

# Market analysis decision

## 24-hour business mail

DECISION

# Autoriteit Consument & Markt



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## 1 Introduction

1. The full liberalisation of the postal market that became a reality in 2009, introduced and energised competition throughout the national letter mail transport segment. The aim was to increase the choice of providers of mail transport services particularly for business mail senders. The full liberalisation would give these business senders more choice, lower prices and better quality of service.
2. A vulnerable competition situation has arisen in the postal market. This is the result of market developments, such as the declining trend in volumes and the reduction in the number of mail transport companies operating nationally. The postal market thus has specific characteristics as a result of which it risks developing into a market in which there is no longer any actual competition.<sup>1</sup>
3. In the light of the competition situation in the postal sector the regulatory toolbox has been strengthened.<sup>2</sup> In 2014, the 2009 Postal Act (hereinafter: Dutch Postal Act) gave ACM the power to impose *ex ante* obligations on mail transport companies having significant market power (hereinafter: SMP) in a relevant market for mail transport services. The aim of exercising this power is to generate actual competition by eliminating potential competition problems in the market.
4. In this market analysis decision, ACM has analysed the transport of 24-hour bulk mail letter consignments nationally<sup>3</sup> (hereinafter: 24-hour bulk mail) and ascertained that PostNL<sup>4</sup> has SMP in the markets for small business 24-, 48- and 72+-hour bulk mail, medium business 24-, 48- and 72+-hour bulk mail and large business 24-, 48-, and 72+-hour bulk mail. In order to eliminate the various potential competition problems in these markets, ACM is imposing a number of obligations on PostNL. These obligations will help to generate actual competition in the analysed postal markets. The effects of these obligations have been quantified in an impact assessment.

### *Scope of this decision*

5. This market analysis decision concerns 24-hour bulk mail. It addresses potential competition problems by imposing obligations on PostNL with regard to 24-hour bulk

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<sup>1</sup> *Kamerstukken II 2012/13, 33 501, no. 3, p. 2-4.*

<sup>2</sup> *Kamerstukken II 2012/13, 33 501, no. 3, p. 1.*

<sup>3</sup> Unaddressed consignments are not included.

<sup>4</sup> Unless stated otherwise, references to PostNL in this market analysis decision are deemed to mean PostNL N.V. and its group companies as referred to in article 2:24b of the Dutch Civil code.

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mail. Possible problems with 48-hour and 72+-hour bulk mail are neither investigated nor addressed in this decision.

6. This market analysis decision therefore only concerns 24-hour bulk mail. The scope of this decision thus comprises mail transport services offered under special conditions and tariffs (bulk mail) for ultimate delivery to addressees in the Netherlands. Mail transport forming part of the universal service obligation (hereinafter: USO) does not fall within the scope of this market analysis decision.<sup>5</sup> The scope of this market analysis decision also excludes the transport of parcels that are not delivered to the letterbox designated for delivery<sup>6</sup>.

### *Guide for readers*

7. In this section, ACM first outlines the context and background of this market analysis decision. This is followed by a description of the legal framework in which ACM conducts a market analysis and imposes obligations. ACM then summarises the process adopted. Finally, there is a guide for readers in which ACM describes the structure of this market analysis decision.

### **1.1 Background and context**

8. This market analysis has been conducted against the background of a vulnerable competition situation in the postal market, which results from various market developments, such as the declining trend in volumes and the reduction in the number of mail transport companies operating nationally. ACM analyses these market developments below.

### *Dutch Postal Act 2009; full liberalisation of the mail transport market*

9. The Dutch Postal Act made the full liberalisation of the mail transport market a reality. In that liberalisation, the reserved space – a statutory monopoly – for the legal predecessors of PostNL was reduced in 2000 from letters up to 500 grams to letters up to 100 grams and in 2006 from letters up to 100 grams to letters up to 50 grams. The Dutch Postal Act marked the final stage in the gradual liberalisation, with no service being reserved exclusively for PostNL from 1 April 2009. The rationale for fully liberalising and allowing competition throughout the postal sector was to increase the choice of mail transport

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<sup>5</sup> In this connection, see article 13b, paragraph 2, of the Dutch Postal Act.

<sup>6</sup> Letterbox packets do therefore fall within the scope of the market analysis decision.

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providers available to business senders in particular and achieve lower prices and better quality of service for them.<sup>7</sup>

### *Development of the number of mail transport providers*

10. When the Dutch Postal Act came into force there were four national providers of mail transport. These were PostNL, Sandd, Selektmail and Netwerk VSP Geadresseerd (or their legal predecessors). These mail transport companies operated their own networks across practically the whole of the Netherlands and delivered mail using their own employees. Since then, the playing field has changed greatly due to a number of market developments. With the departure of Netwerk VSP Geadresseerd – a former PostNL subsidiary – as a provider of mail transport at the end of 2011 and Sandd's acquisition of Selekt Mail in 2011 the number of mail transport companies operating nationally was reduced to two. Furthermore, in contrast to Post NL, Sandd does not have a five-day mail transport network for bulk mail and only transports mail two days a week.
11. A number of relatively small, regional mail transport companies also operate in the postal sector. The regional mail transport companies collect and deliver bulk mail from business senders only at local and regional level. In order to offer 24-hour bulk mail throughout the Netherlands, regional mail transport companies require access to the network and the use of the associated facilities of PostNL.

### *Contracting postal market*

12. Another significant ongoing development is the contraction in the volume of mail. The total volume of national letter mail delivered in the Netherlands declined from 5.1 billion to 2.8 billion items between 2008 and 2016.<sup>8</sup> Figure 1 shows the development in the mail volume and turnover in national letter mail in the period from 2008 to 2016.

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<sup>7</sup> *Kamerstukken II* 2005/06, 30 536, no. 3.

<sup>8</sup> ACM (2014) Postal market monitor, p. 3 and ACM (2015) Postal market monitor, state of the Dutch postal market in 2014, p. 7. The figure has been updated on the basis of 2016 figures from ACM's Postal market monitor.

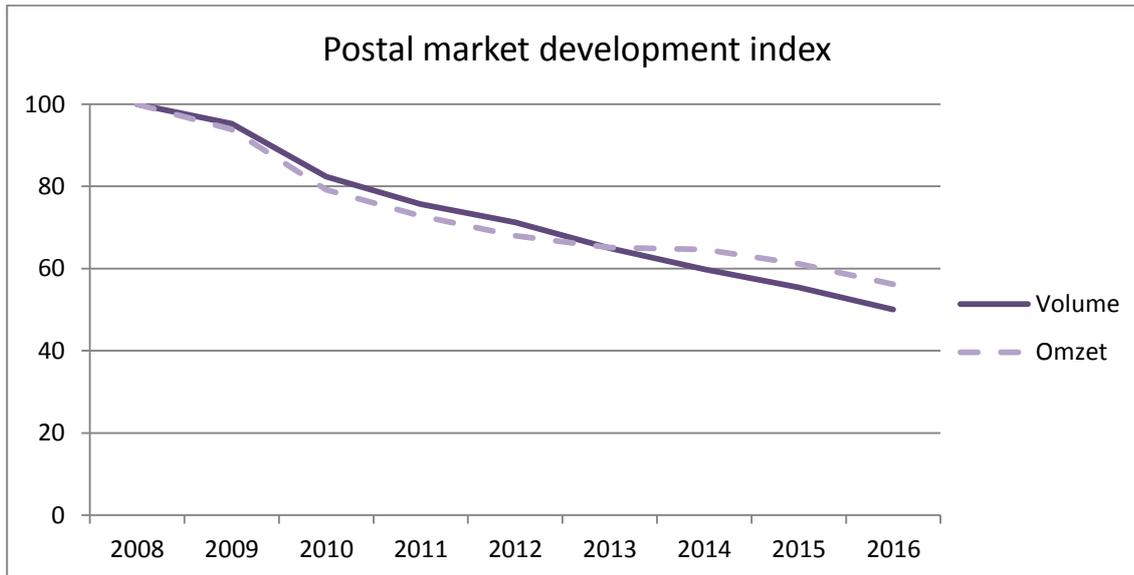


Figure 1: development in the volume and turnover of national letter mail in the period 2008-2016.<sup>9</sup>

*Universal postal service*

13. By means of the USO, the legislature ensures that a basic package of mail transport services of a certain quality is available and accessible at uniform and affordable tariffs. The rules for the USO apply only to PostNL as the designated provider of the USO. On the basis of the USO, PostNL is required to deliver single piece mail – i.e. mail at the single piece tariff for consumers and business senders – five days a week, and funeral and medical mail six days a week. On average over a year, PostNL is required to deliver at least 95 percent of letters the following day. The USO also includes requirements with regard to mail (including bulk mail) to and from foreign countries and with regard to PostNL's service and collection points. These service and collection points are subject to requirements with regard to the number, the distribution and the range carried.
14. An important fact with regard to this market analysis decision is that the USO is of limited size in terms of mail volume in relation to the total volume of national letter mail. It is also important that as the provider of the USO, PostNL has a mail transport network that enables it to transport mail five days a week throughout the Netherlands in order to

<sup>9</sup> Postal market monitor, state of the Dutch postal market in 2014. This figure is included in the confidential report, but is also included in the public news release concerning this monitor, which can be consulted at:

<https://www.acm.nl/nl/publicaties/publicatie/15115/De-stand-van-de-Nederlandse-postmarkt/>.

The figure has been updated on the basis of the 2015 and 2016 data from ACM's Postal market monitor.

provide the USO, but also uses this network to transport bulk mail which, to the extent that it is offered and delivered in the Netherlands, falls outside the scope of the USO.

## 1.2 Objectives of the market analysis

15. The legal history of the Dutch Postal Act shows that the introduction of the new powers for ACM was prompted by certain developments in the postal market. The legislature considered that the existing regulatory toolbox in article 9 of the Dutch Postal Act and the application of the Dutch Competition Act – in particular article 24 of the Dutch Competition Act – was no longer sufficient, as the market risked developing into a market in which there was no longer any actual competition. In order to solve or prevent possible competition problems effectively in the field of mail transport, the legislature therefore introduced a system of *ex ante* regulation.
16. The system of *ex ante* regulation is aimed primarily at protecting effective competition in the postal market against potential competition problems resulting from anticompetitive practices by a mail transport company with SMP.
17. Competition means that end-users (including business end-users) have a choice of different providers of mail transport services. This leads to lower prices and better quality of service. Competition also provides the most incentives to achieve efficiency improvements and innovation in the field of mail transport. End-users, including business end-users, benefit from a competitive postal market.

### *Infrastructure competition*

18. Having regard to the objectives formulated by the legislature in the context of ACM's SMP power, ACM is required to exercise this power in such a way that it contributes as far as possible to the generation of effective and lasting competition in the postal market.
19. In the notes to section 3a of the Dutch Postal Act the legislature stated which types of competition could be protected by the use of the toolbox.

*“The proposed regulatory toolbox contains measures to protect the maintenance and development of competition (between networks) in the postal market. This bill also ensures that other mail transport companies can gain access to the postal network of the party with SMP on a transparent, proportionate and non-discriminatory basis and thus contributes to the potential for competition in the postal market (network competition).”<sup>10</sup>*

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<sup>10</sup> See *Kamerstukken II 2012/13*, 33 501, no. 3, p. 12.

20. On the basis of the above, ACM notes that the legislature sees added value in both competition between networks (hereinafter: infrastructure competition) and competition in the network (hereinafter: service competition).
21. In ACM's opinion effective and lasting competition is best achieved by prioritising obligations that promote infrastructure competition. Effective and lasting competition is best guaranteed in a situation in which mail transport companies compete with each other with their own postal infrastructures. They are then less dependent on the PostNL mail network and hence better able to develop their own commercial offer of mail transport and to distinguish themselves from PostNL. ACM has therefore formulated the objective of promoting infrastructure competition as far as possible with the regulation of the postal market.

### 1.3 Legal framework

22. Article 13a of the Dutch Postal Act defines a mail transport company that has SMP as *“a mail transport company that, alone or jointly with other companies, has economic strength in a mail transport services market defined in accordance with the principles of general European competition law that enables it to behave largely independently of its competitors, customers and ultimately consumers in this market”*.
23. Article 13b, paragraph 1, of the Dutch Postal Act states that ACM can impose an obligation on a mail transport company as stated in articles 13e to 13k of the Dutch Postal Act if it judges on the basis of a market analysis that a mail transport company has SMP. Under article 13b, paragraph 2, of the Dutch Postal Act the aforementioned obligations cannot be imposed on the provider of the USO with regard to mail transport services which form part of the USO in or pursuant to articles 16 and 17. Article 13b, paragraph 3, of the Dutch Postal Act specifies that ACM will exercise due proportionality in imposing the obligations.
24. The structure adopted in section 3a of the Dutch Postal Act is flexible<sup>11</sup> and provides scope for ACM to analyse markets and find appropriate solutions, depending on the developments in the market.<sup>12</sup>

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<sup>11</sup> For example, a “three criteria test” of the kind applied in the Telecommunications Act was deliberately not applied. Cf. *Kamerstukken II 2012/13, 33 501, no. 3, p. 17* and *Kamerstukken II 2012/13, 33 501, no. 6, p. 7 ff*. Similarly, unlike in the case of the Telecommunications Act, an analysis of markets is not mandatory, for example, and the markets or market segments that ACM is required to investigate are not specified. In addition, there is no obligation to resolve identified problems at a particular access level.

<sup>12</sup> *Kamerstukken II 2012/13, 33 501, no. 3, p. 5 & 17* and *Kamerstukken II 2012/13, 33 501, no. 6, p. 7-8*.

*“In this connection, it can be noted that in this bill an instrument was chosen that offers flexibility to anticipate various developments in the postal market. It is ACM's responsibility to assess on a case-by-case basis whether an obligation is appropriate, and if so which. Whenever it imposes an obligation, ACM must ensure that it is proportionate.”<sup>13</sup>*

*“This means it must consider which obligations are necessary and appropriate in a specific case of significant market power, having regard to the specific competition problem that ACM considers plausible in that specific case. If ACM decides to impose one or more obligations, it must clearly state which competition problem it is seeking to prevent and how each imposed obligation contributes to that goal.”<sup>14</sup>*

#### *Access obligation*

25. On the basis of article 13e, paragraph 1, of the Dutch Postal Act, ACM can impose an obligation on a mail transport company with SMP to fulfil reasonable requests for types of access to be determined by it. In such cases the mail transport company must provide access on equal terms under equal circumstances in accordance with article 13b, paragraph 2, of the Dutch Postal Act. The mail transport company must in any case apply the same conditions as those that apply under equivalent circumstances to itself, its subsidiaries or its partner companies.<sup>15</sup> ACM can attach rules to the obligation referred to in paragraph 1 of article 13e of the Dutch Postal Act with regard to fairness, reasonableness and opportunity. If necessary in order to provide access, ACM can also set technical or operational rules on the basis of the fourth paragraph.
26. On the basis of article 2, paragraph 1(n), of the Dutch Postal Act access is deemed to mean: *“making parts of the mail transport network and associated facilities available to another mail transport company under certain conditions for the provision of mail transport services by that mail transport company.”* On the basis of article 2, paragraph 1(m) of the Dutch Postal Act associated facilities are deemed to be: *“services, physical infrastructures and other facilities or elements associated with a mail transport network or*

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<sup>13</sup> *Kamerstukken II 2012/13, 33 501, no. 3, p. 17.*

<sup>14</sup> *Kamerstukken II 2012/13, 33 501, no. 3, p. 22. See also Kamerstukken II 2012/13, 33 501, no. 6, p. 8.*

<sup>15</sup> ACM deems partner companies to be companies in which PostNL is a minority shareholder and exercises control, joint ventures in which PostNL has a participating interest or companies with which PostNL cooperates on a structural basis for its business operations.

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*mail transport service that allow or support the provision of services via that network or service.*<sup>16</sup>

### *Tariff obligation*

27. On the basis of article 13f, paragraph 1, of the Dutch Postal Act, ACM can impose an obligation with regard to the tariffs to be charged or the cost allocation for types of access to be determined by it. This is possible if in ACM's judgement a market analysis shows that the mail transport company involved, since it has SMP, can keep tariffs at an excessively high level or squeeze margins. On the basis of article 13f, paragraph 2, such an obligation can mean that a cost-oriented tariff must be charged for access or that a cost allocation system to be determined or approved by ACM must be used.

### *Transparency obligations*

28. On the basis of article 13g, paragraph 1, of the Dutch Postal Act, ACM can impose an obligation to publish information to be specified by it and in a manner to be determined by ACM. On the basis of article 13g, paragraph 2, ACM can also impose an obligation to publish a reference offer including a description of the types of access to be determined by it. By means of article 13g, paragraph 3, ACM can attach rules to the obligations with regard to the degree of detail and the means of publication.

### *Other obligations*

29. On the basis of article 13h, paragraph 1, of the Dutch Postal Act, ACM can impose the obligation to maintain separate accounts in which the revenues and costs of the mail transport services determined by it which the mail transport company offers to the company itself, to other mail transport companies or to end-users are separate from those of the other activities conducted by the mail transport company. On the basis of article 13h, paragraph 2, ACM can attach rules with regard to the organisation of the accounts, the degree of detail and the submission of accounting documents to ACM including data on income received from third parties.
30. On the basis of article 13i, paragraph 1, of the Dutch Postal Act, ACM can impose the obligation, with regard to the provision of designated mail transport services for other mail transport companies or end-users, to provide a designated mail transport service independently of other services. ACM can also impose an obligation to treat these other mail transport companies or end-users equally in equal cases. Furthermore, ACM can

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<sup>16</sup> An example of associated facilities concerns the containers used to drop off mail.

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oblige a mail transport company with SMP to guarantee a reasonable quality level. On the basis of article 13i, paragraph 2, ACM may attach more detailed rules as necessary for the proper fulfilment of those obligations.

31. In the case of designated mail transport services which the company provides for end-users, ACM can impose obligations on the basis of article 13j, paragraph 1, of the Dutch Postal Act with regard to control of the tariffs to be charged or the cost allocation. On the basis of article 13j, paragraph 3, ACM can attach more detailed rules as necessary for the proper fulfilment of those obligations. On the basis of article 13k of the Dutch Postal Act, ACM can impose an obligation to refrain from introducing new or amended tariffs for mail transport services for end-users until such tariffs have been approved.

### *Mutual service provision (article 9 of the Dutch Postal Act)*

32. In order to allow other mail transport companies to gain access to PostNL's network, the Dutch Postal Act includes a provision in section 3 (Mutual Service Provision). Article 9 of the Dutch Postal Act specifies that a

mail transport company that has a network with which mailpieces can be delivered on at least five days per week to all addresses in the Netherlands and that provides mail transport under special conditions and tariffs using that network must also provide this mail transport for other mail transport companies under conditions and tariffs that are non-discriminatory and transparent vis-à-vis other senders and other mail transport companies. PostNL is the only mail transport company in the Netherlands that has such a mail transport network.

33. In 2014, as described in marginal 3, the amended Dutch Postal Act came into force and ACM gained the new power in relation to SMP. The legislature anticipated that after the amended Dutch Postal Act came into force ACM would need some time to assess whether an obligation should be imposed on a mail transport company with SMP. The legislature deems it is desirable during that transitional period that mail transport companies can rely or continue to rely on article 9, paragraph 1, of the Dutch Postal Act. It has therefore determined that article 9 of the Dutch Postal Act will cease to apply at a time to be specified in a Royal Decree.<sup>17</sup> It has since been announced that article 9 of the Dutch Postal Act will cease to apply on 1 August 2017.<sup>18</sup>

<sup>17</sup> *Kamerstukken II* 2011/12, 33 501, no. 3, p. 22.

<sup>18</sup> <https://www.rijksoverheid.nl/ministeries/ministerie-van-economische-zaken/documenten/besluiten/2017/06/30/besluitvorming-vernemen-artikel-9-postwet>.

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34. The reason for allowing article 9 of the Dutch Postal Act to lapse lies in the fact that the SMP regulatory toolbox is broader and more flexible. The new toolbox is on the one hand better suited to tackling competition problems and anticipating the dynamics in the market. On the other hand, this toolbox also makes it possible to guarantee access for mail transport companies to the mail transport network of a dominant market participant. The legislature therefore considers that the existing relevant requirements with regard to mutual service provision can lapse.
35. Since article 9 of the Dutch Postal Act will cease to apply, ACM has conducted the analysis and assessment of the market situation in this market analysis decision on the basis of the absence of article 9 of the Dutch Postal Act. This means that the analysis does not take account of the presence of article 9 of the Dutch Postal Act.

### *Policy Rule*

36. On 18 December 2016, the Minister of Economic Affairs published a Policy Rule on *ex ante* regulation under the Dutch Postal Act. The Policy Rule further specifies ACM's application of articles 13a to 13k of the Dutch Postal Act. The first article of the Policy Rule deals with definitions. The fifth and sixth articles contain final provisions. The second, third and fourth articles are explained separately below.
37. Article 2 of the Policy Rule states the goals of the *ex ante* regulation. According to first paragraph, ACM must ensure that its decisions based on articles 13a to 13k of the act do not extend further than is necessary to address potential competition problems in a relevant market defined by ACM for mail transport services and to guarantee static and dynamic efficiency in the market for mail transport services. It follows from the second paragraph that, in order to achieve the goals stated in the first paragraph, ACM exercises the power to impose obligations in such a way that decisions help ensure that in the defined relevant market mail transport companies can also over the long term (a) innovate in their network for mail transport services or the offered mail transport services, and invest in their network and that mail transport companies (b) can compete on both the quality and price of the mail transport services.
38. Article 3 of the Policy Rule describes the requirements set by the legislature with regard to the proportionality of decisions taken on the basis of articles 13a to 13k of the Dutch Postal Act. In the application of these articles, the first paragraph obliges ACM to only impose obligations on a mail transport company with SMP that are necessary, appropriate and the least far-reaching means available to achieve the goals stated in article 2 of the Policy Rule. The provisions of the first paragraph require ACM to impose

no obligations on the mail transport company with SMP that are more far-reaching than is necessary to enable other mail transport companies in the defined relevant market to compete over the long term with the mail transport company with significant market power, or that have the effect of distorting the financial position of the mail transport company with significant market power in such a way as to threaten financial instability.

39. Article 4 of the Policy Rule requires ACM to conduct an impact analysis. According to the first paragraph this means that ACM is required to demonstrate that the imposed obligations are necessary, appropriate and proportionate in order to achieve the objectives stated in article 2 and that other less far-reaching measures are not effective. The second paragraph adds a requirement that the substantiation referred to in the first paragraph must include an analysis, as far as possible in a quantitative sense, of the economic effects on the postal market and of the regulatory costs involved in the market analysis decision.

The third paragraph adds a requirement that if a mail transport company with SMP demonstrates in quantitative terms that an intended decision has any of the effects referred to in article 3, paragraph 2, ACM will amend the intended decision accordingly, or ACM will demonstrate by means of a quantitative analysis that there is no such effect.

#### *Procedure*

40. On the basis of article 13d, paragraph 1, of the Dutch Postal Act the preparation of the market analysis decision is subject to section 3.4 of the General Administrative Law Act (hereinafter: Awb). On the basis of this section of the Awb, ACM makes a draft of the decision available for inspection for a period of six weeks, together with the documents that are reasonably necessary to assess the draft. This is also reported in the Government Gazette. The draft decision is also sent to interested parties. On the basis of article 3:15 and 3:16 of the Awb, interested parties can present their opinions on the draft orally or in writing, at their discretion, during this six-week period. ACM must compile a report of the opinions submitted.

## **1.4 Process**

### **1.4.1 Public consultation on the definition of new powers**

41. From 13 January 2014 to 7 February 2014, ACM held a public consultation in which interested parties were given an opportunity to state which competition problems they experienced in the postal market. They could also state their opinion on the use of the

new powers.<sup>19</sup> The aim of this phase was to determine, prior to the market analysis, how ACM could use its new powers most effectively.

42. With regard to the competition problems raised in the consultation for the various mail transport services, ACM then investigated the potential damage caused by the competition problems for end-users and how effectively and efficiently ACM could use the new powers to remedy the identified competition problems in a situation in which article 9 of the Dutch Postal Act does not apply. The greater the potential damage for end-users and the more effectively and efficiently ACM could operate, the higher was the priority that ACM gave to the problem. In this way, ACM aims to ensure that the greatest effect is achieved for market participants and end-users.
43. Various regional mail transport companies raised possible problems with regard to the transport of 24-hour bulk mail. These problems relate to access to the network and the associated facilities of PostNL for 24-hour bulk mail and the consequences this has for competition in the postal market. The regional mail transport companies have to use PostNL for onward distribution and delivery on the following day in the Netherlands for that part of the 24-hour bulk mail that is outside their own delivery area and for which they cannot provide transport by any other means. After all, PostNL is the only nationally operating mail transport company with a five-day mail transport network that is suitable for transporting 24-hour bulk mail.<sup>20</sup> This high dependence on PostNL poses risks to competition in the transport of 24-hour bulk mail.
44. On the basis of the responses from the consultation, ACM decided to investigate these identified problems in the transport of 24-hour bulk mail in greater detail by means of a market analysis.<sup>21</sup> By 24-hour mail ACM means the mail which must be delivered one day after it was dropped off at a mail transport company. By bulk mail ACM means a consignment of mailpieces that are not carried at the single item tariff but are offered for mail transport under special conditions and tariffs and are ultimately delivered to recipients in the Netherlands in the designated letterbox.

#### **1.4.2 Analysis phase up to the draft decision of December 2014**

45. Below ACM describes the various investigative steps it has taken in reaching this decision.

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<sup>19</sup> [https://www.acm.nl/nl/publicaties/publicatie/12435/Consultatie-wijziging-Postwet-2009/..](https://www.acm.nl/nl/publicaties/publicatie/12435/Consultatie-wijziging-Postwet-2009/)

<sup>20</sup> The Sandd mail transport company does not operate in the market segment for 24-hour business post.

<sup>21</sup> ACM's opinion on the results of the consultation, 28 March 2014,

[https://www.acm.nl/nl/publicaties/publicatie/12763/Uitkomsten-consultatie-gewijzigde-Postwet-2009/.](https://www.acm.nl/nl/publicaties/publicatie/12763/Uitkomsten-consultatie-gewijzigde-Postwet-2009/)

*Questionnaires on market definition and dominance analysis*

46. On 3 April 2014, ACM sent a questionnaire to mail transport companies to obtain data and information for the market definition and dominance analysis. ACM sent an extensive questionnaire to the six largest mail transport companies in the Netherlands.<sup>22</sup> ACM also sent an abridged version of the questionnaire to a selection of 30 small mail transport companies.<sup>23</sup> In order to limit the administrative expense for market participants, ACM chose not to approach all the small mail transport companies of which it was aware. The selection of the 30 surveyed companies was based on defined criteria (turnover > €0.5 million, existence of its own delivery organisation, different degree of use of access to PostNL) and presents a representative picture of the different types of regional mail transport companies (local and regional mail companies and social work companies).

*Interviews with mail transport companies*

47. ACM also interviewed the mail transport companies PostNL, Sandd, Van Straaten Post, Intrapost and Ergon. Discussions also took place with Coöperatieve Zakelijke Post Nederland U.A., trading as Businesspost, an association of collaborating social work companies, and a number of other mail transport companies.<sup>24</sup> These discussions were intended on the one hand to gain a view of the mail transport activities of the respective companies and to obtain a picture of their operating methods. On the other hand, these discussions served to obtain a more detailed oral explanation from those mail transport companies of their responses to the aforementioned questionnaire on the market definition and dominance analysis.

*Questionnaire concerning competition problems and possible obligations*

48. Subsequently, on 24 June 2014, ACM sent a questionnaire to 16<sup>25</sup> mail transport companies with questions on obligations which could possibly be imposed if a mail transport company had SMP in a more precisely defined market.<sup>26</sup> The aim of this questionnaire was to collect information on mail transport companies' assessment of the

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<sup>22</sup> Questionnaire for the market definition and dominance analysis of 3 April 2014.

<sup>23</sup> Questionnaire sent to mail transport companies of 3 April 2014.

<sup>24</sup> The decision to hold discussions with these mail transport companies was due to the fact that they are the largest providers of bulk mail that responded to the consultation.

<sup>25</sup> Of the 30 mail transport companies approached with the questionnaire on the market definition and dominance analysis, a number were dropped because they did not respond or were not sufficiently able to provide a detailed and reasoned response to the questionnaire on competition problems and possible obligations.

<sup>26</sup> Questionnaire on the possible obligations of 24 June 2014.

proportionality within the meaning of article 13b of the Dutch Postal Act

of any obligations that ACM could impose on the basis of that article in order to prevent the identified potential competition problems.

*External survey of business senders*

49. Part of ACM's investigation is an external survey of the purchase of services, the actual, intended and expected switching behaviour and the requirements of business mail senders. The contract for this external survey was awarded after a tender process to SEO Amsterdam Economics (hereinafter: SEO).<sup>27</sup> In order to assess the questionnaire that would be sent out to business senders, SEO issued a request through ACM to the large mail transport companies (PostNL, Sandd and the regional mail transport companies Van Straaten Post, Intrapost and Businesspost) to provide contact details of large and other business senders. On the basis of the provided contact details and its own contact details SEO conducted interviews with business senders to test and validate the questionnaire. The Association of Large-Scale Consumers of Postal Services (hereinafter: VGP) was approached by SEO and included in the survey among business senders.
50. For the survey three samples were selected among business senders, members of the VGP (26 organisations) who had been approached in writing, other large business mail senders (34 organizations) and respondents in a PanelClix online panel. This resulted in almost 400 business senders completing all or part of the questionnaire. The results of this external investigation were used in the market definition and dominance analysis in this decision.

*Mail market monitor*

51. On the basis of article 33 of the Dutch Postal Act, ACM is responsible for collecting, processing and analysing data on the operation of the postal market and sending an annual report of its findings to the Minister of Economic Affairs. To compile the monitor ACM has asked the largest mail transport companies to provide detailed information on their mail transport activities every year since 2008. Mail transport companies were also asked additional questions on the scale of their activities. This information was used for the quantitative substantiation mainly of the dominance analysis in this decision.

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<sup>27</sup> Report by SEO Amsterdam Economics, 'Keuzemogelijkheden en overstappedrag zakelijk postvervoer', September 2014, on behalf of ACM.

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*Draft decision of 19 December 2014*

52. On 19 December 2014, ACM published the draft decision on the market analysis of the postal sector. In this draft decision ACM concluded that PostNL had SMP in the national markets for the transport of small business 24-hour and 48-hour bulk mail, medium business 24-, 48- and 72+- hour bulk mail and large business 24-, 48- and 72+-hour bulk mail.
53. In the draft decision ACM judged that the following obligations were appropriate in order to avoid the potential competition problems described in the draft decision:
- a. an access and (associated) non-discrimination obligation for 24-hour bulk mail (article 13e of the Dutch Postal Act). This obligation means that PostNL must grant other mail transport companies access to its network under reasonable conditions. For this access PostNL must also apply the same conditions as it applies to 24-hour bulk mail from business customers;
  - b. a tariff obligation with regard to access for 24-hour bulk mail (article 13f of the Dutch Postal Act). Under this obligation the tariffs for a PostNL access service must be non-discriminatory compared to the tariffs which PostNL charges to business customers. The tariff obligation included in the draft decision meant that for access for 24-hour bulk mail PostNL must not set (wholesale or other) tariffs at a higher level than the weighted average of the retail and other tariffs that it charges for a comparable 24-hour bulk mail service for its business customers; and
  - c. an obligation to publish certain information and a reference offer (transparency obligations) (article 13g of the Dutch Postal Act). This obligation means that PostNL must make the information of relevance for providing access to its network for 24-hour bulk mail available promptly to purchasers of that access (i.e. mail transport companies). PostNL must also include its access offer for 24-hour bulk mail in a reference offer to be published by it.

**1.4.3 Survey phase up to and including consultation obligations July 2015**

*Consultation and opinions on draft decision of December 2014*

54. ACM received 18 written opinions on the draft decision up to 30 January 2015. ACM received 11 opinions from mail transport companies and one opinion from an interest organisation of large business mail senders. ACM determined that the other parties which

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submitted an opinion on time could not be considered to be interested parties in the draft decision within the meaning of article 1:2, paragraph 1, of the Awb.

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### *Relevant developments and more detailed investigation*

55. In February 2015, the European Court of Justice (hereinafter: ECJ) issued its judgement in the Belgian bpost case.<sup>28</sup> In the bpost judgement the ECJ stated that the granting of discounts *per sender*<sup>29</sup> did not breach the non-discrimination principle with regard to USO services as stated in the Postal Directive.<sup>30</sup>
56. In the spring of 2015 there were a number of investigations into the conduct of PostNL and possible breaches of article 9 of the Dutch Postal Act by PostNL in relation to the tariffs and conditions applied for 24-hour bulk mail. These investigations focused on PostNL's strategic product and pricing behaviour resulting from the tariffs and conditions applied for 2015 and the discriminatory application of conditions and tariffs. With regard to the tariffs and conditions applied for 2015, this concerned the introduction of the Dienst Diverse Afzenders (*Diverse Senders Service - DivA*),<sup>31</sup> the transparency of tariffs and conditions,<sup>32</sup> **[confidential:**

] There were also procedures  
against the discriminatory application of conditions and tariffs for mail transport

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<sup>28</sup> Judgement of the European Court of Justice in the bpost-Bipt case of 11 February 2015, C-340/13.

<sup>29</sup> *Per sender* means that the tariffs are charged to a mail transport company on the basis of the consignment volume and annual volume per individual business customer (per sender) of the mail transport company rather than on the basis of that mail transport company's total lodged consignment volume and annual volume.

<sup>30</sup> Directive 97/67/EC of the European Parliament and the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998, L 15, p. 14), as last amended by Directive 2008/6/EC of the European Parliament and the Council of 20 February 2008

<sup>31</sup> On this matter see the decision of ACM of 1 May 2015 (reference ACM/DTVP/2015/201094\_OV) to be found at [www.acm.nl/nl/publicaties/publicatie/14721/Last-onder-dwangsom-PostNL-voor-te-hoge-tarieven-concurrentie/](http://www.acm.nl/nl/publicaties/publicatie/14721/Last-onder-dwangsom-PostNL-voor-te-hoge-tarieven-concurrentie/) and the ruling in preliminary relief proceedings of the District Court of Rotterdam of 10 September 2015, ECLI:NL:RBROT:2015:6445

<sup>32</sup> On this matter see the decision of ACM of 16 October 2015 (reference ACM/DTVP/2015/205887\_OV) to be found at [www.acm.nl/nl/publicaties/publicatie/15050/Besluit-transparantie-PostNL/](http://www.acm.nl/nl/publicaties/publicatie/15050/Besluit-transparantie-PostNL/) and the ruling in preliminary relief proceedings of the District Court of Rotterdam of 11 December 2015, ECLI:NL:RBROT:2015:9022.

