs of users these restrictive rights were not challenged. However the Treaty of Rome (1957) restricted the scope of the postal monopoly and opened up the prospect of competition and better consumer protection.¹

3 Emerging Competition

Significant competition began to emerge towards the end of the 20th century. The telephone became the preferred method of personal communication. In response to the decline in the volume of letters posted the Posts transformed themselves into an advertising medium. Of more significance was the emergence, during the 1970s and 1980s, of the Courier and Express Industry to meet the needs of businesses for fast international communication.

In response to the challenges this posed to the traditional state owned operators from the 1970s onwards the traditional model of postal service provision began to transition to a commercial customer focused approach with the provision of postal services increasingly transferred from government agencies to state-owned companies or public corporations. As early as 1967 the British Government created a government corporation, “the Post Office”, to provide postal services. Also the Posts began to compete with each other internationally, based on arbitrage of the terminal dues system of inter-state remuneration, which led to the emergence of “Remail”.

There was also structural separation of Post and Electronic Communication and explicit restrictions on the postal monopoly. For example the British Telecommunications Act 1981 removed to a certain extent the exemption from

¹Article 90 of the Treaty of Rome of 1957 required that:

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.*

liability to users of postal services (section 70) and made provision for the suspension of the monopoly in certain circumstances (section 69).

The provisions of the Treaty of Rome ensured that the emerging competitors were allowed to continue as independent operators rather than being subject to the state monopoly, as had happened in the past. The defining judgment of the European Court of Justice, in the “Corbeau” case,² was that the Belgian Post Office had a “dominant position in a substantial part of the common market within the meaning of Article 86 of the Treaty” and that:

23. (2) The provisions of Article 90(1) of the Treaty, in conjunction with Article 86, prevent a Member State from applying the statutory monopoly established for the basic postal service also to rapid delivery services such as those at issue in the main proceedings, which present an actual added value as compared with the operations of collection and delivery of correspondence effected by the basic postal service.

So far as consumer protection is concerned the Court observed that “the service gives rise to a direct fiduciary relationship between the defendant and his customers”.

The foundations were now in place to give consumers significant rights. Legislation was necessary to give full effect to the Court’s decision.

4 European Postal Directive (1997)

The Corbeau judgment came at about the same time as the European Commission published its Green Paper on postal services in 1993, and four years later the Postal Directive (1997) was adopted. The legal purpose of this Directive was to protect incumbents from the full rigor of the provisions of the Treaty of Rome for a transitional period of ‘gradual and controlled liberalization of the market’.³

Countries were required to guarantee the provision of certain basic postal services (the “universal service”).⁴ They have the flexibility to decide what exactly constitutes the universal service to fit their domestic circumstances. The specification of the universal service is important from the consumers’ point of view not just because of its guaranteed provision but also because of other obligations imposed by the Postal Directive (1997), including transparent, cost-orientated and affordable prices and measurable quality of service standards apply only to the universal service.

Article 19 of the Postal Directive (1997) effectively ended the sovereign immunity which postal services had enjoyed for so long.⁵ It required countries to

²European Court of Justice Case C-320/91 Paul Corbeau 19 May 1993, [1993] ECR I-2563.

³Directive 97/67, Recital 8.

⁴Directive 97/67, Article 3.

⁵although by then the doctrine of sovereign immunity was no longer enforceable in some countries —see for example *Byrne v Ireland*, [1972] 1 IR 241.

Table 2 Scope of universal service

No of countries	Scope
9	Single piece only
7	Single piece and bulk letters
11	All

draw up transparent, simple and inexpensive procedures to deal with postal users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards, about items they had sent or which they expected to receive. These should 'enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation'. Users who do not get satisfaction from the USP can appeal to a 'competent national authority'.

The changes mandated by the Postal Directive (1997) in terms of compensation payable and access to simple and inexpensive complaints procedures have not been implemented in a harmonized manner. There are also significant differences from one country to another concerning the scope of the universal service. Many commonly used postal services are not part of it, even where they are provided by the universal service provider, particularly value-added services like track and trace or delivery by a specified time. The European Commission (2015) summarizes the current scope of the universal service as shown in Table 2.

The position with regard to compensation is more positive. ERGP (2015) reports that mandatory compensation schemes for consumers are now required in 22 European countries and in 10 other countries compensation is covered by general terms and conditions and by civil law. According to WiK (2013) in 16 countries both the NRA (National Regulatory Authority) and NCPA (National Consumer Protection Authority) have power to enforce these user protections measures, in 13 countries it is the sole prerogative of the NRA and in one country it is the sole prerogative of the NCPA.

Recital 34 to the Postal Directive (1997) also confirmed that Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts applies to the postal services.

5 Traditional Postal Services

Since the Postal Directive was enacted almost 20 years ago, changes in the technical, economic and social environment have been significant. For example, the use of the post to receive and pay utility bills is much reduced. Email, Skype, Facebook and other social media have replaced the mail as the preferred means of personal correspondence, especially cross-borders. The receipt of advertising material through the letterbox is more targeted. Overall 'letter post' volumes are much reduced and expected to fall further.

