



# **Prices and Conditions of Access to the Postal Network – The Principle of Non- Discrimination**

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Presentation does not necessary reflect the views of the institution the author belongs to.

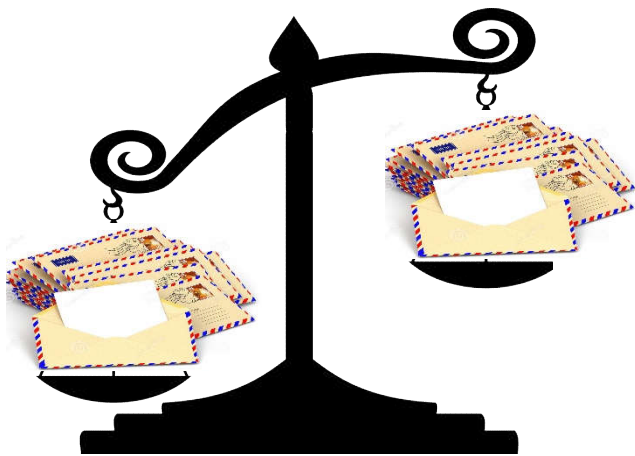
- Assessment from the perspective of the principle of non-discrimination (PND).
- When access seeking operator (ASO = access-based + mixed-by-pass) and business sender (BS) deposit same volume of equally pre-sorted postal items at the same access points....
- ....is incumbent obliged to charge them same prices and offer same conditions?

### Key findings:

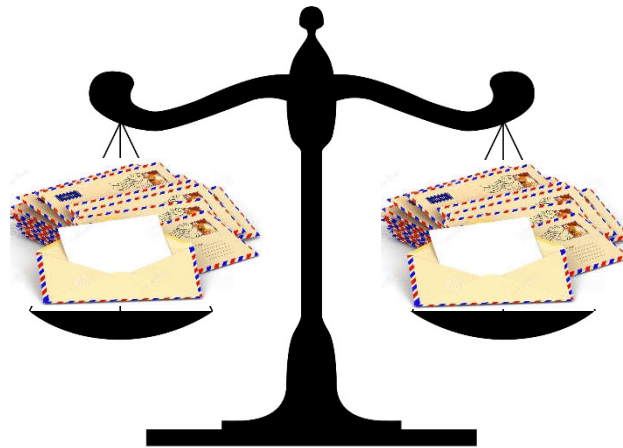
- PND & ECJ case law (Vedat Deniz + bpost cases) are applicable.
- However, ~~“One interpretation fits all situations”, “mechanic” and uncritical application of the reasoning~~ *mutatis mutandis* application is advised.
- There are arguments supporting lower tariffs/more favourable conditions for business senders and *vice versa*.

## ACCESS SEEKING OPERATOR VS BUSINESS SENDER

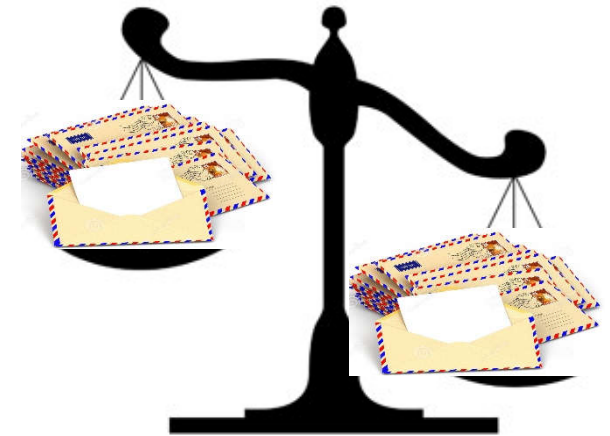
- ASO & BS may perform similar/identical tasks (hand on same volume of equally pre-sorted postal items at the same access points).
- What does PND require from the incumbent?



Better prices /  
conditions for ASO



Equal prices /  
conditions



Better prices /  
conditions for BS



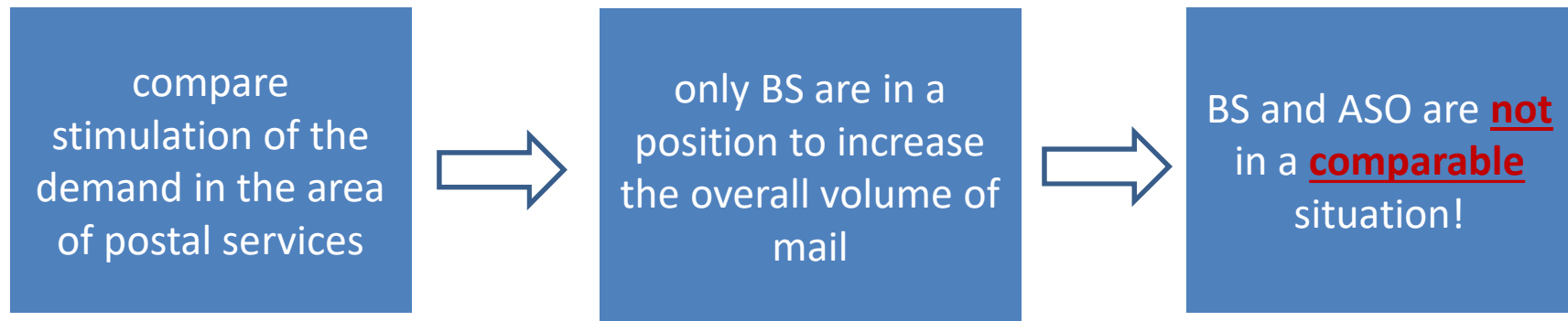
- PND is not postal sector specific principle.
- ECJ: „Comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified.“
- Challenging part is to find whether two situations are comparable. *Tertium comparationis* must be established.