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companies in relation to business senders such as the Uniform Sender Address Condition<sup>33</sup> and the awarding of a contract for mail transport services by the municipality of Rotterdam<sup>34</sup>. **[Confidential:**

]. The essence of these practices is that PostNL designed and applied the tariffs and conditions in such a way that it had a detrimental effect on competing mail transport companies. The information from these enforcement investigations and procedures provided grounds to examine whether the previous analysis of the potential competition problems and the fulfilment of the obligations in the draft decision needed to be amended.

57. On 24 April 2015, ACM sent clarification questions to PostNL in response to a number of points in the opinion submitted by PostNL. PostNL was also asked about the tariffs and discounts it applied for bulk mail. ACM received responses to the questions on 22 May 2015. This response prompted the further questions raised by ACM on 11 June 2015. PostNL then answered these questions on 1 July 2015.

### *Proposed amendment of the tariff obligation*

58. On the basis of its more detailed investigation ACM chose to amend the tariff obligation in the draft decision of 19 December 2014. With regard to the amendment of the tariff obligation, ACM proposed further development and refinement.
59. In addition, on the basis of the opinions on the draft decision, ACM concluded that the market definition for the small business market in the draft decision of December 2014 should be amended so that 72+-hour bulk mail was also included in the small business postal market.<sup>35</sup>

### *Consultation and opinions on obligations July 2015*

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<sup>33</sup> On this matter see the ruling of the District Court of Rotterdam of 4 February 2016, ECLI:NL:RBROT:2016:823.

<sup>34</sup> On this matter see the ruling in preliminary relief proceedings of the District Court of Rotterdam of 25 June 2015, ECLI:NL:RBROT:2015:4520

<sup>35</sup> This substantiation of the amended market definition is developed further in the next section. A modified approach has been adopted to substantiate the relevant defined markets.

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60. ACM then consulted on the intended amendment of the tariff obligation on 6 July 2015. By means of a consultation document ACM asked mail transport companies to answer a number of questions on the intended amended obligations.<sup>36</sup>
61. In the period up to 24 July 2015, ACM received responses and answers to the consultation questions from a total of 14 mail transport companies. Almost all these mail transport companies were critical with regard to the refinement of the tariff obligation and particularly with regard to its consequences.

### 1.4.4 Fulfilment of amended obligations in new draft decision June 2016

#### *Visits to mail transport companies*

62. The critical responses from mail transport companies to the amended fulfilment of the tariff obligation provided grounds to investigate the objections in the light of a possible reconsideration of this fulfilment. To this end, ACM made on-site visits in September and October 2015 to various mail transport companies that had responded to the consultation and held discussions with them.

#### *Discussions with PostNL*

63. Against the background of the tariff obligation formulated by ACM in the July 2015 proposal consulted on and the other ongoing investigations into possible violations of article 9 of the Dutch Postal Act, PostNL issued a request to ACM at the end of July 2015 to discuss its tariff and discount structure with regard to 24-hour bulk mail and a possible fulfilment of the obligations in the market analysis decision.
64. ACM informed PostNL that a market-supported solution for PostNL's tariff structure could be considered in the market analysis decision and the prospective obligations. By market-supported solution ACM means a solution that is supported by PostNL and all competing mail transport companies. From August 2015 ACM entered into discussions with PostNL on possible adjustments to its tariff and discount structure. In various discussions PostNL presented an elaboration of an adjusted tariff and discount structure. According to PostNL, these adjustments would eliminate the potential competition problems, address the previous objections on the part of ACM and at the same time safeguard the interests of PostNL. During the discussions ACM responded critically to PostNL's proposals.

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<sup>36</sup> On this matter see the publication of 6 July 2015 on the ACM website: Consultation on obligations in the postal sector market analysis, to be found at [www.acm.nl/nl/publicaties/publicatie/14467/Consultatie-verplichtingen-marktanalyse-postsector/](http://www.acm.nl/nl/publicaties/publicatie/14467/Consultatie-verplichtingen-marktanalyse-postsector/).

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65. ACM also told PostNL continually during the discussions that, in order to achieve a market-supported solution, PostNL should discuss its intentions for a change in the tariff and discount structure with mail transport companies, in order to involve them in the further decision-making on the fulfilment of the obligations. In a letter of 2 November 2015<sup>37</sup> ACM informed the mail transport companies that it was in discussions with PostNL. ACM asked mail transport companies if they were interested in contributing to the design of a future-proof tariff structure as part of the decision-making for the market analysis decision.
66. During the period from December 2015 to the beginning of February 2016, PostNL made contact with other mail transport companies in order to involve them in the design of a future-proof tariff structure.

### *Industry group meetings*

67. ACM then decided to organise two industry group meetings.<sup>38</sup> *During the first meeting on 16 February 2016, PostNL had the opportunity to present its proposal for the fulfilment of the obligations, incorporating the results of the discussions with the other mail transport companies. The underlying reason for this was that if PostNL and mail transport companies could reach agreement on certain aspects of the obligations, ACM could possibly incorporate these in the final market analysis decision.*
68. 11 mail transport companies took part in this first industry group meeting on 16 February 2016. During the meeting, PostNL fed back its findings from the discussions with the mail transport companies. PostNL also set out its vision for the fulfilment of the obligations on the basis of these findings. Participating mail transport companies were given an opportunity to react to this during and after the industry group meeting. After the end of this meeting ACM received reactions to PostNL's proposal, including critical ones, from participating mail transport companies. From the reactions ACM concluded that there was little or no support among mail transport companies for PostNL's proposal.
69. As no market-supported solution was available, ACM presented a basic draft of the intended tariff obligation at the industry group meeting of 11 March 2016. In this draft, ACM took account of PostNL's aforementioned practices violating article 9 of the Dutch Postal Act, the impact of PostNL's proposals for a future-proof tariff structure for competing mail transport companies, as well as the responses of mail transport

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<sup>37</sup> Reference ACM/DTVP/2015/206397

<sup>38</sup> [www.acm.nl/nl/publicaties/publicatie/15119/Uitnodiging-voor-Industry-Group-bijeenkomsten-marktanalyse-postsector/..](http://www.acm.nl/nl/publicaties/publicatie/15119/Uitnodiging-voor-Industry-Group-bijeenkomsten-marktanalyse-postsector/)

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companies to previous proposals from ACM and PostNL's proposal during the industry group meeting of 16 February 2016. The draft presented by ACM included a substantial change in the tariff obligation to be imposed on PostNL compared to the draft decision of December 2014 and the amended obligation of July 2015 that was consulted on. At its request, ACM received written responses to this basic draft from participating mail transport companies after this industry group meeting.

### *Draft decision June 2016*

70. ACM developed this new draft decision further on the basis of the oral and written responses from participating mail transport companies as well as the previously received opinions and information.
71. ACM received 12 written opinions on this draft decision, seven of which were submitted by mail transport companies. ACM determined that the other parties which submitted an opinion on time could not be considered to be interested parties in the draft decision within the meaning of article 1:2, paragraph 1, of the Awb.

### *Policy Rule*

72. On 18 December 2016 the Minister of Economic Affairs published a Policy Rule on *ex ante* regulation based on the Dutch Postal Act (hereinafter: Policy Rule). The Policy Rule further specifies ACM's application of articles 13a to 13k of the Dutch Postal Act. ACM conducted an implementation review on a draft of this Policy Rule.
73. The Policy Rule states that the most important goal is guaranteeing the static and dynamic competition in the market for mail transport services. The obligations to be imposed by ACM that are intended to fulfil this objective must also help ensure that mail transport companies can innovate and invest in their network and that they compete with each other on both the price and the quality of mail transport services.
74. It also follows from the Policy Rule that in accomplishing these objectives ACM can only impose obligations on PostNL that are necessary, appropriate and proportionate. The latter means that the least far-reaching solution must be adopted that addresses the potential competition problems observed by ACM. When imposing obligations it is also necessary to prevent the financial position of PostNL being distorted to such an extent as to pose a risk of financial instability for PostNL.
75. Finally, the Policy Rule obliges ACM to substantiate the necessity, appropriateness and proportionality of imposed obligations and to state why less far-reaching obligations are

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not effective. This substantiation must include an impact analysis that quantifies the economic effects of the obligations on the postal market as far as possible.

*Impact assessment and research by Frontier Economics*

76. In order to fulfil the increased burden of proof incumbent on ACM as a result of the Policy Rule, ACM must quantify the economic effects of the prospective obligations. ACM does this by analysing the economic effects by means of a quantitative determination of the economic effects of the *ex ante* regulation on business senders of bulk mail, the mail transport company with significant market power (PostNL) and the other mail transport companies for the years during the regulatory period. This analysis of economic effects translates into a calculation of the consumer surplus (for business senders of bulk mail), the producer surplus (for PostNL and other mail transport companies) and the total surplus. In addition, ACM calculates the regulatory costs involved in the *ex ante* regulation in order to produce a welfare-economic analysis for the defined relevant markets.
77. For the quantitative impact assessment ACM instructed the research and consulting firm Frontier Economics on 23 January 2017 to develop an economic model. Using this economic model (hereinafter: the Frontier model) ACM can quantify the economic effects of the prospective obligations on the defined markets as far as possible. The results of the Frontier model have been used to substantiate the proportionality of the prospective obligations.

*Consultation on potential competition problems, obligations and impact assessment*

78. As well as adding an impact assessment, ACM also amended various aspects of the prospective obligations in response to the Policy Rule and the responses received to the draft decision of June 2016 and the most recent insights. The biggest change made concerns ACM's decision to require PostNL to charge cost-oriented tariffs for the access services for 24-hour bulk mail.
79. Having regard to the above adjustments, ACM consulted on the potential competition problems, the obligations and the impact assessment on 6 April 2017. ACM also offered mail transport companies the possibility of accessing the Frontier Economics model by means of a data room procedure. Following this consultation ACM received nine written opinions, six of which were submitted by mail transport companies. ACM determined that the other parties which submitted an opinion on time could not be considered to be

interested parties in the draft decision within the meaning of article 1:2, paragraph 1, of the Awb.

80. ACM received the opinion of PostNL on 18 May 2017. This opinion includes an analysis from PostNL of the impact of the proposed obligations, a cost benefit analysis (hereinafter: CBA). By means of this CBA, PostNL fulfils article 4, paragraph 3, of the Policy Rule. This article of the Policy Rule states that if PostNL demonstrates sufficiently by means of a quantitative substantiation that the obligations either go further than is necessary in order to safeguard competition in the long term or that they threaten the financial stability of PostNL, ACM must amend the intended decision accordingly or must substantiate in quantitative terms why there is no such effect. According to PostNL, its analysis shows that the obligations imposed by ACM threaten its financial stability.

#### *Final decision*

81. On the basis of the opinions on the fulfilment of the obligations that was consulted on and the impact assessment, recent monitor data with updated data for 2016, a (slightly) amended model to assess the effects of the obligations and taking into account PostNL's invocation of article 4, paragraph 3, of the Policy Rule, ACM has taken a final market analysis decision.

### **1.5 Structure of this decision and guide for readers**

82. In this market analysis, ACM determines whether a mail transport company is operating with SMP in the defined relevant markets. ACM then describes the potential competition problems that may result and which obligations are proportionate within the meaning of article 13b of the Dutch Postal Act in order to prevent these problems.
83. ACM has adopted the following procedure in the investigation:
- ACM determines the starting point of the market definition. ACM then defines the relevant markets. The investigation into the definition of the relevant markets is included in section 2;
  - ACM then performs the dominance analysis for the defined relevant markets. With the dominance analysis ACM investigates whether there are companies operating in these markets with SMP. This dominance analysis is included in section 3;
  - If a company with SMP is operating in the relevant market, ACM investigates which potential competition problems may arise. The investigation into the potential competition problems is included in section 4;

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- ACM then investigates which obligations are necessary and appropriate in order to prevent these potential competition problems. The fulfilment and justification of the prospective obligations is included in section 5;
- ACM then examines the impact assessment in section 6. This section includes a quantitative analysis of the effects of the prospective obligations.
- The market analysis decision ends with the provisions (section 7).

The annexes to this market analysis decision contain more detailed analyses for the market definition and the impact assessment. ACM also presents the memorandum of findings in response to the opinions on draft decisions and consultations in the annex.

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## 2 Market definition

### 2.1 Introduction

84. In this section ACM defines the relevant markets.
85. In section 2.2 ACM first describes the analysis framework of the market definition. A description of the transport of bulk mail follows in section 2.3. Then, in section 2.4 ACM describes the starting point for the market definition, dealing with the definition of the product markets in section 2.5. In section 2.6 ACM then defines the relevant geographic markets. Finally, in section 2.7, ACM finally defines the relevant markets.

### 2.2 Analysis framework for market definition

86. The definition of the relevant market is the first step in assessing whether a company has SMP, as the next step in the market analysis, namely determining whether a company is able to behave largely independently of its competitors, customers and end-users, must be investigated in the defined relevant market.
87. ACM determines the relevant market in accordance with the principles of general European competition law. The European Commission Notice explains how the market is defined.<sup>39</sup> ACM also takes account of the European Commission guidelines for the market analysis of the electronic communications sector (hereinafter: market analysis guidelines) in its analysis.<sup>40</sup> These market analysis guidelines contain guidance on market definition in the light of the assessment as to whether a company has SMP.
88. In determining the relevant market, ACM investigates which products compete with each other and therefore belong to the same relevant market. A relevant market has two dimensions: the product market and the geographic market.

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<sup>39</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03).

<sup>40</sup> Guidelines of the Commission for market analysis and assessment of SMP in the scope of the common regulatory framework for electronic communication networks and services, *OJEC* 2002 C 165/03.

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### *Definition of product market*

89. A relevant product market comprises all products that can be substituted or are sufficiently interchangeable. Substitution occurs when, on the basis of their objective characteristics, products are suitable to fulfil a constant need of the customer. But substitution can also result from the price or intended use of the products, or the competition conditions and/or the structure of supply and demand in the market concerned. Products that are only interchangeable to a limited or relatively limited extent do not form part of the same product market.
90. In defining the relevant markets there are two sources of competitive pressure: i) substitution on the demand side and ii) substitution on the supply side. If there is substitutability on the demand side or on the supply side, there are grounds for defining the market more broadly than in the case of the initial product definition (the starting point). Demand substitution is a measure of the readiness of a customer to replace the product concerned with other products. Supply substitution occurs when providers other than the provider of the products concerned are prepared<sup>41</sup> to use their company resources in the short term to offer the products concerned without having to make considerable investments or additional investments in order to do so.<sup>42</sup>
91. ACM first investigates demand substitution. It then analyses whether supply substitution imposes additional restrictions on the pricing behaviour of the hypothetical monopolist.

### *Definition of geographic market*

92. The relevant geographic market is the area within which the companies concerned play a role in demand for and supply of goods and services, within which the competitive advantages are sufficiently homogenous and which can be distinguished from adjacent areas by the fact that different competitive conditions clearly prevail in them.<sup>43</sup>
93. In the definition of the geographic market ACM investigates whether there are areas that are distinguished from each other by having different competitive conditions. ACM focuses here on the presence of regional differences, geographic differentiation in price setting by suppliers and geographic differences in product characteristics.

### *Approach to the investigation*

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<sup>41</sup> Market analysis guidelines, marginal 52.

<sup>42</sup> Market analysis guidelines, marginal 39.

<sup>43</sup> Market definition notice, marginal 8.

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94. A number of investigative methods can be used to define the relevant market. The most widely used method to define a relevant market is an analysis of the interchangeability of products by means of an analysis and comparison of objective characteristics of the products to be compared, the use and intended application of the products, the relevant prices, switching between products and an assessment of the competition situation in the supply of products.
95. Another method for defining a relevant market is applying the hypothetical monopolist test by means of a critical loss analysis. This analysis uses information on prices at a competitive level, the gross margin and the price sensitivity of products to determine step by step whether a hypothetical monopolist is able to increase the prices of a product or set of products profitably.
96. A significant issue in the aforementioned critical loss analysis is obtaining reliable data on prices at a competitive level, the margin and price sensitivity. The level of the gross margin affects the determination of the critical loss and the results of the critical loss analysis. ACM must estimate the level of this gross margin. To determine the actual loss it is necessary to start from competitive prices, whereas in the transport of 24-hour bulk mail it is assumed that there is no competitive market and prices are not competitive. Working with supracompetitive prices leads to an overestimate of the willingness to switch and gives rise to a cellophane fallacy<sup>44</sup>, *with the risk that a relevant market is defined too broadly. SEO<sup>45</sup> did not use prices at a competitive level in its analysis. In the vignette analysis, SEO uses average revenues from bulk mail and takes no account of the different composition of the mail streams within the various service frameworks. Debate also surrounds the precise application of the critical loss analysis.*
97. The results from the SEO survey, combined with the estimates for the critical loss and actual loss and the precise application of the analysis, mean there is insufficient possibility to implement a critical loss analysis with robust results for market definition. ACM explains this further in annex 1.

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<sup>44</sup> A 'cellophane fallacy' occurs when there are supracompetitive prices, as a result of which a hypothetical monopolist test produces no reliable picture of the relevant substitution possibilities. In the case of supracompetitive prices customers are more inclined to consider a product to be a substitute than if the price has come about as result of competition.

<sup>45</sup> Report by SEO Amsterdam Economics, 'Keuzemogelijkheden en overstappedrag zakelijk postvervoer', September 2014, on behalf of ACM.

98. In this market analysis decision, ACM therefore uses the first regular method to define the relevant markets as reliably as possible. In doing so, it uses the results of the SEO survey as far as possible.

### 2.3 Description of bulk mail

99. Before ACM defines the relevant markets, it provides a brief description of the services.

100. This market analysis relates to the transport of addressed national letter mail. Unaddressed mailpieces and mailpieces that do not fit in the letterbox and/or are not delivered through the letterbox – such as the transport of registered mailpieces, parcels, express post and mailbox deliveries<sup>46</sup> – therefore fall outside the scope of this market analysis. The distinction between the USO with regard to consignments offered for transport and delivered in the Netherlands – single piece mail or mail sent at a single piece tariff – and mail transport services outside the USO with regard to consignments offered for transport and delivered in the Netherlands – bulk mail or mail carried under special conditions and at special tariffs – is also important. In accordance with article 13b, paragraph 2, of the Dutch Postal Act, this market analysis focuses on the transport of bulk mail that is offered for transport and delivered in the Netherlands and not on the USO.

101. Bulk mail comes almost exclusively from business senders. The transport of bulk mail concerns a mail transport company's offer to business senders to collect, sort, transport and then deliver their mail. The bulk mail transport offer differs among other things in terms of delivery within a shipping duration or service framework (24-hour, 48-hour or 72+-hour transport) and the related delivery punctuality<sup>47</sup>, and in the method of lodging the bulk mail to be transported (dropped off coded and sorted at a mail transport company, uncoded and unsorted mail dropped off at a mail transport company or the collection of bulk mail by a mail transport company from a business sender). The transport of bulk mail also involves different mailpieces, such as letters<sup>48</sup>, direct mail<sup>49</sup>, *periodicals and letterbox packets*.

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<sup>46</sup> The fact that mailbox deliveries are outside the scope of this market analysis decision is illustrated on the basis of the opinion of Emco.

<sup>47</sup> Delivery punctuality is measured by the percentage of the mail delivered within shipping duration.

<sup>48</sup> For letters the term transaction mail is also used.

<sup>49</sup> Printed matter is another term for direct mail.

## 2.4 Starting point of the definition

102. The relevant market is defined on the basis of the services in which the potential competition problems arise.<sup>50</sup> When choosing the starting point of the definition for the present market analysis, ACM therefore believes it is important in the first place to identify the mail transport services in which potential competition problems arise.
103. The analysis of the competition problems carried out among market participants at the beginning of 2014 on the basis of the market consultation led to the conclusion that an identified competition problem lies in the risk of PostNL *de facto* refusing to provide access for mail transport companies to its network and associated facilities for 24-hour bulk mail. This access is required because the competing mail transport companies do not or do not yet have a national mail transport network for 24-hour bulk mail. These bulk mail companies offer the bulk mail outside their own delivery areas to PostNL for further distribution and delivery. This mainly concerns bulk mail with a shipping duration of 24 hours which these mail transport companies offer to their own business customers. It follows from this that the starting point for the market definition must be the transport of 24-hour bulk mail.
104. The question is whether the competition problems apply to all 24-hour bulk mail. After all, mail transport companies other than PostNL currently serve almost exclusively small and medium business senders of bulk mail. A few mail transport companies, however, are about to introduce 24-hour mail transport services for large business mail senders.<sup>51</sup> The potential competition problems for the transport of 24-hour bulk mail therefore extend to all types of business senders.

## 2.5 Definition of product markets

105. In this section, ACM specifies the services which will be investigated to ascertain whether they are a substitute for 24-hour bulk mail. Before setting out the research questions,

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<sup>50</sup> After all, in order to determine whether the possible potential competition problems will arise in the services in question, it is necessary to investigate whether sufficient competitive pressure is exerted on the services concerned. In order to investigate that, it is necessary to determine the possible substitutes (B, C, D) for the respective services (A). This can be determined by taking the A services as the starting point. If the B, C or D services are taken as the starting point, the competitive pressure on those B, C or D services is investigated, but not the competitive pressure on the A service.

<sup>51</sup> In the tender procedure for mail transport organised for the municipality of Rotterdam, a large business sender of mail, the mail transport company Van Straaten Post submitted a tender and was ultimately awarded the contract to transport 24-hour bulk mail. In the case of [confidential: ] too there are a number of mail transport companies competing for a large business volume of 24-hour bulk mail.

ACM first describes the results of previous market definitions. It then analyses the answers to the relevant definition questions.

### 2.5.1 Previous market definitions

106. In the Dutch context, the only investigation which ACM (and its predecessors) have conducted into the market definition for mail transport in the recent past has been the decision of the Netherlands Competition Authority (hereinafter: NMa) concerning the acquisition of Selekt Mail by Sandd.<sup>52</sup>
107. In the Sandd-Selekt Mail decision of 2011, NMa concluded that there was a market for addressed business mail. In this decision, NMa states that this business mail market is distinct from the private mail market. NMa also considered that the market for addressed business mail should possibly be further segmented. In the market for addressed business mail it may be possible to draw a distinction in terms of the type of mailpieces: (i) direct mail, (ii) periodicals and (iii) transaction mail (i.e. letters). In the market for addressed business mail it is also possible to draw a distinction in terms of (i) delivery time and shipping duration (time-critical and non-time-critical mail), (ii) sorted or unsorted mail and (iii) type of business customer. However, the decision does not answer the question of whether further distinctions should be drawn in the market for addressed business mail, since this was not important for the assessment of the concentration in question.
108. The European Commission similarly does not draw a further distinction in the market for business mail transport in the market definition. In the cases considered, the European Commission did not assess whether a further distinction should to be drawn in the transport of business mail.<sup>53</sup> A relevant point here is that no further rulings by the Commission were required on the precise definition in the assessments of the concentrations involved. In its decisions, the European Commission did nevertheless segment the relevant mail transport market on the basis of a distinction into (i) standard mail transport and transport of express mail (ii) domestic and cross-border mail transport (iii) business mail and private mail (iv) addressed and unaddressed mail (v) incoming cross-border mail and outgoing cross-border mail. In its decisions, the European Commission does not consider any distinction in terms of the type of mailpieces, such as letters, direct mail and periodicals.

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<sup>52</sup> Decision in case 7124 Sandd – Selekt Mail, 8 April 2011.

<sup>53</sup> Decisions of the European Commission, COMP/M.6503 – La Poste/Swiss Post/JV, marginals 18 to 26, COMP/M.5152 – Posten AB/Post Danmark A/S, marginals 14 ff., COMP/M.3971 – Deutsche Post/Exel, marginals 23 and 24.

109. ACM notes that the existing and available decisions are based on a relevant product market for business mail. According to ACM this should be taken to mean the market for bulk mail.<sup>54</sup> ACM also notes that a further distinction could be drawn in this market for bulk mail, which would lead to narrower relevant product markets. However, this distinction – as far as is known – has not previously been examined in depth, particularly in the Dutch context.

#### 2.5.2 Research questions for the product market definition

110. In order to define the relevant product market, ACM considered whether a further distinction within bulk mail was relevant on the basis of the decision in the Sandd – Selekt Mail case.

111. In the first place, ACM notes that the possible distinction between unaddressed and addressed mail is relevant in the use of its SMP power. After all, ACM's powers relate to mail transport services and according to the Dutch Postal Act these are defined as the transport of addressed items.<sup>55</sup> The transport of unaddressed items is therefore outside the scope of the Dutch Postal Act. Secondly, ACM notes that by its nature and characteristics the transport of unaddressed items is a substantially different service than the transport of addressed items. ACM has not, therefore, examined such further distinction in this decision.

112. In addition, ACM does not give more detailed consideration to a possible further distinction into uncoded/unsorted and coded/sorted lodged bulk mail. Almost all 24-hour bulk mail is dropped off uncoded and unsorted at a mail transport company.<sup>56</sup> Furthermore, mail transport companies have stated that this distinction is not a relevant factor in the market definition based on 24-hour bulk mail.<sup>57</sup> It also follows from the SEO survey that this distinction is of very limited significance for a further distinction of bulk mail.

113. In terms of the characteristics of the transport of 24-hour business mail (and bulk mail in general), ACM sees the shipping duration as the main differentiating choice factor for a further distinction in the market definition. The SEO survey into the options and the

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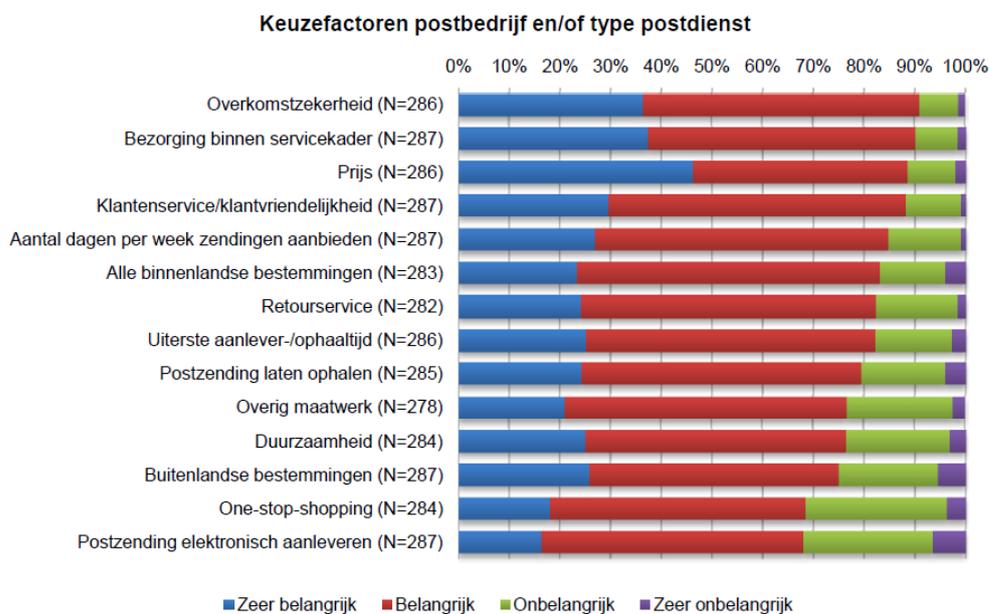
<sup>54</sup> As stated in section 2.3 bulk mail is almost exclusively mail from business senders.

<sup>55</sup> In the Dutch Postal Act (article 2), a mail transport service is defined as one or more of the business operations carried out in order to deliver mailpieces. A mailpiece is defined as a letter or another addressed item designated in an order in council.

<sup>56</sup> Of the total of 24-hour bulk mail less than [confidential: ] 0-5 percent was dropped off coded and sorted in 2014. In 2016, this figure was [confidential: ] 0-5 percent.

<sup>57</sup> Responses from mail transport companies to question 40 of the questionnaire of 3 April 2014.

switching behaviour of business senders shows that shipping certainty and delivery within the service framework were the most important choice factors for business senders of bulk mail (see Figure 2). It also follows from the SEO vignette analysis<sup>58</sup> that the service framework and the associated delivery punctuality are the most important characteristics of bulk mail.<sup>59</sup> For the definition of the relevant product market ACM therefore investigates whether a further distinction is to be drawn in terms of shipping duration and the associated delivery punctuality.



**Figure 2: importance of choice factors in business mail; source: SEO<sup>60</sup>**

114. To define the relevant product market(s), ACM investigates the following steps.
115. ACM first investigates whether the starting point for the market definition of 24-hour bulk mail provides grounds for a further distinction in terms of shipping duration. This therefore translates into the question of whether 48-hour and 72+-hour bulk mail exerts competitive pressure on 24-hour bulk mail to such an extent that they belong to the same relevant product market.
116. ACM then investigates whether there are grounds for a further distinction in terms of business senders. It investigates whether particular customer groups should be

<sup>58</sup> An explanation of this analysis can be found in the SEO report.

<sup>59</sup> SEO Amsterdam Economics report, p. 47 and table 10, p. 48.

<sup>60</sup> SEO Amsterdam Economics report, figure 39, p. 37.

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distinguished that differ from each other in terms of their requirements, choices and bulk mail offer.

117. Finally, ACM examines the role of digital transmission in the market definition for the transport of 24-hour bulk mail.

### **2.5.3 Do 48-hour and 72+-hour bulk mail belong to the same relevant product market as 24-hour bulk mail?**

118. In this section, ACM investigates whether 48-hour and 72+-hour bulk mail belongs to the same relevant product market as 24-hour bulk mail. ACM investigates this successively by comparing these mail transport services with each other using a description of the facts concerning the use and intended application, product characteristics, prices, switching and barriers to switching and the assessment of the competition situation. ACM then assesses demand and supply substitution.

#### *Use and intended application*

119. The use or intended use of the transport of 24-hour bulk mail is comparable to the transport of 48-hour and 72+-hour bulk mail. The transport of bulk mail with a different shipping duration ultimately concerns the transport of mailpieces for the business sender between location a and location b, based on a mail transport network established for this purpose. It is not possible to assess the extent to which these different types of bulk mail transport can be distinguished from each other.

#### *Product characteristics*

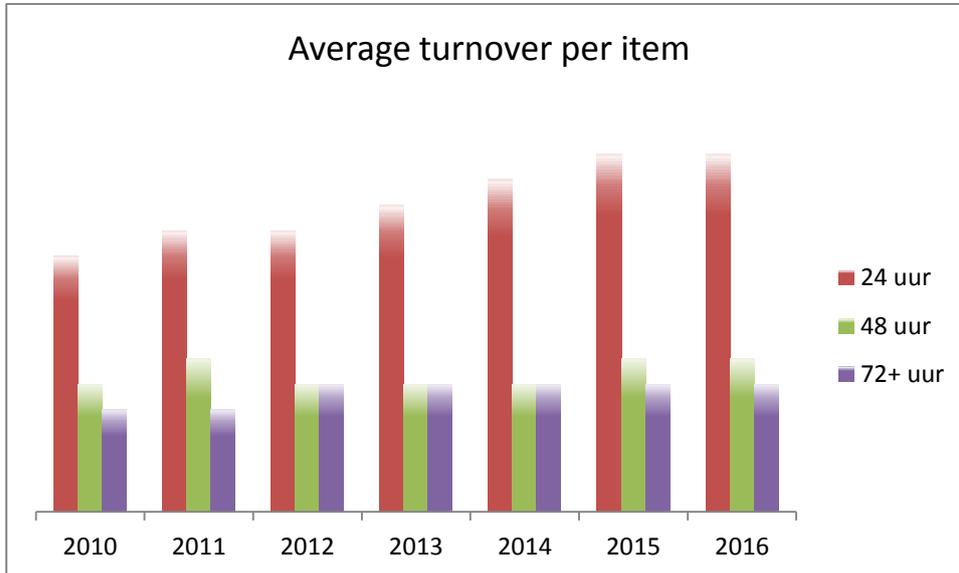
120. The offer of 24-hour bulk mail differs from 48-hour and 72+-hour bulk mail in terms of the shipping duration aspect. For 24-hour bulk mail, a mail transport company offers to provide a mail transport service that enables mailpieces to be delivered to the appropriate letterboxes with a specific degree of certainty on the day after they are dropped off at the transport company. 48-hour and 72+-hour bulk mail differs from 24-hour bulk mail in that the delivery of the dropped-off bulk mail takes place a longer time after drop-off and is therefore less time-critical. For a business sender these mail transport services therefore differ in terms of transport speed.

121. Compared to 24-hour bulk mail, transport companies' offers of 48-hour and 72+-hour bulk mail have no substantial differences in terms of objective product characteristics other than the shipping duration. For 24-, 48- and 72+-hour bulk mail, the various products available are broadly similar in terms of product characteristics, drop-off conditions, requirements for the design of mailpieces and the quality of the bulk mail transport.

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*Prices*

122. The data provided for ACM's annual mail market monitor indicate that the average revenue per mailpiece in 24-hour business mail rose over the 2010-2016 period, while the average revenue for 48-hour and 72+-hour business mail remained roughly constant (see Figure 3).<sup>61</sup>
123. Mail transport companies, particularly PostNL, offer a differentiated range of bulk mail products, in which the product offer differs in terms of format, weight and consignment size. The rise in average revenue for 24-hour business mail could be the result of a changed mix in the volume ratio of 24-hour business mail as compared to 48-hour and 72+-hour mail. There are no indications of this, however. The tariffs for 24-hour business mail have also risen across the entire product offer over the past few years. PostNL's public and internal tariff booklets indicate a similar tariff rise over the 2012-2017 period for the main 24-hour business mail products.



**Figure 3: trend in the average revenue (cents/per mailpiece) of business mail for the different service frameworks [amounts confidential]**

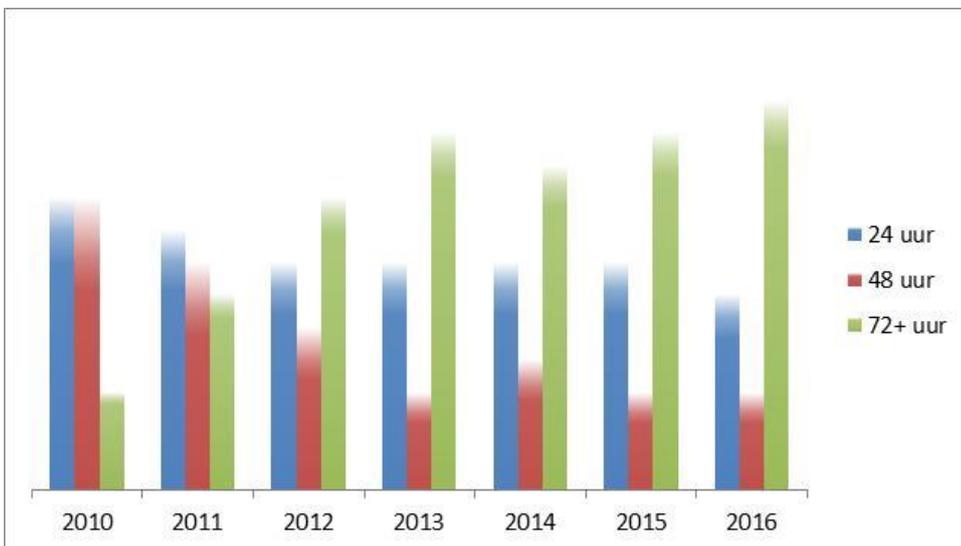
<sup>61</sup> These figures have been updated in comparison with the 2016 Draft Decision.