Consumer correspondence (C2B and C2C) is now a very small percentage of the total number of letters. ITA/WiK (2009) reported that the importance of private correspondence (C2B and C2C) has declined in many countries and that, overall, more than 85 % of letters were sent by businesses. Given the decline in volumes since then the percentage of private correspondence has almost certainly declined further. Also with changes in the type of letters sent by businesses, the interest of addressees in receiving the mail is most probably much reduced. There is obviously less interest in receiving bills or advertising material than receiving a letter containing a check or travel tickets, both of which have been more prone to e-substitution.

Sovereign immunity, in terms of legal restrictions on access to the courts, lives on. See for example section 26 of Ireland's Communications Regulation (Postal Services) Act 2011. It is not surprising that there is no access to the Courts given the low cost of using the post and the high cost of legal proceedings, which, of course, is why the Postal Directive (1997) mandates the use of simple and inexpensive complaints procedures and encourages the use of ADR (Alternative Dispute Resolution).

The conflict between European and International law in the case of cross-border mail is a cause for concern. For example, the terms and conditions of the UK universal service provider states that Royal Mail "will only accept liability, where the loss or damage is due to any wrongful act done, or any neglect or default committed by a member of staff or agent of Royal Mail ...". This means that if loss or damage is incurred in another country or while being transported by an airline, compensation might be refused.

But there is no evidence that the interests of consumers are being compromised. According to an analysis in WiK (2013) it appears that overall the user complaint procedures are well used with a meaningful right to review. It can be concluded therefore that in the case of the traditional postal services the consumer protection measures introduced by the Postal Directive (1997) are sufficient, although there is scope for greater harmonization. It should be noted however that issues such as the provision and scope of the universal service may become a problem in the coming years.

Also many of the postal service providers now offer services well beyond the scope of the traditional postal services. The consumer protection measures necessary for these services are considered in the next section.

6 E-Commerce Delivery Services

6.1 Postal Parcels

Parcels were not originally part of postal service. Hearn (2013) noted that the market for the distribution of goods, in parcels or otherwise, was the preserve of

transport companies—railways, canals, shipping and “common carriers”. But at its second Congress in 1878 the UPU decided to establish an “optional” international parcel post system. But most importantly the parcel service remained outside the scope of the state monopoly and consumers therefore had a few rights.

Although some countries were slow to introduce the new postal parcel services,⁶ the new service led to a boom in Mail Order trading with some of London’s major department stores, advertising extensively and publishing latest times for dispatch to most countries for Christmas delivery. Books, magazines and small goods could also be sent by LETTERPOST. During World War II and afterwards “Red Cross” and “American” parcels played important role in bringing much needed relief to populations that did not have access to so-called “luxury” goods. As goods became more freely available and postal costs increased volumes inevitably declined, and by the 1970s the postal parcel service was a shadow of its former self.

6.2 *The E-Commerce Revolution*

On the other hand, e-commerce is driving significant increases in the volume of goods delivered by postal parcel and other home delivery services. But the traditional Postal Operators (universal service providers—USPs) are no longer dominant players in this market. According to TPR (2015) their market share, at the European level and according to the number of packages delivered, is only 10 %.

As noted in Hearn (2016) e-commerce is evolving very rapidly and the boundaries between the various sales channels are becoming blurred. Postal and other home delivery options are no longer the automatic preference of consumers. For many the ability to collect the goods from a local store or from a parcel locker accessible 24/7 is more desirable. Returns, that is the ability to return unwanted⁷ or damaged goods, are also a significant feature of the market. GLS,⁸ DPD,⁹ Fastway and Hermes all have a network of ‘post offices’ to facilitate returns. Other companies offer to collect from the addressee. And some retailers encourage returns to their own stores. The use of big data to personalize and localize the offers of retailers blurs the distinction between domestic and international markets.

⁶For instance the United Kingdom did not introduce the service until 1882, and in the case of the USA a domestic postal parcel service was not introduced until 1913, the delay being attributed to lobbying by the private express carriers and rural retail merchants.

⁷Perhaps because the size is wrong.

⁸Royal Mail’s European parcel delivery company.

⁹France’s La Poste’s European parcel delivery company.