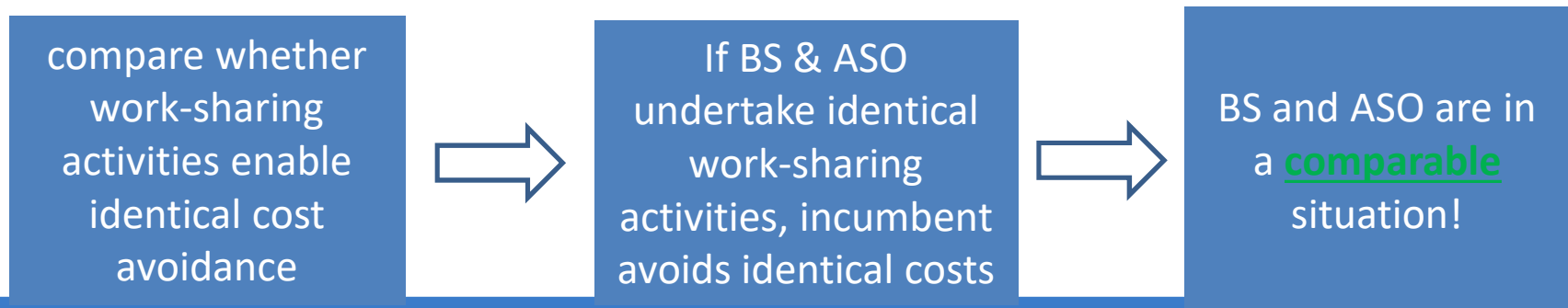
Equal treatment ?

- **Postal Services Directive** prohibit discrimination between ASO and BS
  - Article 11: “/.../ users and the postal service provider(s) have access to the postal network under conditions which are transparent and non-discriminatory.”
  - Article 11a derives from the “/.../interest of users and/or [promotion of] effective competition /.../” when obliging MS to ensure transparent and non-discriminatory access conditions.
  - Article 12: when applying special tariffs and associated conditions, incumbent is not allowed to discriminate neither between “/.../ different third parties...[nor]...between third parties and universal service providers supplying equivalent services.”
- **ECJ** cases dealing with application of tariffs to senders & consolidators:
  - *Vedat Deniz case*: same work-sharing activities provided by either senders or consolidators generate equal cost savings.
  - *bpost case*: same volumes of mail by one and the other category does not reflect equal cost savings.

### Volume discounts



### Operational discounts



- Approach “one interpretation fits all specific situations” seems oversimplified.
- All specific relevant facts and circumstances, if they exist, must be taken into account.
- It should be allowed to argue that there are specific circumstances which prevent full application of the bpost and Vedat Deniz reasoning to the situation of ASO and *vice versa*.
- Non-exhaustive list of arguments which are capable of preventing full application of bpost and Vedat Deniz reasoning to the situation of ASO.
- Some arguments support lower tariffs/favourable conditions for BS and some arguments support lower tariffs/favourable conditions for ASO. Arguments are contradictory.

### **Prevent cherry-picking and safeguard the financial sustainability of the USO**

- Application of uniform US tariffs for low-cost & high-cost areas and uniform access prices create opportunity for (mixed-by-pass) ASO to use incumbent's network only for delivery in high-cost areas at low prices.
- In order to prevent cherry-picking and to safeguard the financial sustainability of the USO, the ASO should be charged more/at different conditions as compared with BS.

### **ASO are not users of US**

- US is reserved for users, i. e. senders and recipients.
- ASO have the right to access the postal network.
- PSD stipulates that US prices shall be cost-oriented.
- PSD does not explicitly stipulate that cost-orientation principle is applicable also to the access.



### **Saved marketing costs**

- No E2E competition → no marketing costs for promoting access.
- Access-based competition → incumbent's marketing activities focus on the promotion of its full range of postal services.
- Incumbent invests in marketing activities targeting (especially business) senders, but saves such costs for senders which use ASO's services.

### **Ladder of investment approach**

- More favourable prices/conditions allow ASO to accumulate capital and then invest these savings in building alternative network(s).
- In order to promote competition between postal operators, ASO should not be charged access fees that are identical to the price charged to BS.

- Reasoning from the bpost and Vedat Deniz judgements is applicable not only to situation of consolidators, as was the case in both judgements, but also to the situation of ASO.
- However, this reasoning should be applied *mutatis mutandis*, meaning that some other/additional arguments can be taken into account as well if they are recognized as relevant in national specific circumstances.
- Some arguments support lower tariffs/more favourable associated conditions for ASO, whereas other arguments support lower tariffs/more favourable associated conditions for BS.
- „One size fits all“ approach does not work. In some MS, identified arguments are capable of playing essential role, whereas, at the same time, these arguments might seem absurdly wrong in other MS.