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*Switching and barriers to switching*

124. To what extent the transport of 48-hour and 72+-hour bulk mail is an alternative to the transport of 24-hour bulk mail can also be assessed on the basis of the actual and expected switching of business senders of 24-hour bulk mail to less time-critical bulk mail.
125. The data provided by mail transport companies over the past years for ACM's mail market monitor indicate that the ratios between purchases of 24-, 48- and 72-hour bulk mail have changed over the years. Figure 4 shows that the relative volume share of 72+-hour bulk mail as a proportion of total bulk mail has risen sharply in recent years, while the volume share of 24-hour bulk mail has declined somewhat and 48-hour bulk mail has fallen sharply. In absolute terms the volume of 24-hour bulk mail fell by [confidential: ] percent in the 2010-2014 period, while the volumes of 48-hour and 72+-hour bulk mail fell by [confidential: ] percent and rose by [confidential: ] percent respectively. Between 2010 and 2016 the volume of 24-hour bulk mail fell by [confidential: ] percent, the volume of 48-hour bulk mail fell by [confidential: ] percent and the volume of 72+-hour bulk mail rose by [confidential: ] percent.<sup>62</sup>



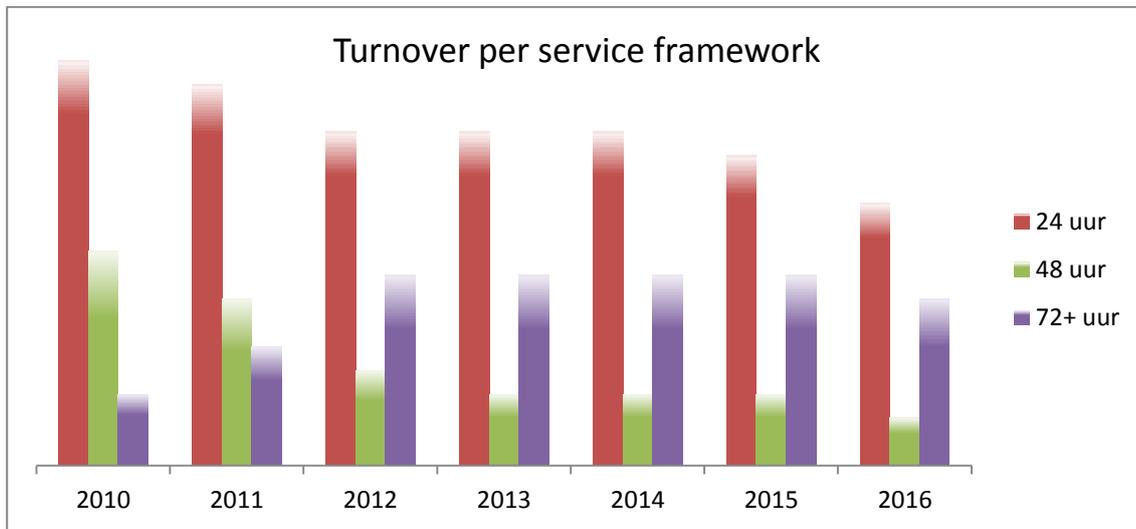
**Figure 4: breakdown of the volume of mail among the various service frameworks [precise ratios confidential]**

126. The trend in turnover of business mail – a combination of the previous two charts – shows that the importance of 72-hour mail has increased since 2010, whereas the importance of 24-hour and particularly 48-hour mail has decreased since 2010. The

<sup>62</sup> These figures have been updated in comparison with the 2016 Draft Decision.

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turnover of 24-hour mail has declined less than the volumes of 24-hour mail. It is also notable that the major shifts occurred in the 2010-2012 period and that the breakdown of turnover between 24-, 48- and 72+-hour mail has stabilised over the past five years (period from 2012 to 2016) (see Figure 5).



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**Figure 5: development in turnover (in EUR) of business mail for the different service frameworks [precise turnover confidential]**

127. The SEO survey shows that during the period from 2010 to the beginning of 2014, 28 percent (80 of 288) respondents switched to a different service framework for bulk mail. This amounts to an annual switching percentage of approximately 5-6 percent of business senders. Of these switchers 48 percent switched between 24-hour and 48-hour bulk mail, 28 percent between 24-hour and 72+-hour bulk mail and 25 percent between 48-hour and 72+-hour bulk mail.<sup>63</sup> 24-hour bulk mail therefore sees more switching than the other service frameworks. There is more frequent switching from 24-hour to 48-hour than to 72-hour bulk mail. Switching intention shows a similar picture: six percent of business senders report that they are “very likely or almost certain” to switch to a different

<sup>63</sup> SEO Amsterdam Economics report, figure 34, p. 33. The percentages have been calculated by taking the total number of respondents (n= 288) and counting the number of switchers by service framework. These totalled 83 (34+31+18). The number switching within 72+-hour bulk mail (n=3) is deducted from this figure, leading to a total of 80. Then, for each switch between service frameworks (24-48, 24-72+ and 48-72+), the number is counted and calculated as a proportion of the total.

type of service framework within a year.<sup>64</sup> This churn is comparable to the switching in the preceding years.

128. A limited percentage of the respondents encounter barriers to switching (problems or obstacles) when switching to a different type of mail service from the same mail transport company. The percentage is somewhat higher in the case of switching to a different type of mail service with a different provider (increase from 8 to 11 percent).<sup>65</sup>

#### *Competition circumstances*

129. The competition situation in 24-hour and 48-hour bulk mail differs from that in 72-hour bulk mail. In 72+-hour bulk mail, Sandd operates with a national mail transport network. Sandd has a substantial share of 72+-hour bulk mail. Hence there is a different competitive relationship than in the case of 24-hour and 48-hour bulk mail, where Sandd is (almost) completely absent. Regional mail transport companies operate mainly in 24-hour bulk mail. They have no national mail transport network and have a limited share of the total of 24-hour bulk mail, and of 48-hour and 72+-hour bulk mail.

#### *Views of market participants*

130. PostNL states that only **[confidential: ]** percent of the total volume of all bulk mail actually has to be delivered within 24 hours.<sup>66</sup> For the remainder of the bulk mail, PostNL states that there is a trade-off between price and quality in terms of the shipping duration of mail. Apart from price, business senders of bulk mail therefore prefer rapid delivery because that is appreciated by the sender and/or recipient of the mail, but there is no need to deliver within 24 hours. In the event of a price increase in 24-hour business mail, PostNL states that the trade-off for some of these senders will therefore be different and part of the mail volume will then be handled through 48-hour or 72+-hour bulk mail. PostNL considers it plausible that the switching in that case will be high enough for effective disciplining between 24-, 48- and 72+-hour bulk mail.
131. Sandd states the opposite in this regard. Sandd states that over the past few years the business market has already addressed the question of how to send mail flows at lower cost by extending the shipping duration. It says that these efforts have now reached their limit. For reasons of service and customer satisfaction it appears that there is no

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<sup>64</sup> SEO Amsterdam Economics report, figure 37, p. 35.

<sup>65</sup> SEO Amsterdam Economics report, figure 40, p. 38.

<sup>66</sup> PostNL, responses to the questionnaire of 3 April 2014, 9 May 2014, p. 76. PostNL, supplementary response, 17 June 2014, response to question 1 of ACM.

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possibility of further switching of the remaining mail flows (of 24-hour bulk mail) to a longer shipping duration.<sup>67</sup>

132. PostNL and Sandd have not presented any investigations to substantiate their positions.

### *Assessment of demand substitution*

133. The above facts concerning bulk mail with a different shipping duration do not present a convincing picture.
134. There are indications that 48-hour and 72+-hour bulk mail are substitutes for 24-hour bulk mail. There are comparable products and, particularly over recent years, switching has taken place from 24-hour bulk mail to 48- and 72+-hour bulk mail.
135. At the same time, the average revenue from 24-hour bulk mail has risen in recent years, with the decline in the volume of 24-hour bulk mail levelling off slightly. There is a considerable and growing price gap between 24-hour bulk mail on the one hand and 48-hour and 72+-hour bulk mail on the other, and there is a clear deviation in the competition situation.
136. This information suggests that the current price rises in 24-hour bulk mail are no longer a strong indication that there is currently sufficient switching to 48-hour and 72+-hour bulk mail. The difference in the competition situation may explain the difference in prices and the price development. Sandd's presence in 72+-hour bulk mail may have led to PostNL starting to offer keen prices for 72+-hour bulk mail in recent years for existing business senders, particularly large business senders, with these keen prices prompting them to switch from 24-hour bulk mail to a 48-hour or 72+-hour service framework. Sandd's presence therefore led to stable average revenues for 72+-hour bulk mail, whereas the average price of 24-hour bulk mail rose. This levelling off of switching indicates that in recent years price-sensitive business senders have switched to 48-hour and 72+-hour bulk mail, but that this switching has now stabilised; almost all business senders who are prepared to accept a longer shipping duration have now switched to this service framework.
137. ACM notes that there are indications on the one hand of demand substitution and on the other hand of the lack of demand substitution of 48-hour and 72+-hour bulk mail for 24-hour bulk mail. Taking all these considerations into account, ACM concludes that 48-hour and 72+-hour bulk mail are sufficient substitutes for 24-hour bulk mail. ACM therefore

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<sup>67</sup> Sandd, responses to question 39 of the ACM questionnaire of 3 April 2014.

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adopts an approach that is conservative by nature and tends towards an overly broad definition of the relevant market.

### *Assessment of supply substitution*

138. ACM naturally also assesses supply substitution. The provision of 24-hour bulk mail requires a five-day mail transport network, whereas twice a week is sufficient for the transport of 72+-hour bulk mail. This makes demands on the potential for supply substitution. Substituting 48- and 72+-hour bulk mail for a 24-hour bulk mail offer is possible and relatively simple. The reverse is more difficult. As a national supplier of 72+-hour bulk mail, Sandd has not offered 24-hour bulk mail in recent years, even amid a rise in average revenue from 24-hour bulk mail, as its mail transport network based on 72+-hour bulk mail does not enable it to offer these services in the short term in response to rising prices of 24-hour bulk mail. This points to the absence of supply substitution.
139. ACM considers that the only other candidate for supply substitution is the distribution and delivery of newspapers. The distribution and delivery of newspapers is characterised by deliveries six times a week within a limited timeframe (often early in the morning or late in the afternoon) to a fixed number of addresses with almost no daily changes. However, the distribution and delivery of newspapers is a substantially different process than the transport of mail. ACM does not, therefore, consider that transporters of newspapers in the Netherlands will also start transporting 24-hour bulk mail. ACM believes that participants are unlikely to move from the distribution and delivery of newspapers to the transport of bulk mail in the foreseeable future.
140. On the basis of the above ACM concludes that there is insufficient supply substitution from 48-hour and 72+-hour business mail to 24-hour bulk mail.

### *Conclusion*

141. On the basis of demand substitution, ACM concludes that 48-hour and 72+-hour bulk mail are sufficient substitutes for 24-hour bulk mail.

#### **2.5.4 Is there a further distinction by type of business sender?**

142. The next question is whether a further distinction should be drawn on the basis of the different customer groups or types of business senders for 24-hour, 48-hour and 72+-hour bulk mail.

### *Differences in the supply and use of bulk mail*

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143. There is no demand substitution between the transport of 24-hour bulk mail for different senders, because these mail transport services are offered to these business customers on a differentiated basis. For a small business sender, for example, a large business offer is not an alternative because this service is not available to them. An analysis of a further distinction by customer type therefore focuses on differences in the way in which bulk mail is offered to business senders.
144. In Table 1 a distinction is drawn by the type of business sender based on a number of characteristics in the way in which they are served by mail transport companies. A rough breakdown has been made into small business, medium business and large business senders based on a combination of characteristics of the offer.<sup>68</sup>

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<sup>68</sup> [Confidential:

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Characteristics	Small business	Medium business	Large business
<b>Bulk mail transport agreement</b>	PostNL: no written agreement, but general terms and conditions Sandd: not active Others: -	PostNL and Sandd: business customer has written agreement and customer number	PostNL and Sandd: written agreement (for individual consignment) Specific customer relationship
<b>Selection of mail transport company by sender</b>	PostNL: public standard offer, no discounts  Other points: as for standard offer	PostNL and Sandd: comparison of offers of mail transport companies, use of standard discounts General account management	PostNL and Sandd: tenders / long-term negotiations Specific account management
<b>Negotiations on prices (customisation)</b>	No	Sometimes	Always <sup>69</sup>
<b>Negotiations on specific requirements and quality conditions</b>	No	No	Sometimes
<b>Minimum consignment volume</b>	Mostly smaller and mixed consignments between 250 and 5,000 items per consignment	Consignments of mailpieces, in addition to smaller consignments	Multiple large consignments of bulk mail
<b>Drop-off method: drop-off location</b>	PostNL: Post office / Business point  Sandd: -	PostNL: Business point (XL): Consignments up to 25,000 items / 1 to 6 roller containers  Sandd: Apeldoorn sorting office	PostNL: Sorting office business desk: consignment of >25,000 items / 6 or more roller containers  Sandd: Apeldoorn sorting office
<b>Drop-off method: (un)sorted/ (un)coded</b>	Uncoded / unsorted	Partly (un)coded / (un)sorted	Mostly coded/sorted

**Table 1: differentiation in bulk mail offer by type of sender**

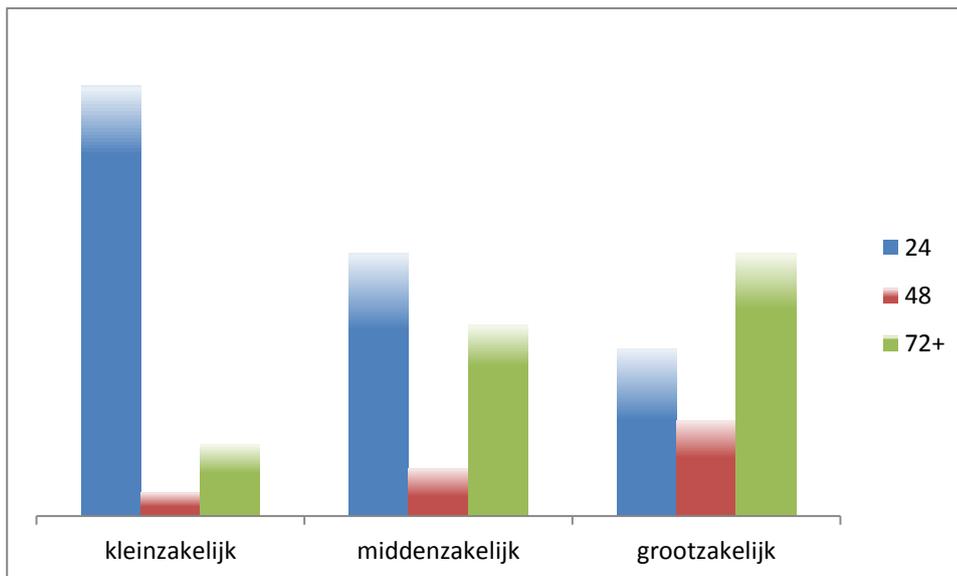
145. The mail transport companies' offers differ in terms of the conditions and tariffs offered for the transport of bulk mail, i.e. whether a business sender uses a standard service with standard terms and conditions (small business), or has an individual agreement with mail transport companies on the basis of which (standard or other) discounts are offered

<sup>69</sup> Tariffs are negotiated in respect of individual consignments.

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(medium business), or whether business senders negotiate with mail transport companies on all aspects of the conditions and tariffs (large business).

- 146. The SEO survey indicates that there are three distinct types of business sender that attach different degrees of importance to the key characteristics of bulk mail, such as the service framework or shipping duration, but also the delivery punctuality and the method of dropping off the mail.<sup>70</sup>
- 147. SEO distinguishes three types of sender of bulk mail based on willingness to switch: small business senders with an annual volume of up to 100,000 items, medium business senders with an annual volume between 100,000 and 2,500,000 items and large business senders with an annual volume in excess of 2,500,000 million items.



**Figure 6: relative breakdown of the volume of bulk mail among the different service frameworks for different types of sender in 2016 [precise breakdown confidential]**

- 148. The data provided by mail transport companies for ACM's 2016 mail market monitor show that the proportions of 24-, 48- and 72+-hour bulk mail purchased by small, medium and large business senders differ greatly. Figure 6 shows the relative share of the volume of bulk mail for the various service frameworks in 2016.

<sup>70</sup> SEO Amsterdam Economics report, see figures 44, 45 and 46, p. 62 ff. These charts for the three different types of sender show differences in the relative importance they attach to the characteristics of service framework, delivery punctuality, (un)coded/(un)sorted and the collection of mail, expressed in the length of the bars in the charts.

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*Prices*

149. The data provided by mail transport companies for the market monitor show that the average revenue from 24-hour bulk mail of a small, medium and large business sender in 2014 amounted to [confidential: ] 80-90, [confidential: ] 60-70 and [confidential: ] 40-50 cents respectively.<sup>71</sup> In 2016 the average revenue per item was [confidential: ] 90-100, [confidential: ] 60-70 and [confidential: ] 40-50 cents [confidential: ].<sup>72</sup>
150. Having regard to the average revenues for 24-, 48- and 72+-hour bulk mail, there is also a clear difference in the average revenue for small, medium and large business senders in 2014 (see Table 2). Business senders differ in the extent to which they receive discounts on the gross standard tariffs. As their volume of bulk mail increases, the net prices<sup>73</sup> for bulk mail decrease.

Type of sender	24-hour bulk mail	48-hour bulk mail	72+-hour bulk mail
Small business	[confidential: ] 0.80-0.90	[confidential: ] 0.40-0.50	[confidential: ] 0.40-0.50
Medium business	[confidential: ] 0.60-0.70	[confidential: ] 0.20-0.30	[confidential: ] 0.20-0.30
Large business	[confidential: ] 0.40-0.50	[confidential: ] 0.20-0.30	[confidential: ] 0.20-0.30

**Table 2: average revenue (in EUR) from bulk mail broken down by type of sender in 2014**

151. In 2016, the difference in the average revenue for small, medium and large business senders was even clearer than in 2014, see Table 3.<sup>74</sup>

Type of sender	24-hour bulk mail	48-hour bulk mail	72+-hour bulk mail
Small business	[confidential: ] 0.90 - 1.00	[confidential: ] 0.50 - 0.60	[confidential: ] 0.40-0.50
Medium business	[confidential: ]	Confidential	[confidential: ]

<sup>71</sup> Postal market monitor, state of the Dutch postal market in 2014.

<sup>72</sup> These figures have been updated in comparison with the 2016 Draft Decision.

<sup>73</sup> A net price of a mailpiece is determined by deducting all discounts from the (gross) standard tariffs for a mailpiece.

<sup>74</sup> These figures have been updated in comparison with the 2016 Draft Decision.

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	0.60-0.70	0.30 - 0.40	0.20-0.30
<b>Large business</b>	<b>[confidential: ]</b>	<b>[confidential: ]</b>	<b>[confidential: ]</b>
	0.40-0.50	0.20-0.30	0.20-0.30

**Table 3: average revenue (in EUR) from bulk mail broken down by type of sender in 2016**

*Switching and barriers to switching*

152. The SEO survey shows that in terms of the extent to which business senders are prepared to switch in the event of price rises, the preferences of these three types of business mail sender differ. The differences in terms of willingness to switch among types of business senders of different sizes are demonstrated by the results of the vignette analysis.<sup>75</sup>
153. The SEO survey also shows that large business senders (defined in the first part of the survey as senders with an annual volume in excess of 1,000,000 items) changed their service framework much more frequently with the same mail transport company in the period from 2010 to the start of 2014 (55 percent of respondents) than the other business senders (with an annual volume of less than 1,000,000 mailpieces) (16 percent of respondents).<sup>7677</sup> There is also a clear difference in terms of those considering switching to another service framework: 74 percent of large business users considered switching in the period from 2010 to the start of 2014, whereas for other business senders the figure is just 39 percent.<sup>78</sup> In addition, 16 percent of these large business senders intend to switch to a different service framework in the forthcoming year, whereas in the case of small business senders the figure is 5 percent.<sup>79</sup>
154. There are also relative differences between the types of sender with regard to the barriers experienced when switching. In the case of small business senders, 7 percent of the respondents state that they experience problems or obstacles when switching to a

<sup>75</sup> SEO Amsterdam Economics report, table 10, p. 48. This table shows that there are clear differences in the elasticities between the different types of sender. It should be noted here that it is not the level of elasticities but the differences between the types of sender that are important.

<sup>76</sup> SEO Amsterdam Economics report, figure 32, p. 32.

<sup>77</sup> Since these large business senders have an enormous share of the total volume, this is reflected in a large degree of shifting to a volume service framework.

<sup>78</sup> SEO Amsterdam Economics report, figure 36, p. 34.

<sup>79</sup> SEO Amsterdam Economics report, figure 37, p. 35. The respondents who are almost certain or very likely to switch in the year ahead are added to this figure.

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different type of mail service from the same provider. In the case of large business senders the figure is 16 percent.<sup>80</sup>

### *Competition circumstances*

155. The competition situation for these three types of business sender differs in terms of the extent to which they can choose between providers of bulk mail and the degree of purchasing power that can be exercised. This means that these three types of business mail sender cannot be combined in the market definition on the basis of the argument that the competition situation is comparable (homogenous).
156. An important factor is the presence of Sandd as an alternative to PostNL: for medium and large business senders Sandd is an option for part of their bulk mail, whereas it is not an alternative for small business senders, other than in exceptional cases.

### *Conclusion*

157. On the basis of the above, ACM concludes that there are sufficient indications that a further distinction has to be drawn between small business, medium business and large business senders for the transport of bulk mail.

### **2.5.5 Digital transmission and its role in market definition**

158. In this section, ACM examines the role of digital transmission in the market definition. A relevant reference point here is that ACM is not aware of any market definitions for the transport of bulk mail in which digital transmission is considered part of the postal market.

### *Outlook*

159. The digital transmission of written information through electronic communication networks and applications can to a certain extent be seen as an alternative to mail transport (in the sense of the overall set of actions performed in order to deliver the sender's mailpieces to the recipient).
160. The importance of electronic substitution for mail transport is emphasised in various reports and in past years contributed to the (substantial) reduction in the volume of letter mail transported. See Figure 1 in section 1.

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<sup>80</sup> SEO Amsterdam Economics report, figure 40, p. 38.

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161. The effect of electronic means of communication on volumes of bulk mail is not a recent development. In the past, the effect of economic activity and the presence of electronic means of communication has been investigated empirically and a connection has already been established between electronic means of communication and the volume of mail transport.<sup>81</sup> The OECD also reported in 1999 that there were mail transport companies that had to compete with other means of communication in providing mail transport for customers.<sup>82</sup> What is clear is that the effect of electronic means of communication has probably increased in the recent past as a result of the increased potential of electronic communication.
162. It is a fact that mail volumes have contracted. Mail volumes are expected to shrink yet further in the years ahead. WIK (2016) assumes a decline of approximately 7 percent per year up to 2020<sup>83</sup>
163. The extent to which the volume of mail transport contracts or will contract in the years ahead is not relevant for an analysis of the competition in the postal market. The crucial question is whether digital transmission is a substitute for the transport of 24-hour bulk mail as a result of a significant and sustained increase in prices of these services from a competitive price level. This comes down to whether the drop in demand for 24-hour bulk mail is the result of price rises or of external factors that cause organic migration to electronic transmission of information regardless of price rises. This question must ultimately be answered in the context of whether a mail transport company has SMP.
164. With regard to the market definition for mail transport, Brennan and Crew<sup>84</sup> indicate that the growing importance of electronic means of communication in itself is no basis for

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<sup>81</sup> Econometric estimates of the effect of economic activity and e-substitution on mail volumes are available in Boldron et al. (2010), Jarosik et al. (2012), Meschi et al. (2011) and Nikali (2008). Boldron, F., C. Cazals, J.P. Florens and S. Lécou (2010), 'Some dynamic models for mail demand: the French case', in M.A. Crew and P.R. Kleindorfer (eds), *Heightening Competition in the Postal and Delivery Sector*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 99-115. Jarosik, M., J. Nankervis, J. Pope, S. Soteri and L. Veruete-McKay (2012), 'Letter traffic demand in the UK: some evidence and review of econometric analysis over the past decade', in M.A. Crew and P.R. Kleindorfer (eds), *Reforming the Postal Sector in the Face of Electronic Competition*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 194-210. Meschi, M., M. Cherry, C. Pace and M. Petrova (2011), 'Understanding the impact of e-substitution on letter mail volumes: a multi-country panel study', in M.A. Crew and P.R. Kleindorfer (eds), *Reinventing the Postal Sector in an Electronic Age*. Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 47-60. Nikali, H (2008). "Substitution of letter mail for different sender-receiver segments", in M.A. Crew and P.R. Kleindorfer (eds), *Competition and Regulation in the Postal and Delivery Sector*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 89-106.

<sup>82</sup> OECD (1999), *Promoting competition in postal services*, to be found at <http://www.oecd.org/regreform/sectors/1920548.pdf>.

<sup>83</sup> WIK Consult, *Future scenario developments in the Dutch postal market*, 21 December 2016, p. 32.

liberalising a market and deregulating existing obligations. Brennan and Crew show from a theoretical perspective that, despite a drop in demand as a result of electronic means of communication, this does not mean that these products belong to the same relevant markets as mail transport and there is no SMP. There may still be a power position, but on a more limited scale due to the contraction of the market.

165. Another perspective concerns the question of what a contracting volume of bulk mail means for the market definition if there is product migration.<sup>85</sup> It could be said that product migration by definition involves the possibility of substitution. Product migration can be modelled as a retracting demand curve. When the demand curve retracts far enough, a significant and lasting price rise from the competitive level is no longer profitable. The relevant assessment question, however, is whether the demand curve has retracted so much due to product migration. Due account must be taken here of the possibility that customers who have not yet migrated have inelastic demand, for example because their mail flow does not lend itself to digital alternatives. The existence of such a group of customers can imply that a significant and sustained price rise from the competitive level is profitable.
166. Another perspective concerns the likelihood of a degree of complementarity between 24-hour mail transport and the digital transmission of information. For example, the VGP previously stated that organisations did not face a choice between sending regular or electronic mail and that the streams were in fact complementary.<sup>86</sup> Now, too, there are examples in which electronic communication for groups of senders leads to an increase in the value of using 24-hour bulk mail because electronic message traffic leads to a follow-up action in which mail is sent.

#### *Assessment*

167. ACM considers it plausible that switching to digital involves organic migration as a result of the trend towards digitisation that is independent of price rises for 24-hour bulk mail. ACM considers that a 10-percent price rise is too small to have any major influence on the choice between mail and the more extensive range of digital transmission options.

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<sup>84</sup> Brennan, T. & Crew, M. 2014. "Gross substitutes vs. marginal substitutes: Implications for market definition in the postal sector." In Crew, M. & Brennan, T. (eds.) *The Role of Postal Service in a Digital Age*. Edward Elgar, Cheltenham, 1–15.

<sup>85</sup> See the article by Oxera (2005), *Product migration: a problem for market definition?*, to be found at <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Product-migration.pdf?ext=.pdf>.

<sup>86</sup> OPTA (2011), *Concurrentie op de postmarkt, analyse en advies*, p. 24.

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The effect of a price rise on mail transport is not a crucial factor in the decision ultimately to switch to digital transmission.<sup>87</sup>

168. A second observation is that there are major non-price-related differences between digital transmission and 24-hour bulk mail that mean a price rise affecting 24-hour bulk mail has little or no effect on purchases of it. The digital transmission of written information through electronic communications networks and applications is a substantially different service than the transport of 24-hour bulk mail.
169. Table 4 provides an overview of the main characteristics of 24-hour bulk mail compared to digital transmission. Aside from the fact that these represent another kind of service entirely, with inherent differences, this table shows that there are also major differences in the main characteristics of these services that are significant in the decision to transmit information.

Characteristics	24-hour bulk mail	Digital transmission
Frequency of the service	1x per day 5 days a week	Continuous
Speed	Low (next day)	High (immediate)
Reliability	Reliable	Reasonably reliable (depending on type)
Integrity / confidentiality	High (private correspondence)	From high to fairly low (depending on type)
Recipient coverage	National coverage: every recipient	Almost national coverage: users of electronic media
Accessibility	Available to all business senders	Depends on the method of digital transmission and availability of resources to the sender and recipient

**Table 4: comparison of characteristics of 24-hour bulk mail and digital transmission. Source:**

<sup>87</sup> The earlier reference at this point in the 2016 Draft Decision to a passage from the study by Copenhagen Economics (2012), Pricing behaviour of postal operators, p. 137 and 138, for the European Commission has been deleted here in response to the opinion voiced by PostNL. WIK (2016), Future Scenario Developments in the Dutch Postal Market, p. 31, also points to the existence of digitisation as a megatrend and the fact that volumes are declining independently of price rises.

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### ACM based on Magli et al.<sup>88</sup>

170. Third, if digital transmission is a substitute for 24-hour bulk mail, this would be expected to put pressure on prices. However, the overview of the development of the average revenues from bulk mail shows that prices for 24-hour business mail have risen (see Figure 3).
171. Finally, the SEO survey asked about the consequences of a rise in prices of 24-hour bulk mail for the fall in demand in favour of digital transmission (and discontinued transmission). Respondents in the survey, business senders of bulk mail, were asked directly how likely they would be to switch in the event of a price rise on the basis of their current prices. The survey showed that 9 to 13 percent of the volume would be lost as a result of a 10 percent rise in the current prices of 24-hour bulk mail.<sup>89</sup> In light of the above, ACM considers this drop in demand so low as to provide insufficient support for a further widening of the relevant product market. Moreover, due to the real risk of a cellophane fallacy, this 9 to 13 percent can be seen as an overestimate.
172. It follows from the above that digital transmission is not a demand substitute for 24-hour bulk mail. This could be demonstrated additionally by a critical loss analysis. In view of the real risk of the cellophane fallacy, however, the critical loss analysis is not sufficiently robust to draw a reliable conclusion. In ACM's view there must be convincing evidence to qualify digital transmission as a demand substitute. No such convincing evidence exists.

### Conclusion

173. ACM concludes that digital transmission is not a demand substitute for 24-hour bulk mail. ACM is seeing a shift from 24-hour bulk mail to digital transmission, but as a result of the trend towards digitisation it considers the migration to digital transmission to be an organic process resulting from new and improved possibilities for electronic communication. There is a committed group of business senders of 24-hour bulk mail who will not switch to digital transmission if prices of 24-hour bulk mail rise. It is precisely this group of business senders that would be worth monopolising in the market and

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<sup>88</sup> Magli et al., Postal Markets and Electronic Substitution: What is the Impact of Intermodal Competition on Regulatory Practices and Institutions. Competition and regulation in network industries, vol. 11, no. 4, p. 382-397.

<sup>89</sup> SEO Amsterdam Economics report, p. 52 and 53, more specifically table 15.

consequently requires protection against high prices.<sup>90</sup> A final relevant point here is that there is no precedent in previous market definitions.

#### 2.5.6 Conclusion of product market definition

174. On the basis of the above ACM defines the following relevant product markets:

- small business 24-, 48- and 72+-hour bulk mail (mail from business senders with a total annual mail volume of up to 100,000 items);
- medium business 24-, 48- and 72+-hour bulk mail (mail from business senders with a total annual mail volume of between 100,000 and 2.5 million items);
- large business 24-, 48- and 72+-hour bulk mail (mail from business senders with a total annual mail volume of more than 2.5 million items);

#### 2.6 Definition of geographic markets

175. This section contains the geographic definition of the three previously defined relevant product markets.

176. A relevant factor for the geographic market definition is that the mail transport companies do not differentiate their prices geographically. Mail transport companies that deliver mail nationally, PostNL and Sandd, also apply uniform tariffs nationwide. That is a strong indication of competitive conditions that do not differ greatly within the Netherlands.

177. It is true that this situation exists at a time when article 9 of the Dutch Postal Act is in force, but ACM does not expect it to differ substantially without this regulation. For mail transport companies operating nationally, geographically differentiated tariffs are unattractive due to the considerable additional administrative burden that would result from tariffs for mail transport dependent on the destination address. For the small business market, which is mainly served by regional mail transport companies, the market share of those mail transport companies is too small (their collective market share is [confidential: ] 10-20 percent) in 2016 to justify the additional costs of geographic price differentiation borne by mail transport companies operating nationally.

178. Having regard to the above, ACM concludes that a national market exists in all three product markets.

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<sup>90</sup> In this regard see the statement by Herna Verhagen of PostNL: "We will absorb the expected volume decline as effectively as possible by means of additional cost savings and above-inflation tariff increases." PostNL, Strategy update 2015, 3 November 2015.

## 2.7 Conclusion

179. ACM concludes that on the basis of 24-hour bulk mail the relevant markets are the:

- national market for the transport of small business 24-, 48- and 72+-hour bulk mail (hereinafter: the small business postal market);
- national market for the transport of medium business 24-, 48- and 72+-hour bulk mail (hereinafter: the medium business postal market);
- national market for the transport of large business 24-, 48- and 72+-hour bulk mail (hereinafter: the large business postal market);

180. The above conclusion is also reflected in Table 5.

Relevant market	Abbreviated name	Volume of national letter mail from a sender per year
Small business 24-, 48- and 72+-hour bulk mail	Small business postal market	$\leq 0.1$ mln
Medium business 24-, 48- and 72+-hour bulk mail	Medium business postal market	$> 0.1 - \leq 2.5$ mln
Large business 24-, 48- and 72+-hour bulk mail	Large business postal market	$> 2.5$ mln

**Table 5. The defined relevant markets**

### 3 Dominance analysis

#### 3.1 Introduction

181. In this section ACM conducts the dominance analysis for the relevant markets defined in the previous section. ACM determines in this analysis whether a company operating in the defined relevant markets has SMP.
182. In section 3.2 ACM describes how it conducts the dominance analysis. In section 3.3 ACM briefly describes the offer of mail transport companies. In sections 3.4 to 3.6 ACM then investigates whether the small, medium and large business postal markets defined in section 2 have SMP.