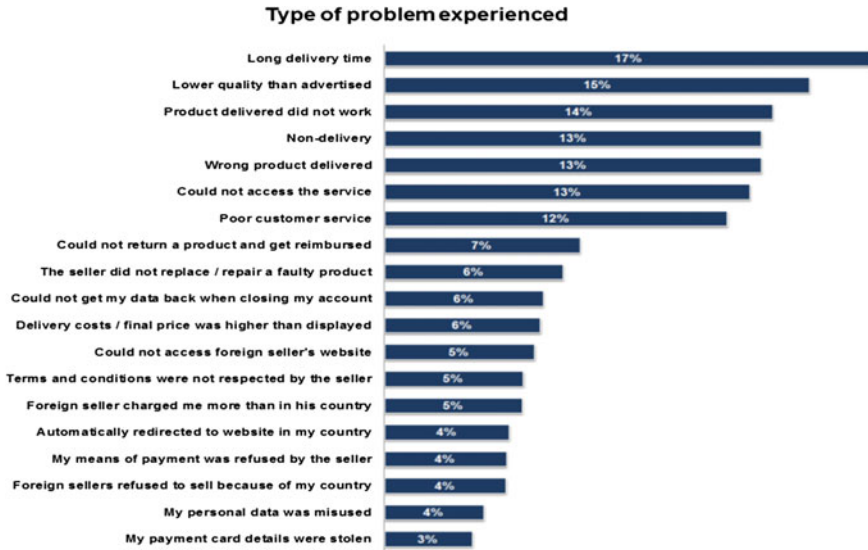


Fig. 1 Consumer concerns about e-commerce. Source GfK Belgium (2015)

6.3 European Commission (and Large E-Retailers) Complains About Quality and Price of Parcel Services

The European Commission regularly commissions surveys of consumer concerns about the use of e-commerce. Figure 1 shows the results of a recent survey by GfK Belgium (2015).

The European Commission (and large e-retailers) complains that the quality and price of postal parcel services impacts adversely on the development of e-commerce. But only three of the 19 problems identified by Commission and set out in Fig. 1 could possibly involve postal parcel services. Even these problems identified by consumers, delivery time, non-delivery and difficulty with returns, could equally be due to failure by the retailer and it is simplistic to place the entire blame on the postal services.

6.4 Consumer Protection When Goods Are Delivered by Postal and E-Commerce Delivery Services

However consumers have a keen interest in receiving the goods and services they have ordered and in being able to return any goods which are damaged or otherwise not acceptable. Copenhagen Economics (2013) confirms there are a wide variety of

players active in B2C delivery (see in particular Table 21). This presents many challenges regarding consumer protection, particularly as most of the delivery companies are subject to the normal law of contract rather than the special position enjoyed by postal service providers.

Under the Consumer Rights Directive (2011) the risk of loss or damage passes to the consumer only when he is in physical possession of the goods. This means that it is the retailer who decides which carrier to use and it is the retailer who negotiates the price and service standards. As the normal rules of contract law apply the liability of the service provider is exclusively to the retailer. In addition, on-line retailers often fail to disclose which service provider is responsible for delivering the goods. As, the consumer wants to receive his goods and the service provider will need some contact in the event of any problem with delivery and presumably it is in the retailer's interest to have the customer contact the delivery company directly. According to TPR (2015) failed delivery rates can vary from 15 to 30 %. Failed deliveries lead to second delivery attempts or being held at a post office or delivery depot pending collection by the addressee.

In essence as a result of the Consumer Rights Directive (2011) the consumer has no contract with the postal service or e-commerce delivery service which delivers any goods ordered from an e-retailer. The only contract is with the seller and it is to the seller that all complaints must be made. However, because of tradition, and the fact that the postal service or e-commerce delivery service may be in contact with the consumer to arrange delivery, consumers may be inclined to make their complaints to the delivery agent. This is undesirable both for legal reasons and because the e-retailer may not become aware of problems which might lead him to change service provider. It is essential therefore to establish an information campaign to inform consumers about the implications of these changes and to inform e-retailers and delivery service providers of their mutual obligations.

Another issue that must be considered is that the "Delivery" charge made by a retailer may not necessarily relate to the cost of delivery to the retailer. The Consumer Rights Directive imposes restrictions on credit card fees that may be charged by e-retailers and it would seem reasonable that similar provisions be enacted to require retailers who show a separate price for delivery to restrict this to the cost involved. A related issue is the need to ensure transparency of the total price charged, as is currently required of airlines. Indeed, the sixth (VAT) Directive requires that VAT inclusive prices be shown in shops and it is the norm for a single price to be displayed. The author would not suggest that a single, delivery inclusive, price be displayed on e-commerce websites but only that there should be transparency as to the total cost.

There is indisputably a need to educate consumers, e-retailers and carriers of these relatively new rules and it should be the role of the European Consumer Centers to help consumers, as Postal NRAs have no expertise in consumer complaints about the sale of goods.

7 Conclusions

Consumer rights concerning the use of postal services been strengthened compared to the time before the Postal Directive was enacted. It is not obvious that more protection is needed for Letters, or postal services generally.

E-Commerce is evolving very rapidly and postal and other home delivery options are no longer the automatic preference of consumers. The Consumer Rights Directive gives consumers real powers but there is a need for education to ensure that consumers, e-retailers and consumers are aware of their rights under the new reality. The Directive needs to be amended to ensure price transparency.

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