#### 3.2 Dominance analysis framework

183. On the basis of article 13b of the Dutch Postal Act, ACM can impose obligations if it determines that a company operating in the defined relevant markets has SMP. A company with SMP can behave to a large extent independently of its competitors, customers and ultimately consumers.
184. The existence of SMP can be demonstrated on the basis of a number of criteria. ACM assesses whether there is SMP on the basis of the criteria specified in the market analysis guidelines (see marginal 87). Section 3.1 of the market analysis guidelines defines various criteria that are important in assessing whether there is SMP.
185. The size of the market share is an important indication of market power.<sup>91</sup>
186. Other criteria that indicate whether a company is able to behave largely independently of its competitors, customers and ultimately end-users are:<sup>92</sup>
- the total size of the company;
  - its technological lead or superiority;
  - easy or preferential access to capital markets/financial resources;
  - economies of scale;
  - economies of scope;

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<sup>91</sup> Market analysis guidelines, marginal 75.

<sup>92</sup> Market analysis guidelines, marginal 78.

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- vertical integration;
- product/service diversification;
- control over infrastructure that is not easy to replicate; and
- a strongly developed distribution and sales network.

187. In addition, ascertaining whether there is SMP also depends on an assessment of how easily potential competitors can enter the market. The criteria that are important here concern the presence of barriers to entry and switching costs and barriers for customers. An assessment of whether there is purchasing power that can counterbalance the position of a provider is also important.

188. The stated criteria cannot be seen as a simple checklist for assessing whether there is SMP or actual competition. A market analysis comprises an analysis of the economic characteristics of a relevant market. The existence of SMP can only be confirmed by means of research based on a number of the specified criteria. For this reason, ACM believes it is not appropriate to attribute a particular weight to the various criteria in advance. In the context of a specific market situation, ACM assesses which factors are important in assessing the dominance in that specific market.

189. ACM has identified criteria that provide a good insight into the competitive relationships in the relevant markets. ACM believes that the criteria it does not include in its assessment are not decisive for the conclusions concerning SMP.

190. For the three defined relevant markets ACM investigates in turn:

- market shares;
- current competition (economies of scale, economies of scope and control over infrastructure that is not easy to replicate);
- purchasing power or the lack of it; and
- potential competition or the lack of it.

### *Market shares*

191. The market share is often used as an indication of market power. In the decisions adopted by the European Commission, a risk of an individual power position is usually

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only deemed to exist if a company has a market share in excess of 40 percent. SMP may also be suspected in the case of a smaller market share, since a power position may be attained without the company concerned having a large market share. According to the case law of the Court of Justice of the European Communities a very large market share – more than 50 percent – in itself already constitutes proof of a power position, barring exceptional circumstances. The company with a large market share can be deemed to have SMP if its market share has remained stable over a longer period. The fact that a company with a large market share gradually loses market share in a particular market may indicate that the market is becoming more competitive, but does not necessarily preclude the existence of SMP.<sup>93</sup>

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### *Economies of scale*

192. Economies of scale apply if the average costs per unit of a product decrease due to higher production. Economies of scale occur to a greater extent in a production process with high fixed costs and low variable and/or marginal costs. Economies of scale can constitute both a barrier to entry and a cost benefit as compared to existing competitors.

### *Economies of scope*

193. Economies of scope occur when the average costs of one product are lower because it is produced with another product by the same company. Economies of scope occur frequently in mail transport networks because the network's capacity can be divided across multiple products. As in the case of economies of scale, economies of scope can also constitute a barrier to entry and give a provider an advantage over its competitors.

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<sup>93</sup> Market analysis guidelines, marginal 75.

*Control over infrastructure that is not easy to replicate*

194. An example of infrastructure that is not easy to replicate would be an extensive network that a competitor could only replicate by devoting considerable investments and time to it. A provider's need to have access to such infrastructure in the relevant market can constitute a significant barrier to entry. In evaluating market power, ACM assesses whether particular infrastructure that is not easy to replicate enables its owner to behave independently.
195. With regard to the replicability criterion, ACM assesses whether the relevant network and the associated facilities can be replicated profitably by a network and associated facilities with similar functionality. It is not necessary for the full network coverage of the infrastructure to be replicated (or to be able to be replicated). A provider with large network coverage has an advantage over a provider with small network coverage, particularly if the customer demand is not concentrated locally but covers several – geographically diverse – locations. In the assessment of this criterion it is therefore important that the replication of network coverage is sufficiently extensive to exert competitive pressure on the relevant market.

*Purchasing power*

196. The presence of customers with a strong negotiating position can affect the degree to which a company is able to behave independently of its customers. The purchasing power criterion may be a decisive factor in assessing whether there is SMP. Purchasing power limits the provider's market power and, depending on the situation, can result in there being no SMP.<sup>94</sup>
197. Purchasing power is generally determined by comparing the volume of demand and the largest customers' purchases with the company's total sales. If a small number of customers account for a large part of total demand, purchasing power may exist. In certain cases, large customers are able to obtain better conditions from their suppliers than smaller customers. An important point is whether the prospective customers have an alternative and whether switching to a competing mail transport company is a credible threat.

*Potential competition*

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<sup>94</sup> In this connection, see for example ECLI:NL:CBb:2006:AY7997.

198. Potential competition can limit SMP. However, if there are considerable barriers to entry, it is possible that the threat from potential competitors will be weak or non-existent. The effect of barriers to entry will most likely be greater if the market is not growing or is growing only slowly and is dominated in the first place by one large provider. Entrants can then only grow by attracting customers of the dominant company. Barriers to entry can be lower in markets in which continuing technological changes and innovation play a role.
199. Barriers to entry can be divided into strategic and absolute barriers to entry. Economies of scale,<sup>95</sup> economies of scope<sup>96</sup> and switching costs<sup>97</sup> are examples of absolute barriers to entry. High investments can represent an important absolute barrier to entry, particularly if there are sunk costs. Sunk costs are costs that have to be incurred in order to enter the market, but which cannot be recovered when leaving the market. These are investments in assets that cannot be sold when leaving the market. Sunk costs lead to a higher entry risk because they cannot be avoided in the event of a failed entry. Entry will be slower if the risk is higher. Strategic barriers arise due to the strategic behaviour of existing market participants, for example in the form of pricing behaviour (dumping prices, price squeezes, cross-subsidies and price discrimination) or behaviour unrelated to prices (such as increased investments, promotion and distribution).

### 3.3 Description of the offers of mail transport companies

200. In the Netherlands, the market is served by the national mail transport companies PostNL and Sandd and a number of smaller, regional mail transport companies.
201. PostNL offers mail transport services a different service framework (24-hour, 48-hour and 72+-hour bulk mail) throughout the Netherlands based on its own national mail transport network with delivery five days a week. Business customers can drop off their unsorted mail at various PostNL drop-off locations throughout the Netherlands, such as Business points (retail locations) and Business desks (letter sorting offices). The mail is then sorted, transported and distributed in PostNL's own mail transport network and delivered throughout the Netherlands. PostNL offers the full range of possible mail transport services. PostNL's turnover from domestic business letter mail has declined since 2010 from **[confidential: ]** €1,200-1,300 million to **[confidential: ]** €900–1,000 million in 2014 and to **[confidential: ]** €700–800 million in 2016.<sup>98</sup>

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<sup>95</sup> Economies of scale make it more difficult to operate profitably on a limited scale in the market.

<sup>96</sup> Economies of scope make it more difficult to operate profitably with a limited scope.

<sup>97</sup> Switching costs make it is more difficult for the entrant to gain market share.

<sup>98</sup> ACM, postal market monitor, underlying data.

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202. Sandd offers the transport of 72+-hour bulk mail but no 24-hour or 48-hour bulk mail; it delivers twice a week, on Tuesdays and Fridays.<sup>99</sup> Sandd has a single central collection point in Apeldoorn where business customers drop off their mail coded and sorted. Sandd then delivers the mail throughout the Netherlands using a number of regional mail transport companies. Sandd's turnover has increased in recent years from €125 million in 2012 to [confidential: ] €100-200 million in 2016.
203. In general terms, regional mail transport companies mainly offer the transport of 24-hour bulk mail.<sup>100</sup> They also offer 48-hour and 72+-hour bulk mail to a greater or lesser extent. In comparison with the national providers, these are relatively small companies (such as social work companies, local and regional mail transport companies) which collect mail in their own regional delivery area, sort it (in some cases manually) and deliver it for small and medium business senders. There are also a number of mail transport companies that operate nationally in customer acquisition but deliver at regional level. In addition, there are around 15 further regional mail transport companies that operate almost exclusively as deliverers for Sandd and deliver Sandd's mail in their region twice a week.
204. In mid-2017, there are approximately 90 mail transport companies operating in the transport of letter mail.<sup>101</sup> The number of regional mail transport companies has remained almost unchanged in the past few years.<sup>102</sup> It should be noted here that the majority of these mail transport companies are very small. A total of 33 mail transport companies reported turnover of over €1 million to ACM for 2016. Of these mail transport companies, the number generating turnover in excess of €5 million, in addition to PostNL and Sandd, is limited to the mail transport companies Van Straaten Post, Intrapost and Skynet. The members of Coöperatieve Zakelijke Post Nederland, trading under the name of Businesspost, also generate this turnover jointly.
205. Regional mail transport companies focus in general on business customers with relatively large volumes of regional mail, such as housing associations, municipalities, healthcare institutions, schools and (regional) small and medium-sized businesses. Large business

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<sup>99</sup> [Confidential:

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<sup>100</sup> Responses from mail transport companies to the questionnaire of 3 April 2014. Response to question 7, and Postal Market Monitor, state of the Dutch postal market in 2014.

<sup>101</sup> ACM mail transport company registration data.

<sup>102</sup> The number of mail transport companies registered with ACM has increased in the period since full market liberalisation from 112 (beginning of 2010) to 121 (end of 2014). There are currently a total of 120 mail transport companies (end of April 2016). OPTA (2010), De Nederlandse postmarkt 2008-2009, p. 8 and Postal Market Monitor, state of the Dutch postal market in 2014.

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senders currently hardly use the services of regional mail transport companies. Various regional mail transport companies have the ambition of growing in their current delivery area and some mail transport companies are currently expanding their delivery area. A number of regional mail transport companies are growing and increasingly active on a national scale, acquiring customers and collecting mail in large parts of the Netherlands.

206. Most of the regional mail transport companies state that their strength lies in 'unburdening' business customers. They generally state that business mail senders appreciate their personal approach and that there are short communication lines between business senders and the mail transport company, for example if something goes wrong. They state that business senders prefer to offer all mail to the same mail transport company so as to ease the pressure on their own organisation.<sup>103</sup>
207. The combined turnover of the mail transport companies in 2014 (except PostNL and Sandd) with turnover in excess of €1 million from letter mail amounted to €46 million.<sup>104</sup> The combined turnover of mail transport companies with turnover of less than €1 million amounted to €23 million.<sup>105</sup> The turnover of mail transport companies increased in 2014 compared to 2013 as a result of the growth of **[confidential: ]**.
208. The combined turnover of the mail transport companies (except PostNL and Sandd) with turnover in excess of €1 million from letter mail increased to €93 million in 2016.<sup>106</sup> The combined turnover of mail transport companies with turnover of less than €1 million rose to €27 million.<sup>107</sup> The turnover of the mail transport companies increased in 2016 compared to 2014 as a result of the growth of **[confidential: ]**.
209. Mail transport companies carry most of their customers' mail themselves. The rest of their mail is delivered nationwide after being dropped off at PostNL or other regional mail companies. In 2014, regional mail transport companies delivered **[confidential: ]** 50-60 percent of the dropped-off mail themselves, **[confidential: ]** 20-30 percent is outsourced to PostNL for delivery and the remainder **[confidential: ]** 10-20 percent is delivered by other mail transport companies.<sup>108</sup> In 2016, the percentage of self-

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<sup>103</sup> Responses to question 24 of the ACM questionnaire sent to regional mail transport companies on 3 April 2014.

<sup>104</sup> Postal market monitor, state of the Dutch postal market in 2014.

<sup>105</sup> Postal market monitor, state of the Dutch postal market in 2014. This turnover also includes a small proportion of turnover from parcel transport. It is therefore an overestimate of the actual turnover.

<sup>106</sup> ACM, postal market monitor, underlying data.

<sup>107</sup> ACM, postal market monitor, underlying data.

<sup>108</sup> Postal market monitor, state of the Dutch postal market in 2014.

delivered mail was higher [confidential: ] 60-70 percent. The percentage of mail outsourced to PostNL decreased to [confidential: ] 20-30 percent and the remainder, delivered by other mail transport companies, rose to [confidential: ] 10-20 percent.<sup>109</sup> In 2016, regional mail transport companies delivered [confidential: ] 30-40 percent of their customers' 24-hour mail themselves, [confidential: ] 40-50 percent was offered to PostNL for onward transport and [confidential: ] 10-20 percent to other regional mail transport companies.<sup>110</sup>

### 3.4 Dominance analysis of small business postal market

#### 3.4.1 Market shares

210. The small business postal market had market turnover of [confidential: ] €300-400 million in 2014.<sup>111</sup> PostNL's share of the small business postal market was [confidential: ] 80-90 percent. Regional mail transport companies had a collective market share of [confidential: ] 5-10 percent.<sup>112</sup> Sandd has a market share of [confidential: ] 0-5 percent.
211. In 2016, the small business postal market had a market turnover of [confidential: ] €300-400 million. PostNL's share of the small business postal market is [confidential: ] 80-90 percent. Regional mail transport companies have a combined market share of [confidential: ] 10-20 percent. Sandd has a market share of [confidential: ] 0-5 percent.<sup>113</sup>
212. Because of PostNL's share in the final processing of mailpieces, it is likely that the market share of regional mail transport companies would be lower without article 9 of the Dutch Postal Act. If article 9 of the Dutch Postal Act is no longer in force, PostNL is not expected to offer access under the same conditions as it does now. According to ACM, without article 9 of the Dutch Postal Act the combined market share of regional mail transport companies is estimated to be between 0 and 10 percent. In the years ahead, ACM expects a market share of over 90 percent for PostNL in the absence of article 9 of the Dutch Postal Act.

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<sup>109</sup> ACM, postal market monitor, underlying data.

<sup>110</sup> ACM, postal market monitor, underlying data.

<sup>111</sup> Postal Market Monitor, state of the Dutch postal market in 2014, underlying data.

<sup>112</sup> The market share of regional mail transport companies is based on turnover from the ACM registration data of mail transport companies. These turnover data also include parcel services, so the market share of regional mail transport companies in the small business postal market may be overstated.

<sup>113</sup> ACM, postal market monitor, underlying data.

*Conclusion*

213. PostNL's market share of the small business postal market in 2016 was [confidential: ] 80-90 percent. ACM expects PostNL's market share to be between 90 and 95 percent in the absence of article 9 of the Dutch Postal Act. ACM concludes that PostNL's large market share is a very strong indication that PostNL has SMP in the small business postal market.

**3.4.2 Current competition**

*Economies of scale*

214. Economies of scale can be represented quantitatively by the gross margin. If prices are at cost price level, the gross margin is the percentage of the cost price comprising fixed costs. In the market definition, ACM concludes that the gross margin is 48 percent (see Annex 1). With such a gross margin there are economies of scale. These economies of scale give a large mail transport company such as PostNL a significant cost advantage over smaller mail transport companies.

215. NERA (2004) finds no *geographic* economies of scale in the EU member states.<sup>114</sup> That result is consistent with the views of mail transport companies. PostNL states that a larger geographic scale may entail both advantages and disadvantages and that the balance between advantages and disadvantages depends, for example, on the volumes of mail, the type of mail and the delivery frequency.<sup>115</sup> Sandd states that the geographic economies of scale are limited.<sup>116</sup> This means that PostNL has no cost advantage because it operates on a larger geographic scale than regional mail transport companies.

216. On the basis of the above, ACM concludes that there are economies of scale in the small business postal market. These strengthen the position of the largest provider, PostNL, and thus contribute to PostNL having SMP.

*Economies of scope*

217. PostNL has economies of scope compared to other mail transport companies. PostNL offers all types of services. Other mail transport companies all have a limited service offer: Sandd mainly offers 72+-hour bulk mail and the regional mail transport companies mainly offer 24-hour bulk mail. The ability to offer all services produces advantages for

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<sup>114</sup> NERA (2004), Economics of postal services, p. 125.

<sup>115</sup> PoastNL, response to question 57 of the ACM questionnaire of 3 April 2014.

<sup>116</sup> Sandd, response to question 57 of the ACM questionnaire of 3 April 2014.

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PostNL. PostNL can more easily meet customers' demands. That also gives PostNL more flexibility in its pricing. Finally, it also leads to cost advantages, because PostNL can achieve optimum utilisation of its network.

218. ACM concludes that PostNL has an advantage over other mail transport companies due to the fact that it benefits from economies of scope. This benefit contributes to PostNL having SMP in the small business postal market.

### *Control over infrastructure that is not easy to replicate*

219. PostNL operates nationally and has a dense collection, sorting, transport and delivery network covering the whole of the Netherlands. Sandd also has a nationwide network with its partners two days a week. There are also various regional mail transport companies operating in the market. All these mail transport companies operate regionally in the collection, manual or automated sorting, transport and delivery of business mail and cover a local or regional network area usually five days a week with their own personnel and limited production resources. Compared to the individual regional mail transport companies, PostNL has an advantage due to its control of infrastructure that cannot easily be replicated.

220. PostNL's advantage decreases if regional transport companies create a national collection, sorting, transport and delivery network through collaboration and reciprocal exchanges of business mail. A number of regional mail transport companies are currently collaborating under the name of Businesspost. Businesspost is a joint venture of social work companies and a number of other mail transport companies operating in business mail transport. By exchanging mail among themselves they can arrange for regionally collected post to be delivered by the affiliated partners. In 2015, Businesspost had a national delivery network with coverage of approximately **[confidential: ]** percent.<sup>117</sup> Businesspost estimates that in the years ahead this coverage will amount to **[confidential]:**

**[ ]**. Van Straaten Post has further expanded the coverage of its delivery network in the last few years. The other mail transport companies mainly operate locally and collaborate to a limited extent with other regional mail transport companies for the exchange of mail.

221. Figure 8 shows the current coverage of the delivery networks of the main regional mail transport companies. The relevant criteria for the selection of these mail transport

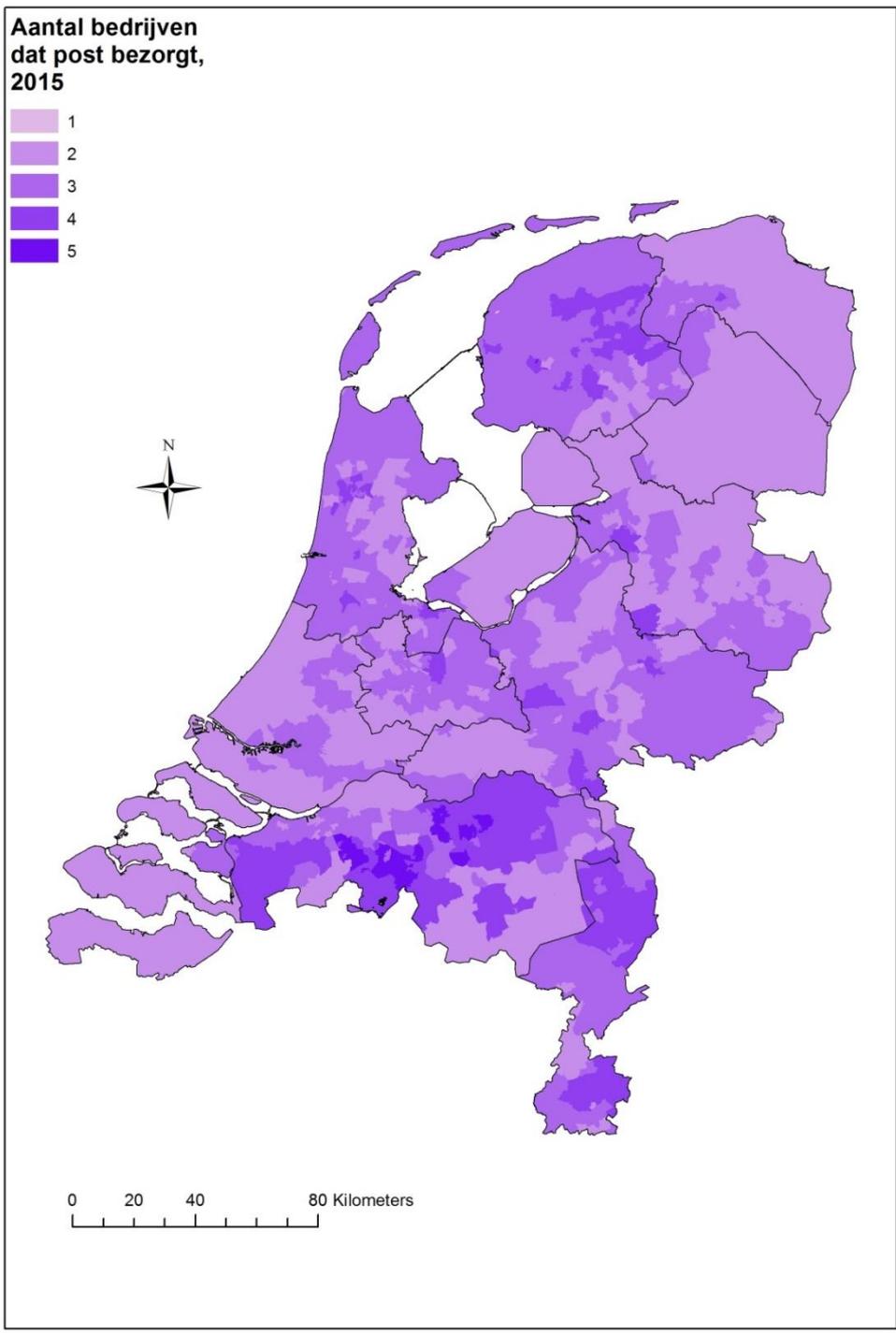
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<sup>117</sup> Responses from Businesspost of 27 October 2014.

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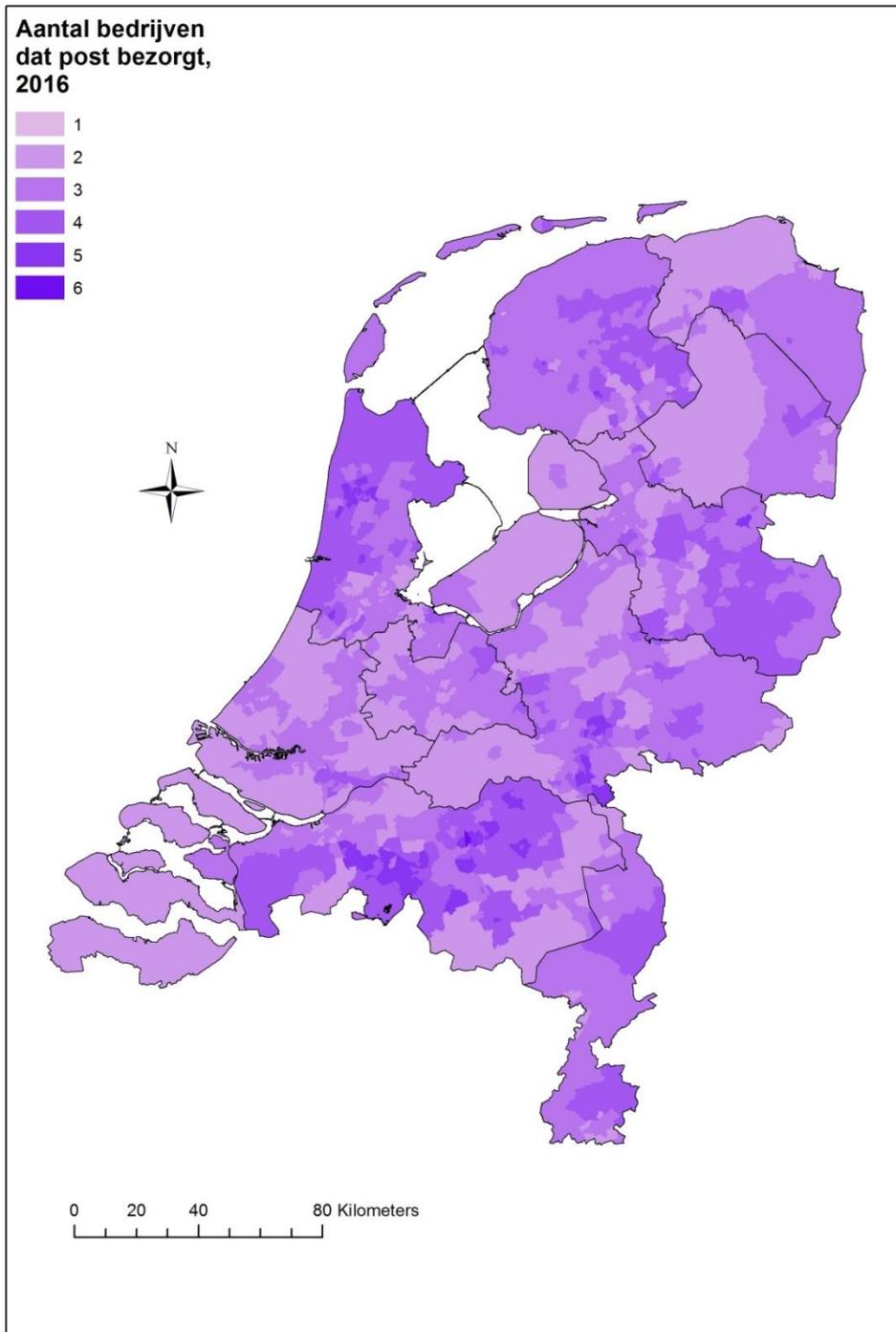
companies concern the extent of their mail transport activities, as reported by mail transport companies to ACM, and the size of their own delivery organisation. Figure 8 shows how many mail transport companies deliver mail per postcode area, regardless of the service framework. Figure 7 shows how many mail transport companies were operating in delivery in a postcode area in 2015, regardless of how many times a week they delivered.

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Figure 7: overview of the number of mail transport companies delivering in 2015 per postcode area, all service frameworks.



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Figure 8: overview of the number of mail transport companies delivering per postcode area in 2016, all service frameworks.

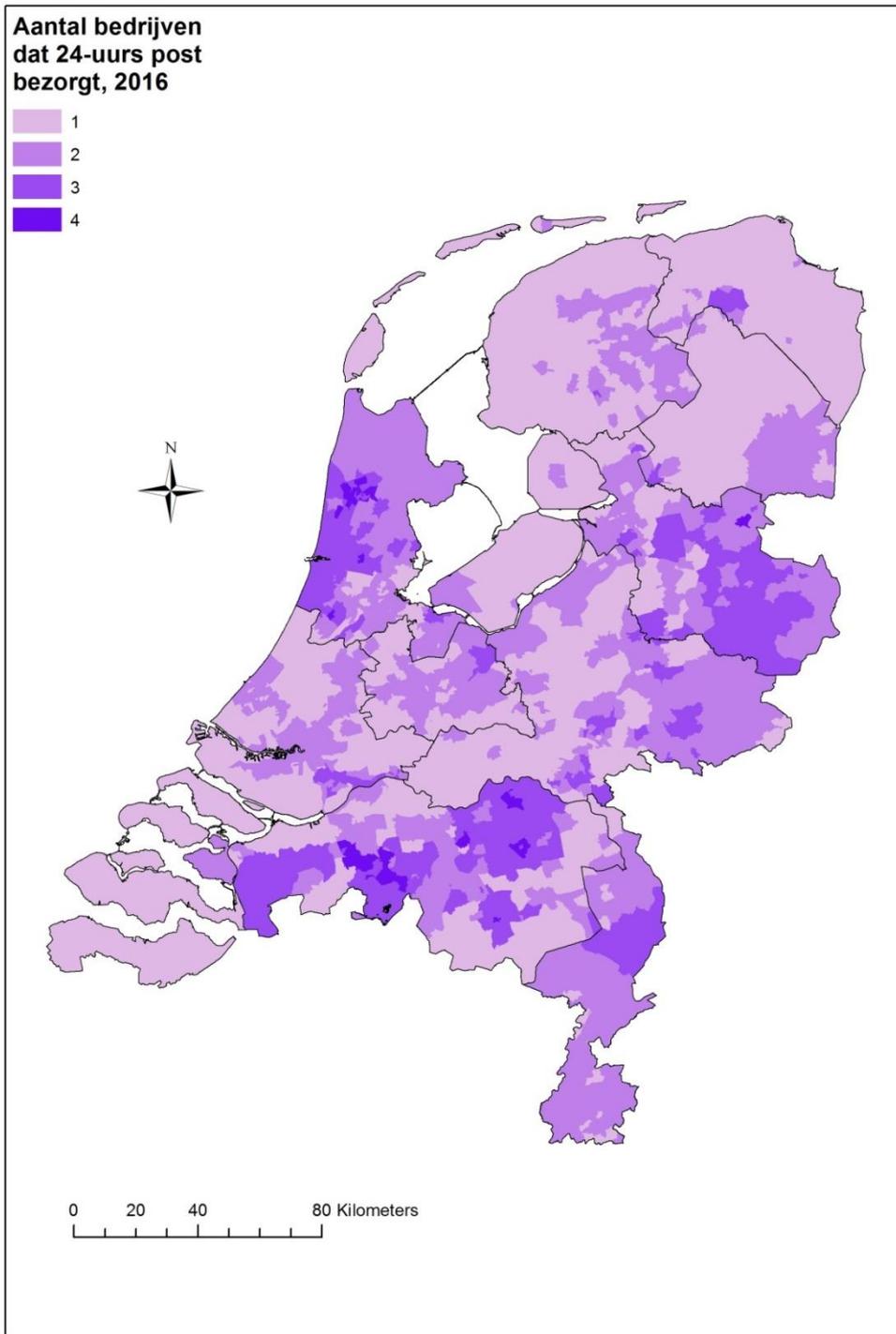
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222. Figure 9 shows how many mail transport companies deliver 24-hour bulk mail, per postcode area. If only the coverage of 24-hour bulk mail is taken into account, there is a different picture of the coverage that regional mail transport companies can offer. The smallest number of mail transport companies that deliver mail five times a week to all addresses in a district<sup>118</sup> is 1. This applies to approximately half of the country. The data concerning the coverage of the delivery network of regional mail transport companies indicate that in 2016 they collectively covered **[confidential: ]** 50-60 percent of all postcode districts in the Netherlands. This figure shows that even if the main regional mail transport companies all collaborated, the regional mail transport companies would not be able to deliver 24-hour bulk mail nationwide.

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<sup>118</sup> For the sake of completeness: there is a second mail transport company that delivers 24-hour mail nationwide, but it only delivers to legal addresses, not door-to-door. This mail transport company is not shown on the map.



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Figure 9: overview of the number of mail transport companies delivering in 24 hours per postcode area in 2016.

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223. Having regard to the scale of the regional mail transport companies, it is not realistic to expect them to be able to replicate the network and associated facilities of PostNL. Collaboration between the regional mail transport companies also proves not to be an adequate alternative to full national network coverage. Although regional mail transport companies use the networks of other regional mail transport companies for mail outside their delivery region, they remain dependent to a significant extent on the network and the associated facilities of PostNL due to their non-national coverage.
224. In view of the above, regional mail transport companies in an unregulated environment would not be able to offer national mail transport for business senders, or in any event not in a way that competes with PostNL.
225. ACM concludes that PostNL has advantages compared to its competitors due to the fact that it has control over infrastructure that is not easy to replicate and national coverage with its five-day delivery network. These advantages contribute to PostNL having AMP in the small business postal market.

**3.4.3 Purchasing power or the lack of it**

226. Small business mail senders have too small a concentration of the business postal volume to exert any kind of purchasing power. Moreover, in the absence of regulation regional mail transport companies have such a limited market position that they represent no alternative for small business mail senders. Sandd is no alternative for small business senders.

*Conclusion*

227. ACM concludes that there is no purchasing power that can give rise to prices for bulk mail for small business senders at a competitive level. The lack of purchasing power contributes to PostNL having SMP in the small business postal market.

**3.4.4 Potential competition or the lack of it**

228. In marginal 214 it was noted that PostNL has economies of scale in the transport of bulk mail for small business senders. This creates a barrier to entry against potential mail transport companies because they will have higher costs with the smaller scale and breadth of their offer. That makes entry with slow growth from a small scale and breadth more difficult. This is reinforced by the fact that this is a shrinking market characterised by having a single large provider. A relevant point is that the barrier to entry is not raised by high and/or largely sunk investments or costs. The necessary company resources (for example buildings and transport vehicles) could be rented or leased. If these resources

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are nevertheless purchased, they can be sold in the event of any departure. A further relevant point is that it is possible to enter on a smaller scale. The current regional mail transport companies have limited scale and a small market share, even in the area in which they operate. The absence of large necessary investments, the absence of largely sunk costs and the possibility of entering on a small scale lead to lower barriers to entry. This does not mean, however, that there are no significant barriers to entry. These lower barriers to entry do not mean that a mail transport company with a smaller scale but equivalent geographic coverage – and equivalent technical efficiency – will not have to bear higher costs. Hence entry remains difficult, particularly on a national scale.

229. Potential competition can come from providers in neighbouring markets. In this case, there are companies operating in the distribution and delivery of newspapers that may become active in the transport of bulk mail. Potential competition from neighbouring markets cannot be expected on a large scale, however. In the past, when the size of the market provided more scope for multiple providers, there were no new entrants. Delivering mail in addition to newspapers does not create sufficient synergies. There are no grounds for assuming that large-scale synergies will exist over the longer term. ACM therefore believes it unlikely that operators will enter from newspaper delivery in the long term.

*Conclusion*

230. ACM concludes that the lack of sufficient purchasing power contributes to PostNL having SMP in the small business postal market.

**3.4.5 Assessment and conclusion**

231. ACM notes that PostNL's market share **[confidential: ]** stood at 80-90 percent of the small business postal market in 2016. In the absence of article 9 of the Dutch Postal Act, ACM expects that PostNL's market share will be between 90 and 95 percent and will decline only slightly if at all in the years ahead. Such a very high market share in itself already constitutes proof of SMP, barring exceptional circumstances. Exceptional circumstances may arise if there is purchasing power and/or potential competition. The assessment shows that those factors are insufficient to prevent SMP. ACM notes that PostNL has scale and network coverage advantages in the small business postal market. These factors give PostNL an important advantage over its competitors.
232. ACM ascertains that PostNL has SMP in the defined small business postal market.

### 3.5 Dominance analysis of medium business postal market

#### 3.5.1 Market shares

233. The medium business postal market had market turnover of [confidential: ] €200-300 million in 2014.<sup>119</sup> PostNL's share of the medium business postal market was [confidential: ] 70-80 percent. Sandd had a market share of [confidential: ] 10-20 percent. Regional mail transport companies had a market share of [confidential: ] 0-5 percent.

234. In 2016, the medium business postal market had market turnover of [confidential: ] €200-300 million. PostNL's share of this market was [confidential: ] 60-70 percent. Sandd has a market share of [confidential: ] [ ] 10-20 percent. The market share of the regional mail transport companies is [confidential: ] 10-20 percent.<sup>120</sup> The combined market share of regional mail transport companies in recent years has [confidential: ]

].

235. ACM expects no substantial differences in market shares in the absence of article 9 of the Dutch Postal Act. In the years ahead, ACM expects PostNL to have a market share of over 75 percent in the absence of article 9 of the Dutch Postal Act.

#### Conclusion

236. ACM concludes that PostNL's large market share is a very strong indication that PostNL has SMP in the medium business postal market.

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<sup>119</sup> Postal Market Monitor, state of the Dutch postal market in 2014, underlying data.

<sup>120</sup> ACM, underlying data for the 2016 postal market monitor.

### **3.5.2 Current competition**

#### *Economies of scale*

237. In the dominance analysis for the small business postal market it was noted that PostNL has economies of scale (see marginal 214). There are no grounds for assuming that economies of scale are substantially different for the medium business postal market.
238. In the dominance analysis for the small business postal market it was ascertained that there are no geographic economies of scale (see marginal 215). There are no grounds for assuming that the position is substantially different in the medium business postal market.
239. On the basis of the above, ACM concludes that there are economies of scale in the medium business postal market. These strengthen the position of the largest provider, PostNL, and thus contribute to PostNL having SMP.

#### *Economies of scope*

240. In the dominance analysis for the small business postal market it was ascertained that PostNL has economies of scope (see marginal 217). There are no grounds for assuming that the economies of scope are substantially different in the medium business postal market.
241. ACM concludes that PostNL has an advantage over other mail transport companies since it benefits from economies of scope. This benefit contributes to PostNL having SMP.

#### *Control over infrastructure that is not easy to replicate*

242. PostNL has a dense national five-day delivery and collection network for business bulk mail. Sandd also has a dense national (two-day) delivery network but only one national collection point, where business customers are required to drop off their bulk mail. Regional mail transport companies have a local or regional network for transport usually five times a week.
243. ACM concludes that PostNL has an advantage over its competitor Sandd due to the fact that it has control of both a dense delivery network and a dense collection network. This benefit contributes to PostNL having SMP.

### 3.5.3 Purchasing power or the lack of it

244. Medium business senders on average have too small a concentration of postal volume in relation to PostNL's total volume to exert any form of purchasing power. The largest among the medium business senders could possibly exert some purchasing power and purchase at competitive tariffs if they could pose a real threat of switching to Sandd for part of their mail (72+-hour bulk mail). However, due to the relatively high costs for the central mail drop-off in the case of Sandd, this is unattractive to most medium business senders. For example, for a large municipality it is unattractive to have to arrange for mail to be dropped off in Apeldoorn and then to be delivered in their own region.
245. In the absence of regulation, regional mail transport companies have a limited position whereby they are no alternative for medium business senders threatening to switch.

#### *Conclusion*

246. ACM concludes that there is no purchasing power in the medium business postal market that can generate prices at a competitive level. The lack of sufficient purchasing power contributes to PostNL having SMP.

### 3.5.4 Potential competition or the lack of it

247. In the dominance analysis for the small business postal market it has been ascertained that no significant entries can be expected (see marginal 230). There are no grounds for assuming that potential entry is substantially different in the medium business postal market.

#### *Conclusion*

248. ACM concludes that the lack of sufficient potential competition contributes to PostNL having SMP.

### 3.5.5 Assessment and conclusion

249. ACM notes that PostNL's market share [confidential: ] was 70-80 percent in the medium business postal market in 2014, and [confidential: ] 60-70 percent in 2016. In the absence of article 9 of the Dutch Postal Act, ACM expects that PostNL's market share will be between 75 and 80 percent and will decline very slightly in the years ahead. Such a high market share in itself already constitutes proof of SMP, barring exceptional circumstances. Exceptional circumstances may arise if there is purchasing power and/or potential competition. The assessment of those two criteria shows that those factors are insufficient to prevent SMP. ACM notes that there are economies of scale and limited

network coverage advantages for PostNL in the medium business postal market. These factors give PostNL an important advantage over its competitors.

250. ACM ascertains that PostNL has SMP in the medium business postal market.

### 3.6 Dominance analysis of large business postal market

#### 3.6.1 Market shares

251. The large business postal market had market turnover of [confidential: ] €500-600 million in 2014.<sup>121</sup> PostNL's market share of the large business postal market was [confidential: ] 80-90 percent. Sandd's market share was [confidential: 15] 10-20 percent. In 2016, PostNL's market share was [confidential: ] 80-90 percent and Sandd's market share was [confidential: ] 10-20 percent. Business senders with an annual volume in excess of 2.5 million use few if any regional mail transport companies. ACM expects no substantial differences in market shares in the absence of article 9 of the Dutch Postal Act. In the years ahead, ACM expects PostNL to have a market share of 80 to 90 percent in the absence of article 9 of the Dutch Postal Act.

#### Conclusion

252. ACM concludes that PostNL's large market share provides a very strong indication that PostNL has SMP in the large business postal market.

#### 3.6.2 Current competition

##### *Economies of scale*

253. In the dominance analysis for the small and medium business postal market it was noted that PostNL has economies of scale (see marginals 214 and 237). For the logistics process of mail transport companies there is no substantial difference between the transport of bulk mail for medium and large business senders. Mail transport companies use the same production resources (such as sorting machines and deliverers) for the small, medium and large business postal markets. This means that PostNL also has economies of scale in the large business postal market.

254. In the dominance analysis for the small and medium business postal markets it has been ascertained that there are no geographic economies of scale (see marginals 215 and

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<sup>121</sup> Postal Market Monitor, state of the Dutch postal market in 2014, underlying data.

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238). There are no grounds for assuming that there are geographic economies of scale in the large business postal market.

255. On the basis of the above ACM concludes that there are economies of scale. These strengthen the position of the largest provider, PostNL, and thus contribute to PostNL having SMP. ACM concludes that there are no geographic economies of scale.

### *Economies of scope*

256. In the dominance analysis for the small and medium business postal market it was ascertained that PostNL has economies of scope (see marginals 217 and 240). There are no grounds for assuming that the economies of scope are substantially different in the medium business postal market.
257. ACM concludes that PostNL has an advantage over its only real competitor, Sandd, since it benefits from economies of scope. This benefit contributes to PostNL having SMP.

### *Control over infrastructure that is not easy to replicate*

258. PostNL has a dense national five-day delivery and collection network for business bulk mail. Sandd also has a dense national two-day delivery network but only one national collection point at which business senders can drop off their bulk mail. For large business senders the disadvantage of the central mail drop-off is probably very small, however.
259. ACM concludes that PostNL has an advantage over Sandd due to the fact that it has control of a dense delivery network. This benefit contributes to PostNL having SMP.

### **3.6.3 Purchasing power or the lack of it**

260. Large business mail senders could possibly purchase at keen prices as a result of having purchasing power if they could choose from real alternatives. For part of the customer demand in the large business postal market there is an alternative to PostNL in the form of Sandd. As a result of the large volumes sent by large business senders and the relatively high concentration on the demand side, they have a stronger position from which to negotiate than small and medium business senders. This is evident from the prices for large business senders, which are lower for comparable mail transport services than for small business senders.<sup>122</sup> ACM has therefore examined whether there is purchasing power among large business senders that can prevent PostNL having SMP.

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<sup>122</sup> This is evident from the responses of PostNL and Sandd to the questionnaire sent by ACM on 23 October 2014.

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261. The large business postal market shows characteristics of a bidding market. Large business senders usually invite tenders for mail transport, with mail transport companies able to bid. The use of a tendering procedure means that the existence of purchasing power in a market with two national providers of mail transport can already give rise to strong competition with attractive offers. However, a bidding market is not necessarily any more competitive than other types of market. This depends greatly on the characteristics of the market. Purchasing power is more likely in a product market in which the variable costs account for a limited proportion of the total costs and there are no capacity restrictions.<sup>123</sup> It was noted previously in the market definition that the gross margin for mail transport is 48 percent. This means that 52 percent of costs are variable. As a result, the incentive to bid aggressively in a tender is less strong than in a market with substantial fixed costs.

262. **[Confidential:**

<sup>124</sup>]

Although large business senders' purchasing power is likely to put some pressure on prices in the large business postal market, it is unlikely that this pressure will lead to competitive prices.

*Conclusion*

263. ACM concludes that there is a limited degree of purchasing power in the large business postal market, but that it is insufficient to generate prices at a competitive level. As a result, PostNL will be insufficiently disciplined to behave independently. The existence of a limited degree of purchasing power is insufficient to prevent PostNL having SMP.

**3.6.4 Potential competition or the lack of it**

264. In the dominance analysis for the small and medium business postal market it was noted that the lack of sufficient potential competition contributes to PostNL having SMP. ACM concludes that this is not substantially different in the large business postal market.

*Conclusion*

265. ACM concludes that the lack of sufficient potential competition contributes to PostNL having SMP.

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<sup>123</sup> OFT, the assessment of market power, 415, p. 12.

<sup>124</sup> **[Confidential:** ]

**3.6.5 Assessment and conclusion**

266. ACM notes that PostNL's market share **[confidential: ]** in the large business postal market was 80-90 percent in 2014 and **[confidential: ]** 80-90 percent in 2016. In the absence of article 9 of the Dutch Postal Act, ACM expects that PostNL's market share will be between 80 and 90 percent and will decline only very slightly in the years ahead. Such a very high market share in itself already constitutes proof of a power position, barring exceptional circumstances. Exceptional circumstances may arise if there is purchasing power and/or potential competition. The assessment of those two criteria shows that those factors are insufficient to prevent SMP. ACM notes that there are economies of scale and economies of scope which can give PostNL an advantage over its competitors.
267. ACM ascertains that PostNL has SMP in the large business postal market.

## 4 Potential competition problems

### 4.1 Introduction

268. In the previous section, ACM came to the conclusion that PostNL has SMP in the three defined relevant markets. This means that this provider is able to exhibit behaviour in those relevant markets that impedes competition (hereinafter: anticompetitive behaviour), which can lead to competition problems. This section deals with potential competition problems.
269. Section 4.2 sets out the analysis framework for the potential competition problems. In section 4.3, ACM then describes how it has identified these problems. In sections 4.4 to 4.6, ACM determines whether PostNL has the incentive and ability to exhibit anticompetitive behaviour. The conclusion follows in section 4.7.

### 4.2 Analysis framework for competition problems

270. In this section, ACM investigates whether there are competition problems that can arise as a result of PostNL having SMP in the three defined relevant markets.
271. It is not necessary for these competition problems to actually also arise; it is sufficient that PostNL has the incentive and ability to exhibit particular anticompetitive practices.<sup>125</sup> In line with the explanation by the legislature<sup>126</sup>, ACM bases its assessment of the potential competition problems on telecommunications case law. In a number of judgements the Trade and Industry Appeals Tribunal has confirmed that when identifying potential competition problems ACM must demonstrate that a company with SMP has the incentive and ability to exhibit anticompetitive behaviour.<sup>127</sup> ACM can assess the incentive on the basis of general considerations concerning the rational behaviour of companies focused on maximising profit.<sup>128</sup> A market participant with SMP does not have to have any concrete plans to start behaving anticompetitively<sup>129</sup> and ACM does not have to demonstrate that the competition problems will arise with absolute certainty.<sup>130</sup>
272. ACM therefore examines whether PostNL has the *incentive and ability* to exhibit anticompetitive behaviour.

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<sup>125</sup> Kamerstukken II 2012/13, 33 501, no. 3, *inter alia* p. 7

<sup>126</sup> Kamerstukken II 2012/13, 33 501, no. 3, *inter alia* p. 9-10.

<sup>127</sup> ECLI:NL:CBB:2011:BQ3146, ECLI:NL:CBB:2010:BL4028, ECLI:NL:CBB:2011:BR6195, ECLI:NL:CBB:2011:BT6098, ECLI:NL:CBB:2007:BB0186.

<sup>128</sup> ECLI:NL:CBB:2011:BT6098, legal consideration 10.9.8.

<sup>129</sup> ECLI:NL:CBB:2011:BT6098, legal consideration 10.9.8.

<sup>130</sup> ECLI:NL:CBB:2007:BB0186.

273. Whether PostNL has the ability to exhibit particular anticompetitive behaviour is determined in part by certain laws and regulations that are in force. In this connection, ACM recalls that the analysis will be carried out on the assumption of the absence of article 9 of the Dutch Postal Act. The question of whether PostNL is able to exhibit anticompetitive behaviour must therefore be answered on the basis that article 9 of Dutch Postal Act will no longer apply.

### **4.3 Structure of investigation**

274. In identifying the potential competition problems, ACM draws initially on the results of the public consultation conducted the beginning of 2014 (hereinafter: problem analysis) to survey the problems that arise in the postal sector. ACM also sent a questionnaire to mail transport companies and received responses concerning competition problems that may arise.<sup>131</sup>

275. From 2013, ACM also conducted various investigations into compliance with article 9 of the Dutch Postal Act. In this framework ACM also identified various actual anticompetitive practices by PostNL. These provide insight into potential competition problems and are also included in the analysis of potential competition problems.

276. In the following sections, ACM investigates which potential competition problems may arise as a result of PostNL's SMP in the three defined relevant markets. In the sections that follow, ACM determines whether PostNL has the incentive and ability to limit competition through its behaviour. As far as possible, ACM describes the specific anticompetitive practices and the potential competition problems that cause them.

277. The analysis of the potential competition problems concerns the transport of 24-hour bulk mail letter consignments nationally. The problem analysis proceeding this market analysis decision revealed that potential competition problems could arise for these services. This does not mean there are not also other types of bulk mail in which potential competition problems arise, but these have not been investigated in this market analysis.

278. In investigating potential access-related competition problems, ACM has not identified any differences between the small business, medium business and large business postal markets. ACM investigated the extent to which there is an alternative the PostNL in the three markets. As ACM also stated in its dominance analysis, it has concluded there are various indicators of a lack of alternatives and the dominance of PostNL in the various markets. Since the three markets show a large degree of similarity, the incentive and

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<sup>131</sup> Questionnaire on possible obligations of 24 June 2014.

ability to implement access-related anticompetitive practices will also arise to an almost equivalent extent. ACM further notes that the distinction between the three different markets lies mainly in the size of the mail volumes offered. In the case of access-related competition problems the volume is less relevant in principle. After all, if a mail transport company is refused access, it is not important whether it wishes to lodge 100,000 or 1,000,000 mailpieces with PostNL. ACM therefore treats the potential competition problems on a unified basis across the three defined relevant markets, although there are specific differences between them with regard to the price-related competition problems described below. ACM describes these differences for the potential competition problem concerned.

279. The problem analysis and the responses to the questionnaire reveal that market participants see the following anticompetitive practices (or the risk of such practices) by PostNL with regard to 24-hour bulk mail:

Refusal of supply/refusal of access (hereinafter access refusal);

Access-related competition problems:

- discriminatory use or the withholding of information;
- improper use of information on competitors;
- delaying tactics;
- unfair conditions;
- quality discrimination;
- tying; and
- strategic product design.

Price-related competition problems:

- price discrimination; and
- margin squeeze.

#### **4.4 Access refusal**

280. A vertically integrated mail transport company with SMP that has control over an infrastructure that is not easy to replicate has an incentive to refuse access to its mail transport network and associated facilities. If a mail transport company with SMP refuses to grant other mail transport companies access to its mail transport network and associated facilities, it denies these other mail transport companies the possibility of competing with it. This access refusal is therefore anticompetitive behaviour.
281. As ACM has already ascertained in the dominance analysis, PostNL, with its dense collection, transport, sorting and delivery network covering the whole of the Netherlands,

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has infrastructure that is not easy to replicate. The coverage of the collection, transport, sorting and delivery network of other mail transport companies is much more limited. Since almost all business senders wish to purchase bulk mail services with delivery throughout the Netherlands, the ability to offer nationwide 24-hour mail transport companies is a requirement for mail transport companies. Even if the other mail transport companies were to collaborate, when providing 24-hour bulk mail they would remain largely dependent on PostNL for delivery outside the joint delivery coverage area. PostNL has an incentive to refuse access to its mail transport network, making it impossible for competing mail transport companies to supply or continue supplying nationwide 24-hour bulk mail to their business customers. This seriously limits other mail transport companies' competition potential and may even force them to discontinue their mail transport activities in 24-hour bulk mail and leave the market. In that case, business senders can only have their 24-hour bulk mail transported by PostNL. In this way, PostNL can keep the price of these mail transport services high and/or increase it and reduce the quality of the services. The above illustrates that PostNL has an incentive to maintain and/or strengthen its SMP in the defined relevant markets by refusing access. After all, by refusing access PostNL can push competitors out of the market, enabling it to increase its market share.

282. Because article 9 of the Dutch Postal Act has been withdrawn, PostNL also actually has the ability to refuse access to its mail transport network and associated facilities. After all, in the absence of article 9 of the Dutch Postal Act, PostNL no longer has the obligation to ensure that the mail transport services it provides under special conditions and tariffs for each mail transport company are provided on a non-discriminatory basis and under transparent conditions and tariffs vis-à-vis other senders and mail transport companies. PostNL has an incentive to refuse to accept particular customers as competitors because these customers can then no longer offer a complete range of services to their customers and are hence less attractive relative to PostNL.

*Conclusion*

283. Having regard to the above, ACM concludes that PostNL has the incentive and ability to refuse to grant mail transport companies access to its mail transport network and associated facilities for 24-hour bulk mail. This has the effect of impeding competition in the defined relevant markets, which is detrimental to mail transport networks and end-users.

#### 4.5 Access-related competition problems

284. In the previous section, ACM concluded that access refusal posed a potential competition problem. ACM ascertains that in the defined relevant markets PostNL also has the incentive and ability to exhibit behaviour that hampers access. This has the same effect, namely that mail transport companies that are dependent on access to the mail transport network are *de facto* excluded from access to PostNL's mail transport network and the associated facilities. That gives rise to a situation in which PostNL may provide access to its mail transport network on paper, but in which the access is designed in such a way as to hinder or frustrate its effective use for other mail transport companies. As a result, these mail transport companies cannot compete or cannot compete sufficiently with PostNL in the provision of 24-hour bulk mail for business senders.

285. ACM sees the following access-related potential competition problems in the defined relevant markets:

- 1) discriminatory use or the withholding of information;
- 2) improper use of information;
- 3) delaying tactics;
- 4) unfair conditions;
- 5) quality discrimination;
- 6) tying; and
- 7) strategic product design.

##### *Re 1) Discriminatory use or withholding of information*

286. A mail transport company with SMP that provides access to its mail transport network and associated facilities has information that is necessary in order to use that access efficiently. This information concerns, for example, the drop-off locations, the drop-off conditions, changes and innovations in the product range or changes and modifications in the mail transport network. By withholding this information from mail transport companies or disclosing it on a discriminatory basis, a mail transport company with SMP can impede or even block access.

287. It is essential that other mail transport companies also have access to the above information. Only then will they be able to make efficient use of 24-hour bulk mail from PostNL for their own business customers. Consideration must also be given, for example, to the timely notification of changes in the terms, product conditions and pricing.

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288. Since PostNL can establish and modify its mail transport network and logistics organisation freely and independently, PostNL has the possibility of disclosing or withholding information on a discriminatory basis. This can lead to an information gap between competing mail transport companies, impeding them in their competition with PostNL in the defined relevant markets.
289. When information is disclosed on plans or modifications, it is also very important to be clear what the status of this information is. The updating of the planning information (and any changes in its status) is also an important precondition for preventing a lack of information or an information gap for competing mail transport companies.
290. For mail transport companies it is extremely important to have information on the tariffs which they will be charged by PostNL and on the conditions under which those tariffs apply. Mail transport companies currently receive an offer from PostNL based on the prevailing purchase level, but if a mail transport company tries to enter into a contract with a large business customer, it has only limited information, if any, on the consequences for the tariffs which it will be charged by PostNL. This makes it more difficult for mail transport companies to make an attractive offer than for PostNL itself.
291. In response to a number of enforcement investigations, ACM ascertained that PostNL did not correctly provide mail transport companies with the information of importance to them, despite being obliged to do so under article 9 of the Dutch Postal Act.
292. In April 2015, ACM imposed an order for periodic penalty payments on PostNL, in the context of a tender for mail transport services for the municipality of Rotterdam.<sup>132</sup> Among other things, PostNL had failed to inform other mail transport companies, in a transparent and non-discriminatory manner, of the special conditions and tariffs that it had offered to the municipality of Rotterdam.
293. In addition, in October 2015, ACM also imposed an order for periodic penalty payments with regard to the so-called Internal Tariff Brochure (hereinafter: ITB) used by PostNL.<sup>133</sup> PostNL uses a public tariff booklet that includes the tariffs for services, including 24-hour bulk mail. The tariff booklet is available *inter alia* on the PostNL website. In practice, the account managers at PostNL use the ITB in their negotiations with existing or potential business customers. The ITB differs, however, from the public tariff booklet. As a result, mail transport companies did not know in advance which mail transport products PostNL offered nor what the tariffs and conditions for these products were.

<sup>132</sup> ACM/DTVP/2015/201093/OV, 15 April 2015.

<sup>133</sup> ACM/DTVP/2015/205887\_OV, 16 October 2015.

294. Finally, ACM has **[confidential:**

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295. The above illustrates that PostNL has the possibility of withholding information or using it in a discriminatory manner. This means that in its offer for existing and potential customers PostNL is able to anticipate or take advantage of changes in the drop-off conditions or pricing, causing competing mail transport companies to lag behind in adjusting their own products and conditions and logistical organisation and preventing them from competing effectively with PostNL. PostNL has an incentive to exhibit this behaviour since the retention or discriminatory use of information gives PostNL a lead over its competitors and enables it to devise a more complete and favourable offer for existing and potential customers.

*Re 2) Improper use of information*

296. A mail transport company with SMP that offers and provides access to its mail transport network thus gains information and data from competing mail transport companies operating in the defined relevant markets. The mail transport company with SMP can make improper use of that information in order to strengthen its position relative to competitors or to weaken its competitors.

297. PostNL can gain access to information on the business customers of competing mail transport companies and can use this information to develop so-called winback activities. In this connection, ACM notes that some agreements between PostNL and other mail transport companies include a provision requiring the mail transport company in question to lodge the bulk mail of a specific business customer with PostNL under a separate customer number. Although this does not necessarily lead to the conclusion that PostNL will make improper use of this information, that is nevertheless a possibility. The incentive to make improper use of information lies in the winback activities described above. After all, PostNL can use information on its competitors' business customers in order to make them a better, targeted offer and thereby increase its market share.

*Re 3) Delaying tactics*

298. By using delaying tactics, a mail transport company with SMP aims to prevent other mail transport companies from accessing its mail transport network within a reasonable period. A mail transport company with SMP can thus prevent a mail transport company from gaining access effectively and efficiently. A mail transport company with SMP can thereby create uncertainty and disadvantage these rival mail transport companies to win the business customer's favour. It thereby impedes effective competition.
299. As a mail transport company with SMP, PostNL has the ability to use delaying tactics. Delaying tactics which PostNL can use include, for example, stretching negotiations or citing alleged technical and other problems with regard to access. Another delaying tactic is delaying the provision of services and resources which mail transport companies need for access. Supplying the required information too late is also a delaying tactic.<sup>134</sup> The incentive for PostNL to use delaying tactics lies in the fact that it can thereby prevent its competitors from gaining access to the market and can thus retain customers before other mail transport companies can make an offer (lock-in).

*Re 4) Unfair conditions*

300. A mail transport company with SMP can set unfair conditions for the use of mail transport services by mail transport companies. These can include, for example, contractual conditions imposing requirements on mail transport companies that are not necessary for the purchase of mail transport services, but which increase the customer's costs or limit the purchase of mail transport services. These could include, for example, demanding unreasonably high sureties or unreasonable purchase guarantees.
301. As a mail transport company with SMP, PostNL has the ability to apply unfair conditions. For example, by setting unfair conditions, PostNL can increase the costs of competing mail transport companies or prevent mail transport companies from serving their business customers properly. The above illustrates the incentive for PostNL to strengthen its own competitive position in the defined relevant market by frustrating the purchase of the mail transport companies' services. The unfair conditions have the effect of restricting the competition.
302. An example of such behaviour is the introduction of a surcharge for mailpieces dropped off at the business desk of the PostNL sorting centres after 7.30 p.m. (up to 9 p.m. at the latest). PostNL introduced this surcharge on 1 July 2015 **[confidential: ]**.

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<sup>134</sup> See responses to questionnaire on possible obligations, question 7.

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PostNL's main argument was that this measure was intended to counter any disruption to PostNL's mail handling process. In practice this amended condition meant that in most cases mail transport companies would pay a surcharge when dropping off mail because the bulk carried by mail transport companies usually comprises mail from different business customers of those mail transport companies. Since mail transport companies then have to combine and sort the mail of the underlying customers, they need more time to compose a consignment of mail. **[confidential]**

] PostNL decided to withdraw the

scheme.

*Re 5) Quality discrimination*

303. A mail transport company with SMP can discriminate in terms of the quality of the 24-hour bulk mail services provided for different customers. A mail transport company with SMP can thus make it difficult or even completely impossible for rival mail transport companies to compete by accessing its postal network. An example is when a PostNL mail transport service that is used by competing mail transport companies is of worse quality than the same service that PostNL offers its own business customers. In the event of a difference in quality of the offer, business customers will tend more to use the mail transport services of PostNL. The incentive for PostNL therefore lies in the fact that through such practices PostNL ensures that it is always able to make a better offer to its existing and potential business customers than other mail transport companies.
304. The reliability of the agreed shipping duration (percentage of the lodged mail delivered within the agreed service framework) and the reliability of delivery (percentage of the lodged mail delivered to the correct address) are examples of quality aspects by which PostNL can discriminate. For example, during onward processing PostNL can give priority to 24-hour bulk mail lodged by PostNL's business customers over mail lodged by other mail transport companies.
305. In practice, ACM notes that **[confidential]**

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*Re 6) Tying*

306. Tying means that a mail transport company with SMP obliges other mail transport companies to use one or more additional services when using 24-hour bulk mail. Since PostNL has a dominant position in the 24-hour segment in all defined markets, it has the ability to tie 24-hour services to 48-hour and 72+-hour services in all defined markets. Such a practice can limit competition in two ways. The incentive for this behaviour lies firstly in the fact that by tying its 24-hour bulk mail to other services, PostNL may be able to transfer market power to other markets in order to limit competition in those markets. Secondly, other mail transport companies are forced to pay for additional services that they do not need, as a result of which their costs are increased and they are less able to compete with PostNL.
307. The purchasing of 24-hour bulk mail by mail transport companies could be tied to the purchase of one or more other services (for example, 48-hour and 72+-hour bulk mail), thereby increasing the costs of mail transport companies unnecessarily.

*Re 7) Strategic product design*

308. A mail transport company with SMP has the ability to design its mail transport offer and services strategically. The mail transport company with SMP then designs its access service in such a way that competing mail transport companies can only use this service at high cost or after a long delay. A mail transport company with SMP has the incentive to design its product strategically in order to frustrate access and disadvantage mail transport companies purchasing access compared to the actual or potential business customers that it serves itself.
309. If PostNL adapts its logistical organisation and mail transport process and makes no provision for access by mail transport companies, it can substantially increase the costs for these mail transport companies of obtaining access for 24-hour bulk mail. PostNL may also deliberately organise or reorganise its mail transport logistics in such a way that the access costs for mail transport companies are substantially increased. This service then becomes less attractive or even completely unviable.
310. For example, PostNL can set the delivery times in such a way that mail transport companies have insufficient time to complete the sorting of the mail collected from their own customers.<sup>135</sup> This means that the business customers of competing mail transport

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<sup>135</sup> See responses to questionnaire on competition problems and obligations, questions 7 and 8.

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companies also have to lodge their bulk mail earlier, making the service less attractive for those mail transport companies.

311. PostNL can also apply strategic restrictions by making unreasonable demands in terms of the characteristics of the bulk mail lodged by mail transport companies as access customers. For example, particular requirements with regard to the appearance and the printing, weight, thickness, type of packaging, shape and format.
312. As an example of such a strategic restriction, ACM cites the introduction of the per sender condition with regard to the annual volume discount applied by PostNL. The effects of this condition are limited almost entirely to other mail transport companies and mean that they are eligible for lower discounts than those that their individual business customers could claim from PostNL if these customers purchased mail transport services directly from PostNL. In this way, PostNL ensures that other mail transport companies can never make a commercially attractive offer to their business customers.
313. In addition, in order to be eligible for these per sender discounts, the mail transport company's mail for each individual sender must be lodged with PostNL, which is inconsistent with the mail processes of competing mail transport companies. Currently, when dropping mail off at PostNL, these mail transport companies combine the mail from different senders, after dividing it for delivery by the companies themselves and by PostNL.
314. Such a per sender condition for wholesale access is therefore *de facto* refusal of access, because there is no longer any real business case for competing mail transport companies to use this access.

*Conclusion*

315. Having regard to the above, ACM concludes that PostNL has the incentive and ability to exhibit behaviour that could lead to each of the aforementioned access-related competition problems. The effect of this is to impede competition in the defined relevant markets, which is detrimental to mail transport companies and end-users.

**4.6 Price-related competition problems**

316. By setting its prices in a particular way, a mail transport company with SMP can undermine the competitive position of other mail transport companies and exploit customer groups. ACM will discuss below the price-related competition problems of price discrimination (exploitative effect) and margin squeeze (exclusionary effect).

317. Although these price-related competition problems arise to a greater or lesser extent in all defined relevant markets, there are differences in the competition conditions in these markets that make certain practices more or less possible. There is a difference with regard to Sandd's presence as a mail transport company with its own national mail transport network that occupies a different position in three defined markets. These differences are discussed (insofar as they are relevant) in the sections concerning individual price-related competition problems.

#### 4.6.1 Price discrimination

318. In the case of price discrimination, a mail transport company with SMP charges different tariffs to different business customers or categories of business customer. As a result of limited competition, the practice of price discrimination enables PostNL to exploit certain customer groups. The potential competition problem that exists for 24-hour bulk mail refers to the exploitation of customers or groups of customers.

#### *Incentive and ability to set the tariffs for 24-hour bulk mail at a high level*

319. The above illustrates that PostNL has an incentive to practise price discrimination so as to exploit certain customers or groups of customers by setting retail tariffs above the competitive price level. After all, if price competition is limited, a price increase in principle generates a rise in turnover. Furthermore, PostNL has SMP in all defined relevant markets. PostNL therefore also has the possibility of exploiting certain customers or groups of customers. This is explained further below.

320. Without regulated access, there are very few possibilities in PostNL's small business postal market for business senders to choose another mail transport company that can transport their mail nationwide. In the case of small volumes, Sandd is only an alternative in very exceptional cases. In the small business postal market PostNL is therefore very close to being a monopolist. The only limitation that PostNL faces in raising the tariffs concerns the set (single-item) franking machine tariffs, because these form part of the USO and are therefore subject to a price cap.

321. In the medium business mail market PostNL experiences some competition from Sandd. For the larger business senders in this market Sandd is to some extent an alternative for part of the bulk mail requirement. Sandd's offer mainly consists of the transporting of large bulk (coded and sorted) mail with a 72+-hour service framework. Customers see Sandd as a possible alternative for part of their mail transport requirement if: (1) a 72+-hour service framework constitutes no impediment, (2) the central lodging of mail does not entail unreasonably high costs, and (3) a business sender is prepared and able to

outsource part of his mail transport requirement to another mail transport company and therefore to opt for a multi-vendor policy. A large part of the demand from business users in the medium business postal market does not meet the above criteria. As a result of the many possibilities PostNL has to differentiate its prices, PostNL may lower its prices for the contested part of the market by means of a cross-subsidy under competitive pressure while keeping its prices high for the non-contested part of the market where there is no or much less competition. Hence in the medium business market it is thus possible to keep tariffs high by means of price discrimination, albeit to a lesser extent than in the small business mail market.

322. The large business postal market consists of business senders (such as banks, insurers, energy and telecom companies and the specific customer group of mailing houses) which send large to very large volumes of bulk mail. PostNL also experiences competition from Sandd in the large business mail market. The above three criteria for switching to Sandd are fulfilled more often in this market. In the large business postal market too, however, there are still sufficient business senders with a particular need for mail transport, such as a 24-hour service framework, that remain dependent on a PostNL offer. Since PostNL issues individual offers for the customers in this market, it has the possibility of keeping prices above the competitive level by means of price discrimination.

#### *Conclusion*

323. Having regard to the above, ACM concludes that PostNL has the incentive and ability to practise price discrimination and charge prices above the competitive level for particular customer groups. These possibilities are greatest in the small business and medium business postal markets. They exist to a certain extent in the large business postal market. This gives rise to the potential competition problem of exploitation of customers or groups of customers.

#### **4.6.2 Margin squeeze**

324. A mail transport company with SMP can squeeze the margins of competing mail transport companies by using a combination of retail tariffs and tariffs for mail transport companies that leaves insufficient margin for these rival mail transport companies to compete.<sup>136</sup>

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<sup>136</sup> The potential competition problem of margin squeeze is referred to specifically in article 13f of the Dutch Postal Act. Competition law recognises margin squeeze as a possible abuse of a dominant position. The Court of Justice of the European Union confirms that margin squeeze in itself can constitute abuse within the meaning of article 102 of the Treaty on the Functioning of the European Union.

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These may be high tariffs that are charged to mail transport companies (the buyers of access), selectively low prices for business customers or a combination of both.

325. The tariffs charged to mail transport companies do not have to feature excessively high prices and the tariffs for customers do not have to involve predatory pricing in order to constitute margin squeeze. Prices that are below excessively high prices and tariffs above the level of predatory pricing can also lead to margin squeeze among competing mail transport companies and have an exclusionary effect on other mail transport companies in the transport of 24-hour bulk mail.
326. Mail transport companies must be able to offer 24-hour bulk mail in order to compete effectively with PostNL. For the onward transport of 24-hour bulk mail outside their own delivery area they depend on access to the PostNL mail transport network. A high or excessively high wholesale tariff increases the costs for mail transport companies that depend on the PostNL network, preventing other mail transport companies from making offers that compete with PostNL. PostNL thus has an incentive to charge these competing mail transport companies a high wholesale tariff so as to squeeze the margins of its competitors. The aforementioned dependency relationship also means that PostNL is also able to charge such tariffs. After all, the mail transport companies concerned have no or insufficient alternatives for the onward transport of 24-hour bulk mail in the Netherlands.
327. The investigations conducted by ACM into PostNL's compliance with article 9 of the Dutch Postal Act shows that PostNL actually also exhibits the aforementioned behaviour in practice. As an illustration, the introduction of a per sender condition for receiving particular discounts for bulk mail has the effect of increasing costs and squeezing margins for competing mail transport companies.
328. In addition to an increase in the wholesale tariffs, margin squeeze can also arise due to the reduction or selective reduction of retail prices, as a result of which competing mail transport companies are unable to make a competitive offer to certain senders. The incentive and ability to behave in this way is particularly great in markets where individual prices are agreed and hence not transparent. This concerns the medium and large business postal markets. PostNL also has an incentive to charge strategic winback promotional prices targeted at particular customers of competitors or to lock in certain strategic customers (retaining them by setting lower prices for long-term contracts),

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hindering the further growth of competing mail transport companies and preventing the entry of competing mail transport companies into the medium and large business postal markets from the small business postal market (for example as result of the further expansion of their delivery network).

329. PostNL also has the ability to apply low prices selectively in the medium and large business postal markets. In these markets, PostNL has an account relationship with its customers and prices are often agreed individually.
330. In the small business postal market these possibilities are more limited because tariffs and conditions are often standard and there is often no account relationship between PostNL and the customer. As a result, selective price reductions are less easy to implement, as there is then a real risk that price reductions will lead to cannibalisation of the company's own customer base (which it serves at higher tariffs). But there are also other possible ways of discriminating by means of price, for example by establishing a 'B brand' (as a low-price brand), running targeted marketing campaigns to win back customers, etc.
331. In practice ACM also sees **[confidential:**

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*Conclusion*

332. Having regard to the above, ACM concludes that PostNL has the incentive and ability to squeeze margins. The effect of this is to impede competition in the defined relevant markets, which is detrimental to mail transport companies and end-users.

**4.7 Conclusion**

333. ACM concludes that in the defined relevant markets PostNL has the incentive and ability to exhibit anticompetitive practices. These practices have an actual or potential negative effect on the achievement of the objectives of the Dutch Postal Act. This concerns the following potential competition problems:

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- access refusal;
- discriminatory use or withholding of information;
- improper use of information;
- delaying tactics;
- unfair conditions;
- quality discrimination;
- tying;
- strategic product design;
- price discrimination; and
- margin squeeze.

## **5 Obligations**

### **5.1 Introduction**

334. In this section, ACM determines whether and, if so, which obligations must be imposed on PostNL in order to prevent the potential competition problems identified in the previous section.
335. To that end ACM first sets out the assessment framework that has been applied in determining the prospective obligations (section 5.2). ACM then describes which obligations are being imposed on PostNL and which rules are attached to them (section 5.3 to 5.5). After that, in section 5.6, ACM analyses the entry into force of the obligations. In section 5.7, ACM finally presents a summary table of the obligations associated with the potential competition problems.

### **5.2 Assessment framework for obligations**

336. If ACM judges on the basis of a market analysis that the mail transport company has SMP, it may impose one or more obligations on the basis of article 13b of the Dutch Postal Act as referred to in articles 13e to 13k of the Dutch Postal Act. The aim of imposing obligations is to prevent potential competition problems.<sup>137</sup> On the basis of article 13b, paragraph 3, of the Dutch Postal Act, ACM meets the requirements of proportionality when imposing obligations.
337. According to the legal history, the proportionality requirement means that ACM must assess whether an obligation in a specific case of SMP is necessary, fitting and appropriate, having regard to the potential competition problem that has been identified. An obligation is necessary, fitting and appropriate if it is based on the nature of the

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<sup>137</sup> *Kamerstukken II 2012/13, 33 501, no. 3, p. 6.*

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observed problem and is proportionate and justified in the light of the legislature's objectives.<sup>138</sup>

338. Further details of the assessment framework for the imposition of one or more obligations as referred to in articles 13s to 13k of the Dutch Postal Act are provided by the Policy Rule.<sup>139</sup>
339. According to the Minister, the assessment framework requires a Policy Rule which on the one hand clarifies the objectives of the SMP instrument and on the other hand provides a further elaboration of the applicable proportionality requirement. The intention is to prevent undesirable effects over the long term and to offer market participants regulatory certainty. The Policy Rule is intended to guide ACM in applying the AMP instrument in such a way that ACM's actions are attuned to the Minister's policy.
340. In the light of the goals of the *ex ante* regulation, the Policy Rule specifies in article 2, paragraph 1, that ACM will ensure that its AMP decisions do not extend further than is necessary to address potential competition problems in a relevant market defined by ACM for mail transport services and to guarantee static and dynamic efficiency in the market for mail transport services. In order to achieve those goals, ACM's decisions must help ensure, in accordance with article 2, paragraph 2, that mail transport companies are able to innovate and invest in a network, including over the long term, and can compete on both quality and price in the provision of mail transport services.
341. In the framework of the proportionality requirement, the Policy Rule specifies in article 3, paragraph 1, that ACM will only impose obligations that are necessary and appropriate and are the least far-reaching means of achieving the goals stated in marginal 340. According to article 3, paragraph 2, this means that ACM will impose no obligations that extend further than is necessary to enable other mail transport companies in the defined relevant market to compete with the AMP party over the long term or which have the effect that the financial position of the mail transport company with significant market power is distorted in such a way as to threaten financial instability.
342. Finally, article 4 of the Policy Rule requires ACM, when substantiating the obligations in the light of the above, to conduct a quantitative impact analysis as far as possible of the economic effects on the postal market and of the regulatory costs of the decision.

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<sup>138</sup> *Kamerstukken II* 2012/13, 33 501, no. 3, p. 7 and 22.

<sup>139</sup> Policy rule of 18 December 2016, no. WJZ / 16194652, Government Gazette 2016, no. 70314.

343. By imposing the following obligations, ACM intends to promote effective and sustainable competition in the relevant markets. This competition means that end-users have a choice of different providers of 24-hour bulk mail. This leads to lower prices and better quality of service. In its assessment of the proportionality of the obligations, ACM also included the obligation of infrastructure competition and the Policy Rule.

### **5.3 Access obligation**

344. On the basis of article 13e, paragraph 1, of the Dutch Postal Act, ACM can impose the obligation to fulfil reasonable requests for the types of access to be defined by ACM. This is possible if ACM judges that a refusal of access or other access-related competition problems would impede the development of a sustainably competitive retail market and/or is not in the interest of the end-user. In this section, ACM investigates whether the imposition of an access obligation is a necessary, fitting and appropriate obligation.

#### **5.3.1 Need for and suitability of an access obligation**

345. ACM has concluded that in the defined relevant markets PostNL has the incentive and ability, *inter alia*, to exhibit the following anticompetitive practices:

- access refusal;
- discriminatory use or withholding of information;
- improper use of information;
- delaying tactics;
- unfair conditions;
- quality discrimination;
- tying; and
- strategic product design.

346. Having regard to the existence of these potential competition problems, it is necessary to impose an access obligation. The access obligation is appropriate for addressing the potential competition problem of access refusal and other access-related competition problems in the relevant markets, as the access obligation enables other mail transport companies to enter the defined markets, or to remain active in those markets, and to compete or continue to compete with PostNL.

#### *Conclusion*

347. ACM concludes that imposing an access obligation is necessary and appropriate in order to prevent access refusal and other access-related competition problems.

### 5.3.2 Form of access and appropriateness

348. On the basis of article 13e, paragraph 1, of the Dutch Postal Act, ACM must determine the form of access to which the obligation to meet reasonable requests refers. Having regard to the conclusion that imposing an access obligation is necessary and appropriate to prevent potential competition problems that result from access refusal and other access-related competition problems, ACM assesses below, in accordance with the requirements specified in the Policy Rule, which form of access is appropriate.

349. In the analysis of the potential competition problems, ACM has ascertained that access refusal and the other access-related anticompetitive practices can cause competition problems with regard to 24-hour bulk mail. On the basis of this analysis, ACM therefore determines that the form of access that PostNL must grant to its mail transport network is 24-hour bulk mail (hereinafter: access for 24-hour bulk mail). Since this form of access is focused on the services to which the observed potential competition problems relate, ACM concludes that this is an appropriate form of access. As ACM is required to consider on the basis of article 3 of the Policy Rule, there is no less far-reaching form of access that sufficiently eliminates the competition problem of access refusal and the other access-related competition problems.

#### *Conclusion*

350. The form of access specified by ACM, as referred to in article 13e, paragraph 1, of the Dutch Postal Act, is access for 24-hour bulk mail. On that basis, PostNL is obliged to comply with reasonable access requests for 24-hour bulk mail.

### 5.3.3 Reasonable requests

351. PostNL is obliged to comply with reasonable access requests for 24-hour bulk mail.

352. In order to guarantee access for 24-hour bulk mail, ACM will state below which access request it deems reasonable in any event<sup>140</sup>.

353. ACM determines that an access request for 24-hour bulk mail is in any event a reasonable request within the meaning of article 13e, paragraph 1, of the Dutch Postal Act if the request is:

- (i) to drop off 24-hour bulk mail in the following categories<sup>141</sup>:

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<sup>140</sup> In this connection see also marginal 365.

<sup>141</sup> The respective categories are detailed below in Re (i) and in Table 6.

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- a. "Wholesale Small"
  - b. "Wholesale Large"
  - c. "Wholesale Special"
  - d. "Wholesale Mixed"
  - e. "Wholesale Letterbox Packets+";
- (ii) to drop off 24-hour bulk mail in the categories referred to in (i) below at one of PostNL's drop-off locations<sup>142</sup>;
- (iii) to drop off 24-hour bulk mail in the categories referred to in (i) in a manner, on the days and by the latest drop-off times at the various PostNL drop-off locations which PostNL uses for its services for business customers. With regard to the drop-off location "business desk of a sorting centre for letter consignments", the latest drop-off time for 24-hour bulk mail must not be before 9 p.m.

354. Re (i): In its offer for business customers PostNL currently sets a condition for the composition of Small, Large and Special 24-hour bulk mail that the appearance, format and sender of the mailpieces in a consignment must be identical<sup>143</sup> and that the individual mailpieces must be in the same weight category<sup>144</sup>. With regard to the composition of 24-hour bulk mail, PostNL currently sets the condition that the sender of the mailpieces in a consignment must be identical.<sup>145</sup>

355. Mail transport companies drop off 24-hour bulk mail at PostNL consisting of mailpieces of different customers, which means that the mailpieces in a such a consignment will differ in terms of appearance, weight category, format and sender. As a result, if a consignment contains one or more mailpieces that do not fall within the weight or dimension limits of the aforementioned categories, this consignment must be offered as a mixed consignment or as multiple separate consignments in which the weight and dimension limits are not exceeded. ACM is of the opinion that the stringent conditions applied by

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<sup>142</sup> For drop-off at PostNL locations, see the PostNL booklet entitled 'Posttarieven Per januari 2017' (PostNL Tariff Booklet 2017), p. 12.

<sup>143</sup> PostNL tariff booklet 2017, p. 8, 10 and 15.

<sup>144</sup> For example 30-40 grams. PostNL booklet 'Posttarieven Per januari 2017' (PostNL tariff booklet 2017), p. 15 and 19.

<sup>145</sup> Appearance, format and weight may differ. With regard to the format, there are minimum and maximum dimensions and different weight categories are used for Mixed, which are determined on the basis of the average weight of the individual mailpieces in the consignment.

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PostNL unnecessarily impede access for mail transport companies. These conditions are therefore unnecessary to process 24-hour bulk mail.

356. Having regard to the above, ACM is of the opinion that an access request involving the purchase of Small, Large or Special 24-hour bulk mail, without the conditions of identical appearance, weight category, format and sender of the individual mailpieces in a consignment, is reasonable. With regard to an access request involving the purchase of Mixed and Letterbox Packets+ bulk mail, ACM is of the opinion that this is reasonable, even if the mailpieces within a consignment come from different senders.
357. The result of the above is that PostNL must in any case offer access for five 24-hour bulk mail products, namely “Wholesale Small”, “Wholesale Large”, “Wholesale Special”, “Wholesale Mixed” and “Wholesale Letterbox Packets+”. Since these services differ in some respects from the product classifications at retail level, the designation “Wholesale” has been added.
358. The wholesale offer described above has been aligned as far as possible with the characteristics of the different 24-hour products in PostNL’s current 24-hour bulk mail retail offer, as set out in the 2017 Public Tariff Booklet. The fullest account possible has also been taken of the way in which mail consignments from mail transport companies have been composed, since they have multiple customers. Table 6 shows the characteristics of the various wholesale access products. The characteristics referred to in this table are not intended to be exhaustive. PostNL is free to set reasonable additional conditions within the scope of this market analysis decision, for example with regard to the method of dropping off mail consignments and the design of individual mail consignments that form part of them. All conditions that apply to access for 24-hour bulk mail must be known and are included in the reference offer (see section 5.5 below). Furthermore, where an individual mailpiece fulfils the characteristics of the Wholesale Small, Wholesale Large or Wholesale Special category, it must not be included in a consignment of mail in which the characteristics of the individual mailpieces in that consignment correspond to one of the two other categories (for example a Wholesale Small mailpiece must not be included in a consignment of Wholesale Large mail and a Wholesale Large mailpiece must not be included in a consignment of Wholesale Special mail). Such mailpieces can, however, be included in a consignment of Wholesale Mixed mail. Wholesale Letterbox Packets+ constitutes an entirely separate category due to the track & trace functionality; an individual Letterbox Packet+ must therefore not be included in a consignment of Wholesale Mixed mail.

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359. Re (i): Mail transport companies can currently already drop off their 24-hour bulk mail at these locations under article 9 of the Dutch Postal Act. If article 9 ceases to apply, PostNL could impede access by accepting no 24-hour bulk mail from mail transport companies at certain drop-off locations or could do so on worse terms. This would have a major impact on mail transport companies. It is therefore crucially important that mail transport companies are able to offer their 24-hour bulk mail at all available PostNL drop-off locations. This obligation is not onerous for PostNL, however, because it is in line with the access that PostNL is currently required to offer under article 9 of the Dutch Postal Act and business customers currently also offer their bulk mail at these drop-off locations.
360. Re (iii): ACM considers it reasonable that mail transport companies must be able to drop off their 24-hour business mail on the same days, with the same latest drop-off times and method as business customers.
361. In the terms and conditions for business customers and mail transport companies, PostNL has specified the following: ‘subject to available capacity bulk mail can be dropped off after the closing time between 7.30 p.m. and 9 p.m. at one of the bulk mail sorting centres’<sup>146</sup>. ACM is of the opinion that such a condition offers insufficient guarantees for mail transport companies reliant on PostNL’s access obligation that their dropped-off 24-hour bulk mail will always be processed as 24-hour bulk mail. The nature of the mail processing by mail transport companies means that they need some time to process the mail and transport it to the PostNL drop-off locations. The ability to drop off 24-hour bulk mail at the PostNL sorting centres up to 9pm, which was the practice under the regime of article 9 of the Dutch Postal Act and hence is also possible, is therefore a requirement in order to compete with PostNL.
362. Table 6 contains a schematic representation of the characteristics of the different wholesale access products, as set out in points (i), (ii) and (iii). For the sake of completeness, a comparison has also been made with PostNL’s current retail offer, as described in the 2017 Public Tariff booklet. ACM notes in this regard that following the consultation it made changes in the table below for the 24-hour bulk mail wholesale offer as compared to the obligations that were consulted on. An important change is the addition of the “sorting machine ready” drop-off requirement for the wholesale products Small, Large and Special at the drop-off locations. “Sorting machine ready” in this market analysis means that a consignment of mail does not have to be processed in the “set-up area”.

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<sup>146</sup> PostNL Postal Tariff Brochure, January 2017 (PostNL Tariff Booklet 2017), p. 12.

24-hour bulk mail retail offer	24-hour bulk mail wholesale offer
<p><i>Small</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and sender the same and all consignments in the same weight category</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 162 x 229 mm</li> <li>• Maximum thickness: 5 mm</li> <li>• Four weight categories, maximum weight: 50 grams</li> <li>• Content: paper</li> <li>• Type of packaging: sealed envelope, card, self mailer</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL</li> <li>• Latest drop-off time at PostNL location, other than business desk<sup>147</sup>: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 7.30 p.m., but subject to available capacity mail can be dropped off at the business desk after the business desk closes at 7.30 p.m. and before 9 p.m.</li> </ul>	<p><i>Small</i></p> <ul style="list-style-type: none"> <li>• Appearance, format, weight and sender may differ</li> <li>• Sorting-machine ready</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 162 x 229 mm</li> <li>• Maximum thickness: 5 mm</li> <li>• Maximum weight: 50 grams</li> <li>• Content: paper</li> <li>• Type of packaging: sealed envelope, card, self mailer</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL, unless explicitly stated otherwise in this market analysisdecision or if certain conditions are unreasonable in relation to a mail transport company</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 9 p.m. (with possibility for PostNL to make an additional offer for earlier drop-off)</li> </ul>

<sup>147</sup> The business desk at the PostNL sorting centres for PostNL letter mail consignments.

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<p><i>Large</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and sender the same and all consignments in the same weight category</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 229 x 324 mm</li> <li>• Maximum thickness: 10 mm</li> <li>• Seven weight categories, maximum weight: 350 grams</li> <li>• Content: paper</li> <li>• Type of packaging: sealed envelope, card, self mailer</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 7.30 p.m., but subject to available capacity mail can be dropped off at the business desk after the business desk closes at 7.30 p.m. and before 9 p.m.</li> </ul>	<p><i>Large</i></p> <ul style="list-style-type: none"> <li>• Appearance, format, weight and sender may differ</li> <li>• Sorting-machine ready</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90</li> <li>• Maximum dimensions: 229 x 324 mm</li> <li>• Maximum thickness: 10 mm</li> <li>• Maximum weight: 350 grams</li> <li>• Content: paper</li> <li>• Type of packaging: sealed envelope, card, self mailer</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL, unless explicitly stated otherwise in this market analysisdecision or if certain conditions are unreasonable in relation to a mail transport company</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 9 p.m. (with possibility for PostNL to make an additional offer for earlier drop-off)</li> </ul>
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<p><i>Special</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and sender the same and all consignments in the same weight category</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 380 x 265 mm</li> <li>• Maximum thickness: 32 mm</li> <li>• Ten weight categories, maximum weight: 2000 grams</li> <li>• Content: all types, including goods</li> <li>• Type of packaging: all types</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 7.30 p.m., but subject to available capacity mail can be dropped off at the business desk after the business desk closes at 7.30 p.m. and before 9 p.m.</li> </ul>	<p><i>Special</i></p> <ul style="list-style-type: none"> <li>• Appearance, format, weight and sender may differ</li> <li>• Sorting-machine ready</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 380 x 265 mm</li> <li>• Maximum thickness: 32 mm</li> <li>• Maximum weight: 2000 grams</li> <li>• Content: all types, including goods</li> <li>• Type of packaging: all types</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL, unless explicitly stated otherwise in this market analysisdecision or if certain conditions are unreasonable in relation to a mail transport company</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 9 p.m. (with possibility for PostNL to make an additional offer for earlier drop-off)</li> </ul>
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<p><i>Mixed</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and weight may differ.</li> <li>• Sender the same</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 380 x 265 mm</li> <li>• Maximum thickness: 32 mm</li> <li>• Nine weight categories, maximum weight: 2000 grams</li> <li>• Content: all types, including goods</li> <li>• Type of packaging: all types</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 7.30 p.m., but subject to available capacity mail can be dropped off at the business desk after the business desk closes at 7.30 p.m. and before 9 p.m.</li> </ul>	<p><i>Mixed</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and weight may differ</li> <li>• Sender: may differ</li> <li>• Minimum number: 250</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 380 x 265 mm</li> <li>• Maximum thickness: 32 mm</li> <li>• Maximum weight: 2000 grams</li> <li>• Content: all types, including goods</li> <li>• Type of packaging: all types</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL, unless explicitly stated otherwise in this market analysisdecision or if certain conditions are unreasonable in relation to a mail transport company</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 9 p.m. (with possibility for PostNL to make an additional offer for earlier drop-off)</li> </ul>
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<p><i>Letterbox Packets+</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and weight may differ</li> <li>• Sender: the same</li> <li>• Minimum number: 1</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 380 x 265 mm (letterbox format)</li> <li>• Maximum thickness: 32 mm (letterbox format)</li> <li>• Maximum weight: 2000 grams</li> <li>• Content: all types, including goods</li> <li>• Type of packaging: protective packaging</li> <li>• Track &amp; Trace</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 7.30 p.m., but subject to available capacity mail can be dropped off at the business desk after the business desk closes at 7.30 p.m. and before 9 p.m.</li> </ul>	<p><i>Letterbox Packets+</i></p> <ul style="list-style-type: none"> <li>• Appearance, format and weight may differ</li> <li>• Sender: may differ</li> <li>• Minimum number: 1</li> <li>• Shape: rectangular, consisting of one whole unit</li> <li>• Minimum dimensions: 140 x 90 mm</li> <li>• Maximum dimensions: 380 x 265 mm (letterbox format)</li> <li>• Maximum thickness: 32 mm (letterbox format)</li> <li>• Maximum weight: 2000 grams</li> <li>• Single tariff</li> <li>• Content: all types, including goods</li> <li>• Type of packaging: protective packaging</li> <li>• Track &amp; Trace</li> <li>• Drop-off method: in accordance with the "Conditions for drop-off of Bulk Mail", most recent version, of PostNL, unless explicitly stated otherwise in this market analysis decision or if certain conditions are unreasonable in relation to a mail transport company</li> <li>• Latest drop-off time at PostNL location, other than business desk: latest drop-off time set by PostNL for its services for business customers</li> <li>• Latest drop-off time at business desk: 9 p.m. (with possibility for PostNL to make an additional offer for earlier drop-off)</li> </ul>
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**Table 6: Characteristics of the different wholesale access products and comparison with retail offer**

363. In the preparation of this market analysis decision, PostNL suggested that the ability to drop off 24-hour bulk mail at the PostNL sorting centres up to 9 p.m. could lead to

problems and additional costs. Having regard to the nature of mail processing by mail transport companies (see marginal 361 above), however, this cannot be changed. In order to encourage mail transport companies to drop off mail earlier and thereby save costs, PostNL has the possibility of making an additional offer. This is possible, for example, by giving mail transport companies a discount if they drop off all or part of their mail earlier. To give PostNL the opportunity to optimise its logistics processes, this offer should not be subject to an obligation to apply a cost-oriented tariff.<sup>148</sup> Such an offer must nevertheless fulfil the obligation resulting from this market analysis decision that PostNL must grant access on a non-discriminatory basis. PostNL must also meet the transparency obligation with regard to that offer.

364. ACM stated above which access requests for 24-hour bulk mail must in any case be considered to be reasonable requests as referred to in article 13e, paragraph 1, of the Dutch Postal Act. That is without prejudice to the fact that a mail transport company can issue a different request to PostNL for access for 24-hour bulk mail. PostNL will assess such a request in the first place against the reasonableness criterion of article 13e, paragraph 1, of the Dutch Postal Act. At the request of the mail transport company or PostNL the resolution of disputes with regard to such a request can be carried out by ACM in accordance with section 8 of the Dutch Postal Act.
365. Notwithstanding the above, an access request for 24-hour bulk mail is also reasonable to the extent that it results from the non-discrimination obligation in article 13e, paragraph 2 of the Dutch Postal Act, which is dealt with below in section 5.3.6.

#### **5.3.4 Restriction of access to the PostNL network for 24-hour bulk mail**

366. Having regard to the objective of infrastructure competition stated in the Policy Rule,<sup>149</sup> ACM is of the opinion that an access request for 24-hour bulk mail cannot be considered reasonable if the requesting company does not provide any mail transport service in the field of 24-hour bulk mail. A company that has outsourced all its offered mail transport services, as referred to in article 2, paragraph 1(d) of the Dutch Postal Act, to a third party cannot therefore claim access to the PostNL network.
367. ACM further considers that an access request for 24-hour bulk mail from a mail transport company cannot be deemed reasonable to the extent that, if that request is honoured, within a period of one year after access has been granted to the respective mail transport company in accordance with this market analysis decision or any subsequent year the

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<sup>148</sup> See also marginal 433 of this market analysis decision.

<sup>149</sup> See article 2 of the Policy Rule.

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percentage of 24-hour bulk mail that is transported by PostNL exceeds 70 percent of the total volume of 24-hour bulk mail of that mail transport company. This is because ACM wishes to promote infrastructure competition.

368. When a mail transport company requests access for 24-hour bulk mail, it is not clear to PostNL whether the 70 percent criterion will be met and PostNL cannot therefore assess whether such a request is reasonable. This means that PostNL cannot refuse an access request for 24-hour bulk mail on those grounds. No later than four weeks after the end of a year, as referred to in the previous marginal, a mail transport company must demonstrate by means of an audit report that the percentage of its total volume of 24-hour bulk mail that it has lodged with PostNL for onward transport will not exceed 70 percent. If it does exceed 70 percent, the access for the year in question must be deemed not to have been granted under the access obligation. The consequence is that with regard to the volume of 24-hour bulk mail lodged in that year PostNL was not obliged to charge wholesale tariffs in accordance with this market analysis decision.

**5.3.5 Rules relating to the access obligation**

369. On the basis of article 13e, paragraph 3, of the Dutch Postal Act, ACM attach rules to the access obligation concerning fairness, reasonableness and opportunity. Section 4 of this market analysis decision shows that PostNL has the incentive and ability to refuse access or exhibit behaviour or apply conditions that impede or frustrate the effective use of access.
370. In order to prevent this, ACM deems it necessary, fitting and appropriate to attach the following rules to the access obligation.
- a) PostNL must not impose any restrictions on the access, unless it has an objective justification for doing so.
  - b) PostNL must provide on time and in full any information which a mail transport company requires in order to make a sufficiently specified access request;
  - c) PostNL must not share with third parties (including its own retail organisation, subsidiaries and partner companies) or use for purposes other than the granting of access any information which it obtains as a result of granting access and which PostNL can reasonably assume to be confidential.
  - d) PostNL must negotiate in good faith with mail transport companies that request access;

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- e) PostNL must request access in time and deal with it appropriately and if necessary discuss it with the requesting mail transport company. A written and substantive response to the access request must be issued to the mail transport company within a reasonable time. ACM considers that a period of more than two weeks after receipt of the access request is reasonable only in exceptional situations. If PostNL believes that a situation is exceptional, it must notify the mail transport company in writing no later than one week after receiving the request, stating the grounds. In such a case it must also state the period within which the requesting mail transport company will receive a substantive response.
- f) PostNL must draw up and apply a clear procedure for dealing with access requests. In this procedure PostNL will state and specify at least:
- that PostNL will respond to an access request within a reasonable period;
  - that if a request is insufficiently specified, PostNL will state on which points it needs to be supplemented;
  - that PostNL will only reject a request on the basis of objective and justified grounds. PostNL will provide a full and proper justification for such a rejection; and
  - the way in which PostNL will negotiate with a mail transport company if at the request of that mail transport company or PostNL more detailed agreements have to be entered into on the requested access.
- g) The conditions which PostNL draws up and applies to grant access must be reasonable and fair. PostNL must in any case:
- draw up and apply reasonable payment conditions, including invoicing and payment procedures;
  - draw up and apply an amendment procedure containing reasonable provisions on the possibilities for amending access;
  - draw up and apply reasonable conditions for contract revisions;
  - draw up and apply reasonable conditions for termination of an access agreement and suspension of services;
  - draw up and apply a dispute resolution procedure with appropriate response times, which does not breach the rights of mail transport companies to make use of the possibility of referring a dispute to ACM;
  - draw up and apply rules for the return of mail to the mail transport company.

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- h) PostNL must offer a level of quality in the access service for 24-hour bulk mail, for example with regard to the quality of timely delivery and the quality of delivery at the correct address. The quality level must at least be equal to the quality as achieved in practice by PostNL for the delivery of 24-hour bulk mail to large and other business customers.
- i) PostNL must not design the access strategically. This means the mail transport network must not be designed in such a way that the availability of access for 24-hour bulk mail impedes its effective use by other mail transport companies. ACM views the imposition of a requirement on other mail transport companies that mailpieces lodged by them in a consignment must come from or bear the same sender address as a strategic product design. PostNL is therefore not permitted to include such conditions in its reference offer. The prohibition of strategic product design also means that PostNL is not permitted to influence the competitive relationships by means of pilots and experiments with business customers.
- j) PostNL must not use tying with regard to access for 24-hour bulk mail.
- k) PostNL must not withdraw or amend previously granted access for 24-hour bulk mail, unless it cannot reasonably be expected to continue the original grant of access. In the latter case, PostNL must (1) allow a reasonable notice and migration period, (2) offer a reasonable alternative with (3) equal treatment of PostNL and other mail transport companies, (4) apply clear and transparent phasing-out procedures, and (5) guarantee continuity of the service in the event of migration.<sup>150</sup>

371. Below ACM explains which potential competition problems the rules address.

372. Re a. This rule addresses the potential competition problem of access refusal. The imposition of restrictions without an objective justification can lead to arbitrariness and by imposing selective restrictions PostNL can exclude competing mail transport companies from the market.

373. Re b. This rule addresses the potential competition problem of the withholding of information.

374. Re c. This rule addresses the potential competition problem of improper use of information.

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<sup>150</sup> ACM has included this additional rule in response to the consultation.

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375. Re d, e and f. These rule address the potential competition problem of delaying tactics. If PostNL does not negotiate in good faith with mail transport companies or does not deal with requests in time or appropriately, it can delay negotiating processes. Access is then ineffective or inefficient. If PostNL is late or selective in issuing the information required for access, it may impede or frustrate effective and efficient access by mail transport companies and hence negatively impact their competitive position. That applies equally to a failure to deal with access requests in time or appropriately. The rule that PostNL must draw up a procedure to deal with access requests is also aimed at preventing that.
376. Re g. This rule addresses the potential competition problem of drawing up and applying unfair conditions. ACM believes it is proportionate to oblige PostNL to apply reasonable conditions with regard to the access to be granted. This concerns essential aspects of the access that ensure that other mail transport companies can compete on an equal footing with PostNL.
377. Re h. This rule addresses the potential competition problem of quality discrimination.
378. Re i. This rule addresses the potential competition problem of strategic product design. It prevents the effective use of access being impeded or frustrated and makes this verifiable.
379. Re j. This rule addresses the potential competition problem of tying. It is intended to prevent mail transport companies having to pay for components or facilities that are not necessary in order to purchase the intended access. Mail transport companies should not have to pay for components or facilities of the mail transport network that are not necessary in order to provide the retail services they intend to provide.
380. Re k. This rule is intended, for example, to deal with situations where the achievement of important cost savings is impeded by meeting the access obligation. In that case, PostNL must comply with points 1 to 5 in these rules.

**5.3.6 The non-discrimination obligation**

381. The access obligation imposed on PostNL means on the basis of article 13e, paragraph 2, of the Dutch Postal Act that PostNL must grant access to other mail transport companies under equal conditions and in any event must apply conditions equal to those that apply under equal circumstances to PostNL, its subsidiaries or partner companies (hereinafter: the non-discrimination obligation). This means that a request for access for a certain 24-hour bulk mail service is a reasonable request as referred to in article 13e, paragraph 1, of the Dutch Postal Act to the extent that PostNL previously granted access

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following an access request from a mail transport company or to the extent that PostNL, a subsidiary or partner company offers and/or supplies that particular 24-hour bulk mail service itself to business senders.

382. The non-discrimination obligation addresses the following competition problems that hinder or prevent access: delaying tactics, unfair conditions, discriminatory use or withholding of information, tying, strategic product design and quality discrimination.
383. Since PostNL itself operates in retail markets that are served by means of access to its mail transport network for 24-hour bulk mail, PostNL has the incentive to favour its own retail organisation, subsidiaries or partner companies. It is clear that such behaviour is harmful to the competitive position of mail transport companies that depend on PostNL. The non-discrimination obligation limits PostNL's potential to frustrate access to 24-hour bulk mail services for mail transport companies and prevents it favouring its own retail organisation, subsidiaries and partner companies.
384. ACM will explain below what it means by "itself" in the context of PostNL's non-discriminatory access obligation. This notion is important because PostNL is a vertically integrated company in which retail and wholesale activities are accommodated in a single organisation. Since these activities take place within a single organisation, there is no access agreement (and hence no purchasing relationship) between the wholesale and retail organisation of PostNL. However, the competition problems that can result from PostNL's incentive to favour its own retail organisation remain. As a result, the non-discrimination obligation makes it necessary for the wholesale service for mail transport companies to be provided under the same conditions as the wholesale service it provides for itself under equal conditions. In other words, PostNL's retail offer must be able to be replicated on the basis of the purchase of the published wholesale offer. This replicability applies to all elements of the PostNL offer to its business customers, even if that involves customisation.
385. The non-discrimination obligation also relates to the availability to mail transport companies of a new or amended 24-hour bulk mail service from PostNL in the retail markets. Prior to and during the notice period<sup>151</sup> for a new or amended 24-hour bulk mail service, PostNL cannot yet offer and/or supply the new or amended service to business customers. PostNL must ensure that a new or amended 24-hour bulk mail service can also be offered by mail transport companies on the day on which PostNL offers it in the retail markets.

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<sup>151</sup> See marginal 502.

**5.3.7 Conclusion concerning the access obligation**

386. ACM has concluded above that the imposition of the obligation on PostNL to fulfil reasonable access requests was a necessary, fitting and appropriate measure.
387. ACM has further determined that the form of access, as referred to in article 13e, paragraph 1, of the Dutch Postal Act, is 24-hour bulk mail. On that basis, PostNL is obliged to comply with reasonable access requests for 24-hour bulk mail.
388. ACM has determined that an access request for 24-hour bulk mail is in any case a reasonable request if it is to:
- (i) lodge 24-hour bulk mail in the following categories:
    - a. “Wholesale Small”
    - b. “Wholesale Large”
    - c. “Wholesale Special”
    - d. “Wholesale Mixed”
    - e. “Wholesale Letterbox Packets+”;
  - (ii) drop off 24-hour bulk mail in the categories referred to in (i) at one of the PostNL drop-off locations;
  - (iii) drop off 24-hour bulk mail in the categories referred to in (i) in a manner, on the days and by the latest drop-off times at the various PostNL drop-off locations which PostNL uses for its services for business customers. With regard to the “business desk of a sorting centre for letter consignments” drop-off location, the latest drop-off time must not be before 9 p.m.
389. ACM has concluded that the access obligation for 24-hour bulk mail and the associated rules are appropriate.
390. Under article 13e, paragraph 2 of the Dutch Postal Act PostNL must grant access to 24-hour bulk mail on a non-discriminatory basis.

**5.4 Tariff obligation**

391. In this section, ACM examines whether an obligation must be imposed on PostNL with regard to the tariffs it charges to mail transport companies for the access granted to them,

which are referred to in the remainder of this market analysis decision as wholesale tariffs. To that end, ACM will first investigate the extent to which such an obligation is necessary and appropriate in order to prevent the potential competition problems described in section 4. ACM then discusses in sections 5.4.2 and 5.4.3 the possible ways of fulfilling the tariff obligation and what should be seen as the most appropriate. In sections 5.4.4 to section 5.4.10, ACM describes the specific content of the tariff obligation and the way in which the wholesale tariffs are determined. Finally, in section 5.4.11, ACM determines which rules will be attached to the tariff obligation.

#### **5.4.1 Necessity and suitability of a tariff obligation**

392. Article 13f, paragraph 1, of the Dutch Postal Act enables ACM, for types of access determined by it, to impose an obligation with regard to the tariffs to be charged or the cost allocation for that access. In accordance with the second paragraph of the article, this obligation may mean that a cost-oriented tariff must be charged or a cost allocation system determined or approved by ACM must be applied for access.
393. In section 4.6 of this market analysis decision, ACM established that in the absence of regulation PostNL has the incentive and ability to practise price discrimination and to squeeze the margins of rival mail transport companies in such a way that the mail transport companies cannot compete effectively with PostNL in the defined relevant markets.
394. There also remains a risk of price discrimination, margin squeeze and strategic design of pricing in situations in which there is an obligation to grant access to mail transport companies (including on a non-discriminatory basis) (see above, section 5.3.6) and the conditions for this have been made transparent (see below, section 5.5) The access obligation and transparency obligation do not, after all, prevent PostNL from practising price discrimination in its retail prices or selectively lowering its retail prices. Nor do they prevent PostNL from setting the access tariffs at a particular level or, by means of the strategic arrangement of its tariff and discount structure, depressing the prices for other mail transport companies that purchase access. In order to avoid these price-related potential competition problems, it is necessary to impose a tariff obligation for the access to be granted by PostNL as a supplement to the access and transparency obligations.
395. The imposition of a tariff obligation is also an appropriate measure because it addresses the potential competition problems of price discrimination and margin squeeze. For example, compliance with a tariff cap or the charging of cost-oriented tariffs limits PostNL's potential for price discrimination and margin squeeze. Both measures set limits on the tariffs which PostNL can charge other mail transport companies.

*Conclusion on necessity and suitability*

396. ACM concludes that in connection with the price-related potential competition problems it is necessary and appropriate to impose an obligation on PostNL on the basis of article 13f, paragraph 1, of the Dutch Postal Act with regard to the tariffs to be charged by it for the access granted to mail transport companies as described in section 5.3 of this market analysis decision.

**5.4.2 Different ways of fulfilling the tariff obligation**

397. ACM noted in the previous section that it is necessary and appropriate to impose a tariff obligation to remedy the observed price-related potential competition problems. On the basis of the Policy Rule, ACM demonstrates that the imposed tariff obligation is not only necessary and appropriate but also fitting. In this framework various ways of fulfilling the tariff obligation were considered in the process leading up to this market analysis decision. ACM describes these different methods of fulfilling the tariff obligation below.

- I. the wholesale tariffs for 24-hour bulk mail are set on the basis of cost orientation;
- II. the wholesale tariffs for 24-hour bulk mail are aligned with the most favourable retail prices for 24-hour bulk mail for PostNL's business customers.
- III. the wholesale tariffs for 24-hour bulk mail are aligned with the most favourable retail tariffs for 24-hour bulk mail for PostNL's business customers, on the understanding that such tariffs are applied on a "per sender" basis. Per sender means that the wholesale tariffs are charged on the basis of the consignment volume and annual volume per individual customer of the mail transport company and not on the basis of the consignment volume and annual volume of that mail transport company;
- IV. the wholesale tariffs for 24-hour bulk mail are set on the basis of the average retail price charged by PostNL for 24-hour bulk mail.

398. ACM acknowledges that several other alternatives are possible. In practical terms, however, these will amount to a variant or combination of the above alternatives. ACM therefore does not believe it is necessary to consider such alternatives here.

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### *Alternative I: Wholesale tariff is cost-oriented*

399. Article 13f, paragraph 2, of the Dutch Postal Act points to the possibility of obliging PostNL to charge a cost-oriented tariff for the access. In the case of cost orientation, mail transport companies that purchase access from PostNL pay an amount not exceeding the amount needed to cover the costs involved and a reasonable return.
400. In order to arrive at cost-oriented wholesale tariffs it is necessary to determine which costs are relevant for the provision of the wholesale access services described in section 5.3. A cost allocation system is also required in order to guarantee consistent allocation of these costs to the described access services. It is also necessary to determine how the reasonable return is calculated.
401. A result of this method of fulfilling the tariff obligation is that PostNL cannot charge such high wholesale tariffs that the margins of mail transport companies purchasing that access are squeezed. This also helps solve the potential problem of price discrimination.
402. Hence, ACM deems this measure to be an appropriate way of fulfilling the tariff obligation because it helps remedy the observed price-related potential competition problems.

### *Alternative II: Wholesale tariff equal to most favourable retail price*

403. Article 9 of the Dutch Postal Act requires PostNL to apply the tariffs and conditions that it applies to its own business customers in a non-discriminatory way in respect of other mail transport companies. This means that other mail transport companies can claim the best tariffs and conditions that PostNL offers its business customers in similar circumstances.
404. A tariff obligation in which other mail transport companies can claim the most favourable prices and conditions that PostNL offers to business customers in comparable circumstances leads to different wholesale tariffs, for example on the basis of different consignment sizes.
405. This interpretation of the tariff obligation eliminates the risk of margin squeeze. After all, in comparable cases PostNL will have to offer the lowest price that it offers in the market for its business customers also to other mail transport companies. This method of fulfilment also prevents the risk of price discrimination. Mail transport companies that use the best retail price offer as a wholesale tariff can thus compete more easily and also enter the medium business postal market and the large business postal market. This means there is a real alternative for business senders in a larger proportion of the market as a whole, leading to price pressure in a large part of the market. This precludes PostNL from

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practising price discrimination and hence charging high prices to particular groups of customers.

406. Since this method of fulfilling the tariff obligation remedies the observed potential competition problems, ACM deems it to be an appropriate measure.

### *Alternative III: Wholesale tariff equal to retail tariff per sender*

407. PostNL has emphasised to ACM the importance of being able to apply a 'per sender model' in determining the wholesale tariffs for mail transport companies. In this per sender model a mail transport company pays a wholesale tariff for 24-hour bulk mail access that is charged per individual retail customer of that mail transport company and is equal to PostNL's retail price for the volume of bulk mail of that respective customer that the mail transport company offers to PostNL for onward transport.

408. ACM considers that this method of fulfilling the tariff obligation is not appropriate for remedying the observed price-related potential competition problems.

409. The main reason for this is that this method of fulfilling the tariff obligation means that price discrimination, which takes place with regard to business customers in the defined relevant markets, is reflected like-for-like in the wholesale tariffs for mail transport companies. As a result, PostNL remains able to charge prices above the competitive level particularly in the small and medium business mail markets. A result of the model is that mail transport companies that are dependent on access to PostNL's mail transport network in order to transport 24-hour mail with delivery throughout the Netherlands will have no real possibility of making a competing offer against PostNL for business senders.

410. The per sender model also gives rise to substantial objections with regard to competition law and operational matters.

411. If other mail transport companies wish to make a competitive offer to their business customers, they must be able to assess in advance which wholesale tariffs must be taken into account in the offer. This means they must share information on their customers with PostNL before making the offer. A consequent effect of this model is that PostNL can gain information on the customers to which other mail transport companies wish to make an offer. PostNL can then use this information to target a better offer. If a customer has previously been served by another mail transport company, PostNL will also have to be informed of that individual customer's mail volume in order to apply the per sender model. From the perspective of balanced competitive relationships, this is an undesirable consequence of this method of fulfilling the tariff obligation.

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412. Another important operational objection is that the per sender model does not answer the question of which price must be used when a business sender of bulk mail is not a customer of PostNL. This is particularly relevant in those cases in which the retail price that a business sender is required to pay PostNL is arrived at in negotiations between PostNL and the respective business customer.

*Alternative IV: Use of weighted average retail price*

413. As a fourth alternative, ACM has looked at the possibility of determining the wholesale tariffs for 24-hour bulk mail services on the basis of a weighted average to be determined for each defined market of the net retail prices charged by PostNL for the services corresponding to bulk mail services in the retail market.

414. The determination of a wholesale tariff based on a weighted average retail price means that compared to alternative II there is no direct link between an individual offer from PostNL to a business customer and the wholesale tariff to be charged on the basis of it. New agreements that PostNL concludes with business customers, however, must always influence the wholesale tariff that is calculated partly on that basis.

415. In this alternative IV, mail transport companies are eligible for the wholesale tariffs of the defined market of which they form part having regard to their volume of 24-hour bulk mail. This means that mail transport companies that have an annual volume of 2.5 million or more mailpieces as part of the 24-hour bulk mail service that they purchase from PostNL claim the wholesale tariffs for the large business postal market in respect of that volume.

416. This method of fulfilling the tariff obligation offers a solution for the potential competition problems of price discrimination and margin squeeze as a result of the charging of high or excessively high wholesale tariffs. It also helps prevent margin squeeze as a result of the lowering or selective lowering of retail prices. ACM is therefore of the opinion that alternative IV is also an appropriate measure for resolving the observed potential competition problems.

**5.4.3 Assessment of the alternatives**

417. In the preceding section, ACM describes what it considers to be relevant alternatives for fulfilling the tariff obligation to be included in this market analysis decision. In this section, ACM determines which of these alternatives is the most appropriate in the framework of the proportionality requirement.

*Alternative III is not appropriate*

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418. As ACM has already stated in marginals 408 ff., *Alternative III* is not appropriate for addressing the potential competition problem of price discrimination. This alternative also limits other mail transport companies' ability to make an offer to customers that competes with PostNL. Furthermore, this alternative gives rise to inevitable competition law and operational objections.

### *Alternative II is not proportionate*

419. A wholesale tariff equivalent to the most favourable retail price, as described in *Alternative II*, completely solves the potential competition problems indicated in section 4.6. However, ACM believes that for the reasons stated below it is not proportionate to fulfil the tariff obligation on PostNL in this way.

420. With a greater degree of price differentiation for 24-hour bulk mail products and a growing volume of competing mail transport companies, it is not impossible that wholesale tariffs will fall below the full cost price as a result of using the most favourable price offer in the large business postal market. As a result, PostNL may no longer be able to recoup its costs on the access services.

421. Excessively low wholesale tariffs pose a risk of losing the incentive for mail transport companies to expand their own mail transport network and delivery area, or to entrust delivery to other mail transport companies, since the level of the wholesale tariffs is an important factor in the make-or-buy consideration on the part of mail transport companies. Having regard to PostNL's existing tariff and discount structure, the wholesale tariff in this alternative also decreases as the mail volume that a mail transport company lodges with PostNL decreases. Determining the wholesale tariffs in the above manner therefore does not contribute to the objective of promoting infrastructure competition.

422. Finally, aligning the wholesale tariff with the most favourable retail price has the significant disadvantage that it limits PostNL's commercial freedom in applying tariffs for business customers. When providing 24-hour bulk mail services, PostNL must constantly consider what consequences the offer for its business customer has for the level of wholesale tariffs. This may mean that due to those consequences PostNL will decide where applicable to offer the customer concerned a less favourable retail price. Aligning the wholesale tariff with the most favourable retail price will in that case have a detrimental effect on the business senders concerned.

### *Assessment of alternatives I and IV*

423. It follows from the above that of the alternatives referred to in section 5.4.2 both a wholesale tariff based on cost orientation (*Alternative I*) and a wholesale tariff based on the average net retail price per defined market (*Alternative IV*) are appropriate for fulfilling the tariff obligation to be imposed on PostNL. Below ACM assesses the alternatives in terms of competition aspects, consequences for PostNL and consequences for the USO.
424. ACM assesses these alternatives against the proportionality requirement, as set out in article 13b of the Dutch Postal Act and further elaborated in the Policy Rule. This requirement means that when imposing obligations ACM must select the least far-reaching means to achieve the intended goal. The Policy Rule requires ACM among other things not to impose any obligations that extend further than is necessary to enable other mail transport companies to compete with PostNL in the long term<sup>152</sup>. Furthermore, according to the Policy Rule, an imposed obligation must not result in its fulfilment disrupting the financial position of PostNL in such a way as to threaten its financial stability.<sup>153</sup> ACM also discusses the extent to which the alternatives to be assessed contribute to the objective of infrastructure competition.

#### *Competition aspects*

425. In both alternative I and alternative IV, PostNL is free to set its own retail prices, since in the case of both alternatives there is no direct link between the retail and wholesale tariffs. That means PostNL also has the possibility of undercutting other mail transport companies. Other mail transport companies may nevertheless be expected to do what is necessary to counterbalance the commercial freedom of PostNL. In both alternatives, other mail transport companies have other possibilities to build up a customer base, particularly in the small and medium business postal markets, as a result of which they can also be deemed able ultimately to compete with PostNL in the large business market. By delivering a large part of the mail themselves in their own delivery area, they can also be deemed able and they also have the incentive to differentiate the tariffs they charge to their business customers and to offer some actual or potential customers a higher price and other actual or potential customers a lower price. In that way, they can also serve larger actual or potential customers that may request a lower price than the wholesale tariffs.
426. ACM further notes that in both alternatives there is an incentive for other mail transport companies to roll out their own network, as they will then be able to develop more margin

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<sup>152</sup> Article 3, paragraph 2(a), of the Policy Rule.

<sup>153</sup> Article 3, paragraph 2(b), of the Policy Rule.

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and reduce the dependence on PostNL. The impact assessment shows in this regard that the cost-oriented wholesale tariffs are higher than the weighted average retail price in the large business market. Cost-oriented wholesale tariffs will therefore provide a proportionately greater incentive to expand their own network and delivery area or to invest in their own mail transport activities than wholesale tariffs referred to in *Alternative IV*. This is in line with the objectives with regard to infrastructure competition.

427. Furthermore, in the case of other mail transport companies which, in terms of the total volume of 24-hour mailpieces they process, belong to the small or medium business postal market, a wholesale tariff based on cost orientation has the advantage that they can compete better with a mail transport company that forms part of the large business postal market. After all, the latter will also use a (possibly lower) wholesale tariff based on the weighted average retail price in the large business market in the other defined postal markets. A cost-oriented wholesale tariff does not allow that possibility, since in that case all mail transport companies have access to the PostNL network under equal tariff conditions.

### *Consequences for PostNL*

428. A wholesale tariff based on cost orientation means that PostNL can always recoup the costs it incurs in the provision of access services and can achieve a reasonable return on them. Since cost-oriented wholesale tariffs are not related to prices at retail level, this alternative provides more scope for PostNL to determine those retail prices in commercial freedom than a wholesale tariff based on the weighted average retail price. After all, in the latter case each price that PostNL agrees with its business customers will affect the calculation of the weighted average and hence the level of the respective wholesale tariff. With regard to this aspect, ACM notes that the wholesale tariffs based on cost orientation for PostNL are less far-reaching and hence better meet the requirement of proportionality than *Alternative IV*.
429. In the preparation of this market analysis decision, PostNL pointed to the risk that fulfilment based on the weighted average retail price in each relevant defined market would cause wholesale tariffs to enter a downward spiral. According to PostNL, the wholesale tariff would then ultimately amount to the lowest unit tariff in the large business postal market. The Policy Rule also points to the need to avoid the risk of such a downward spiral.<sup>154</sup> Leaving aside the extent to which such a development would indeed occur, ACM points out that it would not occur in any case with a wholesale tariff based on

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<sup>154</sup> Government Gazette 2016, no. 70314, p 8.

cost orientation. After all, the wholesale tariff is then constantly at the level of the costs plus a reasonable return, so this method of fulfilling the tariff obligation as such cannot distort PostNL's financial situation in such a way as to threaten its financial stability. To that extent, this alternative meets the requirements set by the Policy Rule.

*Consequences for the USO*

430. Finally, ACM also notes that wholesale tariffs based on cost orientation as such do not have a disproportionately negative effect on the implementation of the universal postal service. Since the access services which PostNL provides are in that case profitable by definition, mail transport companies requesting access will not be able to undermine PostNL's infrastructure. Hence the affordability and implementation of the universal postal service will not be at stake. In this connection, ACM also refers to the impact assessment in section 6.

*Conclusion*

431. Having regard to the points considered above, ACM concludes that a method of fulfilling the tariff obligation in which the wholesale tariffs are set on the basis of the underlying cost of access plus a reasonable return is the most appropriate measure. On the one hand, it gives PostNL scope to determine its retail prices freely and on the other hand, other mail transport companies are given the possibility to purchase their access to PostNL on the basis of a clear wholesale tariff. Moreover, mail transport companies that purchase access from PostNL can take their own business decisions on the basis of more resilient tariff setting.
432. The impact assessment carried out by ACM that is included in section 6 also shows that the alternative in which the wholesale tariffs are set on the basis of cost orientation addresses the potential competition problems as far as possible in the most appropriate way for PostNL.

**5.4.4 Implementation of cost-oriented wholesale tariffs**

433. The tariff obligation imposed on PostNL means that a cost-oriented tariff must be charged when providing mail transport companies with the categories of bulk mail services referred to in section 5.3.3. This obligation applies without prejudice to section 5.4.11.3 concerning wholesale tariffs for new services. A supplementary offer as referred to in marginal 363 of this market analysis decision is not covered by this obligation.

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434. ACM details the tariff obligation further in the sections below. Prior to that, ACM notes that in response to the opinions received on the draft decision of 6 April 2017 the necessary amendments have been made in this part of the market analysis decision. These will not be highlighted individually here in all cases. These amendments relate particularly to the way in which PostNL is required to calculate the cost price for the wholesale service category and the system used to determine the wholesale tariffs.
435. ACM considers that these amendments are necessary to ensure that the set of tariffs applied by PostNL on the basis of the imposed tariff obligations do not provide grounds for selective and strategic purchasing behaviour among mail transport companies that purchase access. It is not the intention that the tariff setting for wholesale services will enable mail transport companies to achieve an improper financial advantage merely by strategically composing the bulk mail they lodge with PostNL.
436. These amendments also fit in better with the existing product and tariff structures of PostNL. By allowing PostNL more scope to set its own wholesale tariffs while adhering to the principles of cost orientation, it is possible to counter the risk of wholesale tariffs having a disproportionately detrimental effect on the tariff structure applied by PostNL in retail. Hence, the tariff obligation also better fulfils the proportionality requirement laid down in the Dutch Postal Act and the Policy Rule in the sense that the obligation has to be fulfilled in a manner that places the least possible burden on PostNL.
437. The tariff setting for wholesale services must nevertheless continue to offer mail transport companies the possibility of composing a competing offer for their customers based on access. On the other hand, the tariff setting must also provide an incentive for mail transport companies to purchase access in a cost-efficient manner and to invest in their own infrastructure.
438. This market analysis decision therefore provides a methodology for determining the wholesale tariffs, with PostNL first being required to determine a cost price for each of the wholesale categories of bulk mail referred to in section 5.3.3. In order to set a wholesale tariff for each distinct weight category within those categories, PostNL can apply disintermediation, as described below. ACM considers this methodology to be an appropriate response to the interests and principles described above. ACM details this methodology further in the sections below.

**5.4.5 Calculation of cost price per wholesale service category**

439. As the first step towards cost-oriented wholesale tariffs, PostNL must calculate the cost price for each of the Wholesale service categories of Small, Large, Special, Mixed and

Letterbox Packets+ referred to in section 5.3.3. In accordance with the description of wholesale service categories provided in section 5.3.3 (table 6), no costs for the setting up of mailpieces have been included in the respective cost prices for the Wholesale Small, Wholesale Large and Wholesale Special services.

440. In each case PostNL must calculate the cost prices in accordance with the rules stated in section 5.4.11.1. For the cost price of the Wholesale Mixed service category, PostNL must also use the following calculation method.
441. PostNL must calculate a cost price for each distinct weight category in the Wholesale Mixed service category. To that end, PostNL first determines for each weight category what proportion of the volume lodged in that weight category consists of mailpieces which, viewed individually, would belong to the Wholesale Small, Wholesale Large and Wholesale Special categories. PostNL must determine this proportion on the basis of the actual volumes in 2016. The cost price for the respective weight category in the Wholesale Mixed service category is then obtained in each case by calculating the cost prices obtained in accordance with the preceding marginals for the Wholesale Small, Wholesale Large and Wholesale Special categories in that same proportion.
442. The cost prices thus calculated in the Wholesale Mixed category can then be increased by the costs which PostNL incurs for the setting up of the respective mail pieces. PostNL must then increase the resulting cost prices by the costs which would be incurred in those cases in which the Wholesale Mixed bulk mail is dropped off by a mail transport company at a location other than the business desk of a sorting centre for letter consignments.

#### **5.4.6 Principles in the allocation of costs**

443. On the basis of the 2009 Postal Regulations, PostNL is required when allocating costs to the universal postal service to follow certain allocation principles and to apply a cost allocation system that is assessed by ACM for compliance with the requirements set in the 2009 Postal Regulations. ACM considers it reasonable and desirable that the fulfilment of the cost allocation for wholesale access services is in line with the allocation principles of the cost allocation system for the USO. This promotes a mutually consistent application of both systems and helps to avoid any omission or duplication of cost cover. It also ensures that the administrative burdens resulting for PostNL from this market analysis decision remain as limited as possible.

*Integral costs*

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444. Below, ACM determines the principles according to which the costs must be allocated to the access services and how that allocation must take place. ACM considers that this should be based on the integral<sup>155</sup> costs which PostNL actually incurs in providing the access services.

### *Top down versus bottom up*

445. ACM first considered whether the basis should be the actual costs as entered in the accounts of PostNL (top down) or the costs of a hypothetically efficient network for the transport of mail (bottom up). PostNL's top-down costs normally serve as the starting point in the calculation of integral costs. Hypothetical costs are only used if there are reasons not to use these actual costs. That could be the case, for example, if PostNL had an obsolete network that entailed structurally higher costs than a modern network and would therefore lead to unreasonably high access tariffs.

446. The main structure of PostNL's network was not created (or was only created to a limited extent) by investments in fixed assets, as in the case of telecom and energy networks, for example. PostNL constantly adapts the structure and operating methods to the changing circumstances. As far as ACM is aware there are no structural inefficiencies and ACM therefore considers that it is not expedient or proportionate to use a bottom-up model. ACM therefore concludes that in determining the integral costs it is necessary to use the top-down costs of PostNL.

### *Current value of assets versus actual historical cost*

447. If asset prices move rapidly, for example due to technological developments, it may be useful if the assets are valued not on the basis of historical cost but on the basis of the replacement value (current value). This can be relevant particularly in capital-intensive sectors, where the majority of the costs are due to the use of fixed assets. Since PostNL does not have a capital-intensive network for the transport of mail and there is also no rapid movement in asset prices, ACM considers that it is not necessary to value the assets at the current value. ACM therefore concludes that in determining the integral costs it is necessary to use the historical cost.

### *Cost causality*

448. The costs must be allocated on the basis of the causality principle. This means that the costs of the different components of the joint production process must be allocated on the

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<sup>155</sup> Also referred to as fully allocated costs.

basis of the use of those different components for the provision of the access services. That means that PostNL must allocate both the direct costs and the indirect common and joint costs on the basis of the principles of activity-based costing. Only the costs that are generated directly or indirectly by the access services can be allocated to these services.

449. ACM acknowledges that this allocation method differs from the allocation applied in the USO based on the 2009 Postal Regulations. The 2009 Postal Regulations include no rules on the allocation of costs to the distinct services within the USO. In the context of access, however, it is necessary to allocate the costs also on the level of the distinct access services. ACM considers it desirable to do this as far as possible on the basis of the principles of activity-based costing. It believes that the resulting cost allocation and the ultimate tariff setting will contribute to a balanced purchase of the various access services.<sup>156</sup>
450. The alignment with the cost allocation system for the USO does nevertheless relate to the provisions of articles 7c, paragraph 3, and 7d of the 2009 Postal Regulations. This means on the one hand that in the framework of wholesale access PostNL allocates the common costs on the basis of turnover.
451. On the other hand, PostNL can limit the proportion of the joint costs allocated to the basic service<sup>157</sup> to that part of those costs that would have been incurred if the basic service had been provided by an independent company. The fact that PostNL supplies the basic service using the joint network gives rise to a cost advantage, because it allows better utilisation of the total capacity of the joint network. ACM therefore considers it reasonable that PostNL is required allocate these joint costs of providing wholesale access in the same way as in the case of the USO.

#### **5.4.7 Return**

452. The use of cost orientation means that the calculation of the cost price also includes remuneration for the cost of capital. PostNL has invested a great deal in its mail transport network. It is therefore reasonable that it receives remuneration on its invested capital. This is intended to provide capital providers and lenders with remuneration for making assets available (cost of capital).
453. The cost of capital is not recorded on an integrated cost basis in the accounts of PostNL. This cost of capital must therefore be calculated separately. The remuneration of the cost

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<sup>156</sup> In response to the submitted opinions it has been explicitly stated in this marginal that the system of activity-based costing must be used in the allocation of costs.

<sup>157</sup> The basic service includes all non-24-hour mail services.

of capital replaces the actual interest and dividends paid, which cannot be included in the cost base.

454. In regulated sectors ACM in principle uses the weighted average cost of capital (hereinafter: WACC) to determine the reasonable return, unless the respective regulation specifies otherwise. The asset costs to be allocated are equivalent to the capital invested in the regulated services multiplied by the WACC.
455. The WACC is the weighted average of the capital costs of the equity and loan capital. The costs of both components are weighted on the basis of the gearing. The gearing is the ratio of loan capital to total capital. ACM considers that the WACC should also be used to determine the reasonable return to be achieved on the provision of wholesale access services for 24-hour bulk mail. The CERP and the ERGP also point to the possibility of using the WACC for the postal sector.<sup>158</sup>
456. In the tariff decision to be adopted on the basis of this market analysis decision<sup>159</sup> ACM will lay down the precise method of determining the WACC and the WACC to be used by PostNL for the wholesale access services for 24-hour bulk mail. Prior to PostNL's submission of the tariff proposal referred to in section 5.4.11.1, ACM will make known the level of the WACC which PostNL is required to use in its calculation of the wholesale tariffs.

#### 5.4.8 Determining the wholesale tariffs

457. The cost prices calculated by PostNL on the basis of the preceding paragraphs correspond in principle to the wholesale tariffs to be applied for the respective service category. However, PostNL will be able to apply disintermediation to the aforementioned cost prices, which means that for each of the distinct weight categories within the Wholesale service categories PostNL can set a different wholesale tariff, provided the average of the wholesale tariffs weighted by volume is equal to the average cost price weighted by volume.
458. Since a different cost pattern applies in the case of the Mixed Wholesale service category, the costs of setting up mailpieces and where applicable the cost of drop-off at a location other than the business desk of a sorting centre for letter consignments are included in the cost price calculation for that service category, disintermediation for the Wholesale Mixed service category must be carried out separately from the

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<sup>158</sup> CERP Recommendation on best Practices for Cost Accounting Rules III, 7 May 2009; ERGP Report on specific issues related to cost allocation, ERGP (13) 28, Ref. Ares(2015)5493694 - 01/12/2015.

<sup>159</sup> For this see section 5.4.11.1.

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disintermediation for the Wholesale Small, Large and Special Wholesale service categories. In the latter categories PostNL can apply disintermediation as a group.

459. In ACM's opinion, the application of disintermediation across all Wholesale service categories collectively would give PostNL excessive freedom to determine tariffs with possibly disproportionately detrimental effects on mail transport companies purchasing access. For these reasons, ACM believes that in the case of disintermediation there are grounds for drawing a distinction between the Wholesale Mixed service category on the one hand and the Wholesale Small, Large and Special service categories on the other hand and not to include the Wholesale Letterbox Packets+ service category in this disintermediation. No disintermediation possibility is necessary for the Wholesale Letterbox Packets+ service category as such, since this category only concerns one product and tariff. Hence there are three service categories or groups of service categories in which disintermediation can be applied:

- Wholesale Mixed service category;
- Wholesale Small, Large and Special service categories;
- Wholesale Letterbox Packets+ service category

460. In order to apply the disintermediation, a weighted average cost price must be determined both for the Wholesale Mixed service category and for the Wholesale Small, Large and Special service categories collectively. Currently, however, the wholesale services categorised in this market analysis decision are not yet supplied by PostNL as such. No volume data are therefore available yet for those wholesale services. To carry out disintermediation, PostNL must therefore first transpose the sales data recorded for 2016 for all 24-hour bulk mail services other than USO services in terms of volumes to the Small, Large, Special or Mixed Wholesale Service categories distinguished in this market analysis decision and the distinct weight categories within those categories.

461. The respective sales data for the bulk mail services must in principle be transposed in each case to what is considered logically and objectively as the most appropriate wholesale category and weight category. Where the format or weight class of the bulk mail service differs to such an extent from the wholesale categories applied in this market analysis decision that transposition on a logical and objective basis is not possible, PostNL must substantiate its transposition choice in greater detail.

462. The disintermediation to be applied by PostNL:

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- (1) must be logically and consistently structured. This means, for example, that a heavier (average) weight is charged for at a higher tariff than a lighter (average) weight and that a larger format is charged for at a higher tariff than a smaller format with the same weight;
- (2) must not result in any discrimination or anticompetitive tariff setting. This means that the tariffs resulting from the disintermediation must not have the purpose or effect of impeding competition. That is the case, for example, if it is aimed at disadvantaging one or more mail transport companies.

#### 5.4.9 Annual cost orientation assessment or multi-year tariff regulation

463. ACM considers that a system of wholesale tariffs that apply for several years is preferable to an annual assessment of the cost orientation of the wholesale tariffs.
464. Compared to the annual recalculation of the wholesale tariffs, fixing the tariffs for a longer period has various advantages. In the latter case, when drawing up their business plans, mail transport companies have a longer period of certainty about the tariffs they must pay PostNL for wholesale access. This provides the necessary certainty when setting retail prices that a mail transport company wishes to offer, when concluding contracts (including long-term contracts) with customers and when taking decisions on investments in their network. This makes it easier for mail transport companies to make the necessary investments to remain active in 24-hour mail. A system of multi-year wholesale regulation also contributes to the objectives of ex-ante oversight formulated by the Policy Rule.<sup>160</sup>
465. In comparison with a system of annual setting of wholesale tariffs, setting those tariffs for a longer period also generates less administrative expenses for PostNL.
466. ACM does not expect that any unforeseen technical or other developments in the next three years with regard to the provision of access services will lead to fundamental changes in the costs or cost structure of PostNL within that period. ACM therefore sees no grounds for fixing the wholesale tariffs for a shorter time than the regulatory period provided for by the regulator.
467. On the above basis ACM considers it reasonable and responsible to have the wholesale tariffs apply for the duration of this market analysis decision. Since the set tariffs will thus have consequences for a longer period for the mail transport companies involved and it is important that there is sufficient certainty on the validity of those tariffs, ACM believes it is necessary for PostNL to submit those tariffs to ACM for prior approval.

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<sup>160</sup> See article 2 of the Policy Rule.

#### 5.4.10 Indexation of multi-year tariffs

468. When wholesale tariffs are set for a number of years, there must be a possibility of amending them in the intervening period in line with developments in the general price level in the market. The tariffs to be applied by PostNL for the wholesale access services apply for the duration of this market analysis decision, with these tariffs serving as a tariff cap.

469. There are a number of possible ways in which the indexation can be applied: NEA; CPI (the general consumer price index); the annual rise in the USO tariffs and the generic increase in tariffs for bulk mail announced periodically by PostNL.

470. The NEA index is an indexation related specifically to the transport sector. The index for the 'dense distribution' (package) subsector is closely aligned with the activities of the mail transport companies. **[Vertrouwelijk:**

]. This index

is determined by an independent body. In ACM's opinion the NEA index offers the best means by which to carry out the indexation.

471. The CPI is a generic indexation which in ACM's opinion cannot provide an accurate picture of the developments in the transport of bulk mail. Nor is the rise in the stamp price (or the individual item price in franking machines) a useful form of indexation.

**[Confidential:**

]. The average price rises for mail transport are generally lower than the rise in stamp prices. With this indexation mail transport companies would therefore pay too much for access.

472. ACM concludes that the actual NEA index used for the 'dense distribution' (package) subsector is a good means of indexing the wholesale tariffs calculated on the basis of the previous calendar year. However, the NEA index does not take account of a specific characteristic of mail transport, namely that volumes are contracting. ACM believes it is reasonable to offer PostNL compensation in that regard by calculating the wholesale tariff to be charged by it for the various access services during the three-year regulatory period on the basis of the forecast cost and volume developments over that period. This calculation system is further elaborated in the rules below.<sup>161</sup>

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<sup>161</sup> A similar provision is included in the market analysis decision on unbundled access of 17 December 2015 (reference: ACM/DTVP/2015207525).

#### 5.4.11 Rules associated with the imposed tariff obligation

473. On the basis of article 13f, paragraph 4, of the Dutch Postal Act, ACM attaches the following rules to the obligation imposed on PostNL with regard to the wholesale tariffs that it charges. These rules are necessary from the perspective of effective enforceability of the imposed tariff obligation. They are also aimed at countering the potential competition problems of price discrimination and margin squeeze.

##### 5.4.11.1 Rules for the calculation of the wholesale tariffs

474. No later than three months<sup>162</sup> after the date of entry into force of this market analysis decision, PostNL must submit a tariff proposal to ACM (hereinafter: the Tariff Proposal). This Tariff Proposal includes the wholesale tariffs for 24-hour bulk mail which PostNL will charge other mail transport companies for access to the PostNL network.

475. The wholesale tariffs included in this Tariff Proposal must be calculated and determined in accordance with the above provisions of sections 5.4.4. to 5.4.10. The Tariff Proposal must be accompanied by a detailed calculation and evidence that this is the case. PostNL must make clear which part of the total costs incurred by it in the provision of mail transport services has been allocated to the granting of the access referred to in this market analysis decision.

476. The Tariff Proposal must be accompanied by a detailed description of the system of cost allocation used that fulfils the rules set in following section.

477. Only those costs which are generated directly or indirectly by the wholesale service categories referred to in section 5.3.3 may be allocated to these services. That means that:

- (1) PostNL may in any case include the following costs in the allocation to the wholesale access services:
  - the direct costs of the wholesale access services;
  - the joint costs of the network used to supply 24-hour bulk mail services; These may be allocated in proportion to use.
  - the joint costs; These are the so-called overheads, which do not relate directly to the joint production of services. They could include management overheads at group level and HR and administration costs.

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<sup>162</sup> This period has been extended by one month in response to the opinions submitted with regard to the 2017 Draft Decision.

- any costs which PostNL incurs specifically to provide wholesale access; ACM assumes that this will involve a limited amount of costs. However, if there is such a large amount of costs that this can be assumed to have a significant effect on the wholesale tariffs to be charged to mail transport companies, ACM may decide that a proportion should be allocated to PostNL's 24-hour bulk mail services, in order to guarantee a level playing field and encourage PostNL to keep these costs as low as possible.
- (2) PostNL is in any event not permitted to include the following costs in the allocation to wholesale access services:
- costs that relate solely to the retail activities of PostNL, such as marketing costs;
  - costs that relate solely to the provision of universal postal services, including the costs of the letterbox network and of the postal outlets and all other costs already allocated to the USO;
  - costs of the business desks, to the extent that they are not used to provide wholesale access services;
  - the costs of any other parts of the PostNL network that are not used in full or in part to provide wholesale access services;
  - the costs of providing non-24-hour bulk mail services (basic service; 48-hour and 72+-hour bulk mail services), notwithstanding the provisions of marginal 451;
  - the costs of differential services, such as collection and delivery services and the operation of mailboxes;
  - costs not previously mentioned which relate solely to activities that fall outside the 24-hour bulk mail service;
  - interest and dividend payments.

478. PostNL must calculate the wholesale tariffs on the basis of the costs as incurred in the calendar year prior to the year in which the Tariff Proposal is submitted (t-1)<sup>163</sup> and the forecast costs for the final year of the regulatory period (t+3)<sup>164</sup> at the price level that applied in t-1.<sup>165</sup> A cost basis is then determined for the wholesale tariffs based on a

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<sup>163</sup> Or of the last available reporting year if no data are available for the previous reporting year (yet); t-1 in that case becomes t-2.

<sup>164</sup> ACM takes a period of three years as its starting point having regard to the provisions of article 13c of the Dutch Postal Act.

<sup>165</sup> That means inflation is disregarded in this forecast.

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straight line between the two values thus obtained. The tariff for the respective year is determined on the basis of the value in the middle of that year.

479. In forecasting the aforementioned costs and the associated expected volumes in t+3, PostNL must take account of the cost savings it envisages and can reasonably expect<sup>166</sup> as well as the available results of independent research into the trends in mail volumes.<sup>167</sup>
480. The costs and volumes for t+3 are determined on the basis of forecasts. If ACM is not sufficiently certain that the forecasts presented by PostNL are realistic or if they are not sufficiently substantiated, PostNL must at ACM's request carry out a reassessment of those forecasts, making adjustments to the costs or volumes. Where applicable ACM may decide to switch to a tariff regulation methodology in which the wholesale tariffs are set every year.
481. The cost basis to be applied each year for the wholesale tariffs will be calculated in principle in accordance with the table below, with the year t being the first year of the regulatory period. Since this market analysis decision comes into force on 1 August 2017, t+3 has been taken to be the final year of the regulatory period for this calculation year.

Year	Calendar year	Calculation of tariff
t	2017	$(\text{cost price year } t+1 + 1/4 \times (\text{cost price year } t+3 - \text{cost price year } t-1)) \times (1 + \text{NEA index}_{t-1})$
t+1	2018	$(\text{cost price year } t+1 + 2/4 \times (\text{cost price year } t+3 - \text{cost price year } t-1)) \times (1 + \text{NEA index}_{t-1}) \times (1 + \text{NEA index}_t)$
t+2	2019	$(\text{cost price year } t+1 + 3/4 \times (\text{cost price year } t+3 - \text{cost price year } t-1)) \times (1 + \text{NEA index}_{t-1}) \times (1 + \text{NEA index}_t) \times (1 + \text{NEA index}_{t+1})$
t+3	2020	$(\text{cost price year } t+1 + 4/4 \times (\text{cost price year } t+3 - \text{cost price year } t-1)) \times (1 + \text{NEA index}_{t-1}) \times (1 + \text{NEA index}_t) \times (1 + \text{NEA index}_{t+1}) \times (1 + \text{NEA index}_{t+2})$

**Table 7: Method of calculating the tariff cap**

482. The following cost base from the above calculation is indexed for inflation each year. PostNL must use the NEA index compiled for the 'dense distribution' (package)

<sup>166</sup> See for example [https://www.PostNL.nl/Images/Q4\\_percent20FY-2016-and-capital-market-day-presentation\\_tcm10-91061.pdf](https://www.PostNL.nl/Images/Q4_percent20FY-2016-and-capital-market-day-presentation_tcm10-91061.pdf) (p. 32).

<sup>167</sup> Such as Future scenario developments in the Dutch postal market, WIK-consult 14 December 2016.

subsector.<sup>168</sup> PostNL must always calculate and announce the new wholesale tariffs no later than two weeks after publication of the relevant NEA index.

483. The Tariff Proposal must be accompanied by an auditor's report. This report must show that the auditor has conducted an audit and determined that:
- the calculations are correct and have been carried out in accordance with the rules set in this market analysis decision;
  - the data used are correct and complete and are consistent with the financial records of PostNL.
484. The wholesale tariffs proposed in the Tariff Proposal must be approved by ACM. ACM will record that approval in a tariff decision to be adopted on the basis of this market analysis decision (hereinafter: the Tariff Decision). The Tariff Decision sets the cost-oriented wholesale tariffs to be charged by PostNL.
485. In the context of the assessment of the Tariff Proposal and the Tariff Decision to be adopted by ACM, PostNL must fulfil requests for additional information or carry out recalculations with regard to the data provided in or with the tariff proposal within the periods specified by ACM.

#### 5.4.11.2 Rules for the cost allocation system

486. The cost allocation system used by PostNL to calculate the wholesale tariffs must include the following elements:
- a) An overview showing that the input of the system (i.e. the costs entering the system) is equivalent to the output of the system (i.e. the weighted total of the cost prices).
  - b) The allocation keys used in allocating the direct and indirect costs. PostNL must explain how these allocation keys came into existence, why they are the best available allocation keys and how and at what frequency the source data of the keys are substantiated.
487. The cost allocation system must also meet the following quality requirements:
- (1) The system is consistent:  
The chosen principles are justified and choices are adhered to throughout the

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<sup>168</sup> For this see

[http://www.niwo.nl/pagina/167/onderwerpen/cijfers\\_en\\_grafieken/kosten\\_en\\_rentabiliteit.html](http://www.niwo.nl/pagina/167/onderwerpen/cijfers_en_grafieken/kosten_en_rentabiliteit.html).

system. If any choices are nevertheless varied, a justification is given as to why it is not possible to adhere to the choice.

(2) The system is transparent:

The system contains all the required information, is accessible, complete and accurate and fits in with the existing internal processes and decision-making, such as the organisation, the budget cycle, accounting, etc. The following must be sufficiently clear:

- The different types and categories of costs, revenues and invested capital that is allocated to the services.
- The cost allocation methodology, including the main cost centres and cost allocation keys. On the basis of costs that arise, it must be clear how these costs are allocated to services and products. It must be clear whether there is direct allocation, allocation based on cost drivers or cost allocation keys or allocation by means of a mark-up. In the case of allocation based on cost drivers or cost allocation keys, it must be clear which cost pools and which cost drivers or cost allocation keys are used. If allocation take place by means of mark-ups, it must be clear precisely how these mark-ups are calculated.
- The sources of the data. These comprise on the one hand sources of financial data and on the other hand sources of non-financial data. It must be clear to what extent these data have been obtained through automated processes or are based on estimates by employees.

(3) The system is traceable.

In order to assess whether the system does indeed lead to the intended output, all steps from the input to the output must be traceable. For example, calculation methods and sums must be correct, there must be no steps missing and there must be no internal contradictions.

488. The cost allocation system must be approved by ACM. To that end, PostNL must comply with the instructions given by ACM to amend the system. The decision to approve the cost allocation system is taken by ACM at the same time as the decision to approve the wholesale tariffs included by PostNL in the Tariff Proposal.

#### 5.4.11.3 Rules with regard to tariffs for new or amended services

489. If PostNL introduces new or amended 24-hour mail transport services for business customers on the basis of a reasonable access request and such services cannot be replicated by mail transport companies on the basis of the applicable wholesale reference offer<sup>169</sup>, PostNL must calculate a wholesale tariff for this purpose in accordance with and in due application of the provisions of section 5.4.4 to 5.4.11.2 and submit a tariff proposal to that effect to ACM. ACM will adopt a separate Tariff Decision with regard to this Tariff Proposal.
490. Newly introduced or amended 24-hour bulk mail services as referred to in the previous marginal must not have such content or design that the application of the wholesale tariffs based on them impedes or limits the competition.

### 5.5 Obligation to publish information and a reference offer (transparency obligations)

491. On the basis of article 13g, paragraph 1, of the Dutch Postal Act, ACM can impose the obligation to publish information to be specified by it in a manner to be specified by it (hereinafter: general transparency obligation).
492. On the basis of article 13g, paragraph 2, of the Dutch Postal Act, ACM can impose the obligation to publish a reference offer including a description of the types of access to be determined by ACM and the tariffs and other conditions to be applied.
493. Article 13h, paragraph 1, of the Dutch Postal Act specifies that ACM can attach rules to an obligation as referred to in paragraphs 1 or 2 with regard to the degree of detail and the method of publication.
494. ACM examines below whether the imposition of the general transparency obligation and an obligation to publish a reference offer are necessary, fitting and appropriate. ACM also states how PostNL must publish the information and the reference offer and within what period publication must take place.

#### 5.5.1 Necessity, suitability and appropriateness of transparency obligations

495. The function of both the general transparency obligation and the reference offer publication obligation is to provide information that mail transport companies need in order to purchase access for 24-hour bulk mail. A necessary precondition for the effective and efficient use of access for 24-hour bulk mail is that mail transport companies have all information of relevance to that access. In section 4.5, ACM concluded that PostNL has

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<sup>169</sup> This does not include economic replicability on the basis of the applicable access tariffs.

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the incentive and ability to withhold or make discriminatory use of relevant information, giving rise to potential competition problems.

496. The general transparency obligation and the obligation to publish a reference offer are appropriate in order to address the potential competition problems of withholding or discriminatory use of information. After all, the obligation has the effect that access-relevant information is published and PostNL's potential to impede or frustrate the purchase of access by other mail transport companies is limited.
497. The general transparency obligation combined with the obligation to publish a reference offer is necessary to remedy the aforementioned potential competition problems. The individual obligations are not sufficient in themselves. The general transparency obligation does not result in the relevant information being available in such a form that an access agreement between PostNL and mail transport companies can be entered into easily and rapidly on the basis of this information. In addition, the general transparency obligation does not enable mail transport companies to ascertain rapidly whether they are being disadvantaged compared to other mail transport companies, PostNL itself, its subsidiaries or partner companies. Moreover, only the combination of both obligations contributes sufficiently to the prevention of tying, delaying techniques, quality discrimination, strategic product design and unfair conditions. The general transparency obligation is therefore not sufficient.
498. There are no less onerous obligations that prevent the aforementioned competition problems and the obligations are thus appropriate. Furthermore, the imposed access obligation and the imposed tariff obligation do not ensure that the mail transport companies requiring access for their 24-hour bulk mail have all information that they require for such access.

*Conclusion*

499. ACM concludes that a general transparency obligation and the obligation to publish a reference offer are necessary, fitting and appropriate obligations. Therefore, on the basis of article 13g, paragraphs 1 and 2, of the Dutch Postal Act, ACM imposes on PostNL a general transparency obligation and the obligation to publish a reference offer.

**5.5.2 Fulfilment of general transparency obligation and publication method**

500. In the framework of the general transparency obligation, PostNL is required to disclose the following information to mail transport companies:

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- a) A general description of PostNL's access obligation with regard to mail transport companies for 24-hour bulk mail services that complies with the provisions of this market analysis decision;
- b) The procedure for handling access requests (see marginal 370(f) above);
- c) The means by which debiting or crediting takes place after the final wholesale tariffs have come into existence as referred to in section 5.6;
- d) The invoicing method and procedure used if the 70 percent criterion as referred to in marginal 368 is exceeded;
- e) All other information required in order to enable mail transport companies to obtain and maintain easy access to the PostNL network for 24-hour bulk mail services, to the extent that it is not already included in the information in this marginal or in the reference offer;
- f) All changes with regard to the information referred to in a) to e) in this marginal;
- g) Changes in the conditions for access for 24-hour bulk mail and the associated practical and process-related consequences for mail transport companies;
- h) Information on the introduction of new 24-hour bulk mail services and the amendment or discontinuation of existing 24-hour bulk mail services. A pilot or experiment by PostNL with regard to a 24-hour bulk mail service is not considered to be a new 24-hour bulk mail service to the extent that it is a short-term pilot for a limited number of business customers of PostNL and to the extent that the pilot or experiment does not unnecessarily exclude and have the effect of impeding competition with other mail transport companies.

501. PostNL must publish the information referred to in the previous marginal on its website. ACM does not believe it is unreasonable if it is published only on a website accessible to mail transport companies.

502. The information referred to in marginal 500 a) to e) must be published on the PostNL website no later than three months after this market analysis decision comes into effect. Changes as referred to in f) to h) must be published on the website at least two months before PostNL implements them. ACM has taken into consideration that mail transport companies must have sufficient time to respond to these changes, but that this period must also be no longer than is strictly necessary, so that PostNL does not have to wait an unnecessarily long time, for example for the introduction of a new 24-hour bulk mail service in the retail market. Mail transport companies thus also have sufficient time to adjust their product portfolio.

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503. Furthermore, PostNL must publish the changes referred to in marginal 500 f) to h) on the same date by means of an electronic newsletter to mail transport companies and to ACM.

**5.5.3 Fulfilment of reference offer obligation**

504. PostNL must draw up a reference offer containing at least:

- a) A description of the access for 24-hour bulk mail, including at least:
  - Access to 24-hour bulk mail in respect of which ACM has already determined in marginal 353 that a request to that effect from a mail transport company is a reasonable request as referred to in article 13e, paragraph 1, of the Dutch Postal Act.
  - the access to 24-hour bulk mail resulting from the non-discrimination obligation (see marginal 381, 384 and 385);
- b) A standard contract for access for 24-hour bulk mail;
- c) The conditions which PostNL applies for the granting of access to 24-hour bulk mail; (see marginal 370 g) above;
- d) All wholesale tariffs;
- e) The drop-off locations for mail transport companies, taking into account the provisions of marginal 353 (ii);
- f) The latest drop-off time at the drop-off locations for mail transport companies, taking into account the provisions of marginal 353 (ii);
- g) The method used to drop off 24-hour bulk mail;
- h) Conditions with regard to the composition of consignments of 24-hour bulk mail.

**5.5.4 Rules concerning the reference offer publication method**

505. On the basis of article 13g, paragraph 3, of the Dutch Postal Act, ACM attaches the following rules with regard to the publication method to the obligation to publish a reference offer;

- a) PostNL must publish the reference offer on its website; ACM does not believe it is unreasonable if it is published only on a website accessible to mail transport companies.
- b) The reference offer must be published on the website no later than three months after this market analysis comes into force. ACM believes that this three-month period is sufficient to enable PostNL to draw up a reference offer.
- c) Any change in the reference offer must be published on the website at least two months before PostNL implements this change. Where a change in the reference

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offer concerns the closure of a drop-off location by PostNL, PostNL must allow period of at least six months. In this case, ACM considers that a six-month period is justified, because such a change will have substantial consequences for the business operations of mail transport companies. In cases in which the owner of a drop-off location, other than PostNL itself, discontinues its business operations, as a result of which PostNL can no longer use the drop-off location, PostNL must immediately report this on the website referred to in a.

- d) PostNL must also give notice of the change to mail transport companies that are customers of 24-hour bulk mail as well as to ACM on the same date by means of an electronic newsletter.

## **5.6 Entry into force of the obligations**

- 506. This market analysis decision comes into force on 1 August 2017. With effect from that date, on the basis of article 13e, paragraph 1, of the Dutch Postal Act, ACM imposes the obligation to fulfil reasonable requests for access for 24-hour bulk mail. In section 5.3.3 of this market analysis decision, ACM has specified which access request for 24-hour bulk mail is deemed reasonable in all cases. PostNL is obliged to offer that access that is deemed reasonable by ACM to mail transport companies no later than 1 November 2017.
- 507. In section 5.4 of this market analysis decision, ACM has imposed a tariff obligation on PostNL on the basis of article 13f of the Dutch Postal Act. The proposal for the wholesale products tariffs, in respect of which ACM determined in section 5.3.3 of this market analysis decision that an access request was reasonable in all cases, and the cost allocation system used in the calculation, must be submitted for approval to ACM no later than 1 November 2017.
- 508. PostNL must apply these tariffs to mail transport companies from the time of submission of the wholesale tariffs to ACM. As soon as ACM has approved the wholesale tariffs and the cost allocation system used to calculate them, PostNL must apply these final wholesale tariffs to mail transport companies and offset these final tariffs against the wholesale tariffs previously charged to mail transport companies.
- 509. PostNL will also carry out the set-off referred to in the previous marginal to the extent that in the period between 1 August 2017 and the date on which it submits the proposal for wholesale tariffs to ACM, it is already granting access for the wholesale products referred to in section 5.3.3 of this market analysis decision. In the remaining cases, PostNL must set off the tariffs charged to mail transport companies in that period against the final wholesale tariffs established for the Wholesale Mixed product.

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510. With regard to the transport obligations, as referred to in section 5.5 of this market analysis decision the general transparency obligation must be fulfilled and the reference offer must be published by PostNL in the manner stated in that section by 1 November 2017 at the latest.

**5.7 Overview of potential competition problems and obligations**

511. Table 8 below contains a clear presentation of the identified potential competition problems and the imposed obligations that contribute to the prevention of the identified potential competition problems.

Obligations	Access	Transparency	Non-discrimination	Tariff
<b>Potential competition problems</b>				
<b>Access refusal</b>	X			
<b>Access-related</b>				
Discriminatory use or withholding of information	X	X	X	
Improper use of information	X	X		
Delaying tactics	X	X	X	
Unfair conditions	X	X	X	
Quality discrimination	X	X	X	
Tying	X	X		
Strategic product design	X	X		
<b>Price-related</b>				
Price discrimination				X
Margin squeeze				X

**Table 8: Potential competition problems and imposed obligations**

**5.8 Conclusion**

512. In the sections above, ACM has determined which obligations will be imposed on PostNL as a mail transport company with AMP. ACM has ascertained that those individual obligations are necessary, fitting and appropriate in order to prevent the identified potential competition problems.

513. The aim of this market analysis decision is to create effective and sustained competition. ACM believes that this will be achieved with the imposed obligations. Mail transport companies will retain access to the PostNL network for 24-hour bulk mail as they do

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under article 9 of the Dutch Postal Act. The access obligation will prevent PostNL from introducing conditions that are detrimental to mail transport companies. That is necessary because in recent years PostNL has on several occasions introduced conditions that have disadvantaged mail transport companies.

514. The tariff obligation is formulated differently than under article 9 of the Dutch Postal Act. More than is the case under article 9, the tariff obligation gives mail transport companies an incentive to operate mail transport services themselves as far as possible. To the extent that they require access to the PostNL network, the regulated tariff eliminates the disadvantage that mail transport companies have relative to PostNL. In comparison with article 9, PostNL gains more freedom to set its own retail prices.
515. The obligations lead to effective and sustained competition. This leads to more choice, lower prices and better quality of service for end-users. Effective and sustained competition also provides the most incentives to achieve efficiency improvements and innovation in the field of mail transport. ACM qualifies the positive consequences of regulation for end-users resulting from competing postal markets as the intended and expected effect of the imposition of obligations.

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## 6 Impact assessment

### 6.1 Introduction

516. In this section, ACM presents the results of the quantitative impact assessment to gauge the effects of the imposed obligations. In the previous section, these results were included in the assessment of the proportionality of the prospective obligations. The quantitative effects of the imposed joint obligations on the defined markets are also shown in this section.
517. Section 6.2 begins with a description of the requirements set in the Policy Rule with regard to the basis for the obligations. Section 6.3 explains the method used in the quantitative impact assessment and gives a more detailed explanation of the economic model for the quantitative analysis of the obligations. Section 6.4 then shows the results of the quantitative impact assessment with regard to the various possible obligations, the access obligation and transparency obligations. These are intended to substantiate the chosen method of fulfilling the obligations. The welfare analysis for the chosen method of fulfilling obligations is then explained in section 6.5. In section 6.6, ACM then presents the consequences of the obligations for PostNL. Section 6.7 deals with consequences for the universal postal service. Finally, section 6.8 deals with PostNL's invocation of article 4, paragraph 3, of the Policy Rule.

### 6.2 Policy Rule

518. The Minister of Economic Affairs published the Policy Rule on 18 December 2016. Article 4 of the Policy rule requires ACM to demonstrate that the imposed obligations are necessary, appropriate and proportionate in order to achieve the objectives stated in article 2 of the Policy Rule and that other less stringent measures are not effective and to this end requires ACM to conduct an analysis, quantitatively as far as possible, of the economic effects on the postal market and of the regulatory costs involved in the market analysis decision. The Minister takes the stated objectives to mean addressing potential competition problems and safeguarding static and dynamic efficiency in the defined market for postal services. In the explanatory notes to the Policy Rule, the Minister gives a more detailed explanation of the analysis to be carried out on the effect of the impose obligations.
519. In this explanation the Minister states that the situation in which obligations are imposed is compared to a situation in which there is no *ex ante* regulation. In order to assess the effects of the prospective obligations, the expected results of *ex ante* regulation must therefore be compared to the expected results of a situation without *ex ante* regulation on the basis of article 13a ff. and in the absence of article 9 of the Dutch Postal Act.

520. The explanatory notes on the Policy Rule also state that a quantitative analysis must be carried out which shows as clearly as possible the level of costs and benefits that the envisaged obligations will generate in any case for the mail transport companies and for end-users. According to the Policy Rule the quantification of the effects of the envisaged obligations could include the costs and benefits of the measures, such as an increase or decrease in the producer and consumer surplus and the implementation and compliance costs of the regulator and mail transport companies respectively. The Policy Rule also requires ACM to take account of side effects such as the effects on entries and departures, investments and quality.

### 6.3 Method used in the quantitative impact assessment

#### 6.3.1 Introduction

521. ACM implements the Policy Rule by quantifying as well as possible the economic effects of the prospective obligations. ACM does this by analysing the economic effects by means of a quantitative determination of the economic effects of the *ex ante* regulation on business senders of bulk mail, the mail transport company with significant market power (PostNL) and the other mail transport companies (Sandd, Van Straaten Post, Intrapost, etc.) for the years during the regulatory period. This analysis of economic effects translates into a calculation of the consumer surplus (for business senders of bulk mail), the producer surplus (for PostNL and other mail transport companies) and the total surplus. In addition, ACM calculates the regulatory costs involved in the *ex ante* regulation in order to produce a welfare-economic analysis for the defined relevant markets.

522. For the quantitative impact assessment, ACM instructed the research and consulting firm Frontier Economics (hereinafter: Frontier) to develop an economic model.<sup>170</sup> Using this economic model, ACM can quantify the economic effects of the prospective obligations on the defined markets as far as possible. The results of this economic model are an important aspect that ACM takes into account in assessing the proportionality of the prospective obligations.

#### 6.3.2 Economic model

523. In order to quantify the economic effects of the prospective obligations on the markets and the effects on mail transport companies as well as possible, an economic model is necessary that analyses how mail transport companies respond to the wholesale access

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<sup>170</sup> Frontier Economics is an internationally renowned economic research and consulting firm. For more information: <http://www.frontier-economics.com/>.

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offer for 24-hour bulk mail and to changes in it. Frontier has developed an economic model to determine the impact of a wholesale access offer for 24-hour bulk mail with the options for tariff obligations on the prices charged by mail transport companies to business senders and on sales of mail transport companies.

524. To this end, it has developed a so-called differentiated Bertrand model for the Dutch postal sector. According to Frontier, this economic model is the most appropriate economic analysis framework for investigating competition between mail transport companies in the Dutch postal sector. ACM agrees with this view. The applicability of the differentiated Bertrand model is demonstrated in greater detail below.
525. There are various mail transport companies operating in the Netherlands and competing with each other on price based on a differentiated offer. Mail transport companies compete with a differentiated offer in terms of service frameworks, quality, brand and image. Annex 2, concerning the quantitative impact assessment, provides a more detailed explanation of the types of players and the differences in positioning of mail transport companies in the economic model.
526. In a differentiated Bertrand model, each mail transport company chooses a pricing that maximises its profit in which the pricing of competing mail transport companies is seen as a given. After iteration an equilibrium situation then arises in which each mail transport company selects a price that is the best response to the prices chosen by all competing mail transport companies. Such a model also includes market power and distances between competitors. The distance between competitors and hence between different mail transport companies refers to the readiness of business senders to switch to another mail transport company in the case of a differentiated product offer. In a differentiated Bertrand model this is shown by means of diversion ratios. These diversion ratios reflect the preferences of a business sender in the choice of a second product and provider if they cease purchasing the current product from a mail transport company as a result of a price increase.
527. The economic model thus estimates the best response from a mail transport company to the pricing of competing mail transport companies. In practical terms, this means that a mail transport company looks to see how it must set its price in order to optimise its profit. In the event of a price reduction it achieves a lower margin on its own customers that has to be compensated somewhat by the margin achieved on new customers. A mail transport company will in theory have to take into account the price elasticity of business senders and the extent of market power of competing mail transport companies.

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528. The model analyses what the most profitable response of all mail transport companies is if they purchase access from PostNL for part of their 24-hour bulk mail. The results of the differentiated Bertrand model provide retail prices for 24-hour bulk mail that reach equilibrium when all mail transport companies have set their optimum price. This price setting also results in an allocation of the total volume of 24-hour bulk mail across the various mail transport companies, expressed in market shares. The setting of the retail prices is then used in combination with the price elasticity of demand to calculate the volume effect in the market.
529. ACM uses the differentiated Bertrand model to assess the response of the mail transport companies in the case of an access offer for 24-hour bulk mail with different average wholesale tariffs. These different average wholesale tariffs follow from various possible methods of fulfilling the tariff obligations as described in the previous section. The level of the average wholesale tariff is an input for the model and ACM has estimated this level for the possible fulfilment of the obligations. A relevant point here is that the method of fulfilling of the tariff obligation is the decisive factor in determining the effects of the prospective obligations.
530. In the model developed by Frontier, the results of the prices for 24-hour bulk mail and sales, expressed in market shares, are set out in five obligation scenarios. Four scenarios concern situations with the various options for the fulfilment of the access offer for 24-hour bulk mail with average wholesale tariffs. There is also a scenario in which there is no regulation, i.e. without obligations and article 9 of the Dutch Postal Act.<sup>171</sup>
531. Frontier has also modelled a base scenario. This base scenario is a constructed model scenario that helps in comparing the effects of the tariff obligations as compared to the situation without regulation. The post monitor data for 2016 were used as the basis for this. The base year is then extrapolated for the years during the regulatory period, partly on the basis of historical developments resulting from these data. The base scenario is necessary in determining the effects of the obligation because a comparison between a scenario with regulation based on an access offer for 24-hour bulk mail with an average wholesale tariff and a scenario without regulation cannot be analysed in a single step in the model. This is because a differentiated Bertrand model is based on a situation in which mail transport companies are already active in the market. In a scenario without regulation, other mail transport companies, however, would not be able to compete

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<sup>171</sup> In the scenario without regulation, ACM has not assessed in advance whether an access offer for mail transport companies conflicts with article 24 of the Dutch Competition Act. The analysis of the hypothetical situation without regulation has been carried out for the purpose of modelling and analysing the effects of the obligation.

effectively with PostNL for 24-hour bulk mail, so they may disappear from the market. Since the model does not take into account entries and departures of mail transport companies, this could mean that the starting position, and the starting point for calculating the effects in the possible obligation scenarios, would be a market with few if any competitors. This does not correspond to the actual situation in which a fair number of mail transport companies are competing with PostNL. The scenario without regulation would therefore lead to meaningless results and is not therefore used directly as a starting point. Annex 2 of this market analysis decision explains the fulfilment of the base scenario and the estimates.

532. ACM compares the results of the different scenarios with the situation without regulation in order to analyse the effects of the different obligation scenarios. In order to analyse the consequences for the financial situation of PostNL, ACM uses the effects of the chosen method of fulfilling the obligations in relation to the situation in which the application of article 9 of the Dutch Postal Act is continued.
533. Then, for the various scenarios of the model, the consumer surplus, the producer surplus of PostNL and the producer surplus of the other mail transport companies (Sandd, Van Straaten Post, Intrapost, etc.) are calculated on the basis of the results of the prices and sales, expressed in market shares, for each individual year of the three-year regulatory period. The sum of the consumer surplus and the producer surplus of all mail transport companies constitutes the overall surplus.
534. Two steps are then taken to arrive at a comparison between the possible obligations with different tariffs for wholesale access and the situation without regulation. First, for each of the scenarios, including the scenario without regulation, the effect is calculated relative to the base scenario. All alternative obligation scenarios thus have the same reference framework. The result – the change in the consumer and producer surplus and the effect on the total surplus – of each of the alternative obligation scenarios is then compared to the result of the scenario without regulation.
535. Frontier has constructed the differentiated Bertrand model in a spreadsheet. This model has been filled with confidential information from ACM concerning volumes, average revenues, market shares and costs. The model produces a quantitative estimate of the development of the average revenues from mail transport and sales, expressed in market shares, as a result of the obligations in order finally to calculate the consumer and producer surplus during the regulatory period on this basis. The model developed by Frontier also offers the possibility of adding more up-to-date information on matters such

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as volumes and average revenues. ACM has used the 2016 data in this market analysis decision.

536. In the quantitative estimate of the effects of the prospective obligations, ACM takes as its basis the small, medium and large business markets as defined in section 2 of this market analysis decision (the market definition). Although the obligations relate only to wholesale access by mail transport companies for 24-hour bulk mail, the effects of the prospective obligations may also extend to non-24-hour bulk mail. After all, a lower average wholesale tariff may make 24-hour bulk mail relatively more attractive than non-24-hour bulk mail, so business senders will switch less rapidly to these services.
537. Small business and medium business markets are modelled separately in the model developed by Frontier. Frontier has not carried out any modelling for the large business market. This is because the differentiated Bertrand model is based on the responses of mail transport companies to each other's prices and sales based on data from 2016. In this year and previous years PostNL was actually the only provider of 24-hour bulk mail for large business senders. Since the differentiated Bertrand model is based on relationships between existing market participants and takes no account of entries of new providers, the model does not estimate the effects on the large business market.
538. To estimate the consequences of this Frontier has produced an analysis of the large business market. The most recent data from the monitor of the postal market indicate that PostNL was the only mail transport company active in 24-hour bulk mail in the large business market. According to Frontier, on the basis of the available data on volumes, the average revenues and the variable costs of mail transport companies, it is not possible for mail transport companies other than PostNL to be profitable over the long term in 24-hour bulk mail for large business senders. Frontier reaches this conclusion by calculating whether other mail transport companies can achieve a positive margin on 24-hour bulk mail for large business senders. This does not mean it is impossible for mail transport companies to enter the segment of 24-hour bulk mail for large business senders, but such entries will be marginal in terms of the volume and market share to be achieved. The rationale for this is that in response to potential entries of mail transport companies in this segment PostNL has scope to adjust its average prices for 24-hour bulk mail for business customers so that the entries do not continue over a sustained period.
539. Since the 24-hour bulk mail market segment for large business senders will only be contestable in the case of high retail prices for these senders, the introduction of wholesale tariffs based on cost orientation will put pressure on PostNL to lower its retail prices. The result of this may be that PostNL's margin will decline slightly benefiting large

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business senders and a shift will take place from PostNL's producer surplus to the consumer surplus of large business senders. Overall this may therefore lead to an increase in the consumer surplus and an almost proportionate decrease in the producer surplus at PostNL. The total surplus in this case will remain almost unchanged, as in the case of the producer surplus of other mail transport companies. Since the effects of wholesale access on the large business market are particularly uncertain given the lack of explicit modelling, ACM does not take them into account in the calculation of the economic effects.

540. Finally, a relevant point in the assessment of the obligations is that in principle ACM will impose obligations on PostNL for a period of three years. The quantitative effects of the prospective obligations are therefore assessed over a period of three years. Since the obligations have to be reconsidered after three years, ACM does not look at the period after the three-year regulatory period when quantifying the effects of these obligations. The estimate of the quantitative effects of the prospective obligations includes a determination of the results for each individual year of the regulatory period.

### 6.3.3 Determination of regulatory costs

541. In addition to the economic effects of the prospective obligations for business senders of bulk mail – expressed in the consumer surplus – PostNL and the other mail transport companies – expressed in the producer surplus – the regulatory costs are also important in a quantitative analysis. The regulatory costs involved in this market analysis decision lead after all to a loss of surplus. The level of the regulatory costs is therefore important for the assessment.
542. The research firm Oxera has in the past conducted independent research on behalf of the Ministry of Economic Affairs into the costs and benefits of market regulators, including at that time OPTA.<sup>172</sup> An approach to regulatory costs is described in the framework developed by Oxera. ACM considers the method described by Oxera to be a useful method to calculate the direct regulatory costs. This method was also used in the past as part of the impact assessment in the market analyses for the electronic communications sector. This method is set out below.
543. The direct regulatory costs break down into two types, namely the direct costs of ACM and the compliance costs of the regulated market participant. The direct regulatory costs concern the costs which ACM has to incur for the development, implementation and enforcement of the intended obligations. These costs include the costs incurred by ACM

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<sup>172</sup> Oxera, Costs and benefits of market regulators, study for the Ministry of Economic Affairs, 2004.

in assessing and determining the conditions and tariffs for mail transport companies. They also include the costs involved in the implementation of the intended obligations, such as the costs of resolving any disputes and the provision of information for market participants. ACM must estimate the level of these regulatory costs. The regulatory costs are calculated each year.

#### **6.3.4 Welfare effects**

544. The welfare effects of the prospective obligations, finally, comprise the sum of the economic effects and the regulatory costs involved in this market analysis decision. The welfare effects of the prospective obligations are calculated for the entire regulatory period by deducting the regulatory costs from the economic effects (the total surplus). The surplus and the costs are discounted using an interest rate.

#### **6.4 Economic effects of the different methods of fulfilling the tariff obligation**

545. When assessing the proportionality of obligations ACM is required by the Dutch Postal Act to examine whether they are necessary, fitting and appropriate in order to solve the potential competition problems and whether the obligations are the least far-reaching measure. According to the Policy Rule an impact assessment must provide the best possible quantitative basis for this.
546. ACM has used the model developed by Frontier to determine the economic effects of the different alternatives for the prospective obligations on PostNL and other mail transport companies. As stated in section 5 concerning the obligations, there are various possible ways of fulfilling the tariff obligation in a given offer of access for 24-hour bulk mail of mail transport companies.
547. The prospective obligations must give other mail transport companies continued scope to compete and hence generate a margin on their mail transport. For PostNL, the prospective obligations must be fulfilled in the least onerous manner. According to ACM this translates into a method of fulfilling obligations that solves the potential competition problems and – in an economic sense – has the least possible negative effect on PostNL's profitability.
548. In the model, ACM quantifies the effects of the obligations for access, tariff and transparency obligations jointly. A separate quantitative assessment of the effects of an individual obligation is not possible because the obligations are interrelated. For example, an access obligation without a tariff obligation is not a genuine obligation that can be imposed because the incentive and ability to charge a higher tariff for access effectively makes this access impossible.

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549. Having regard to the possible ways of fulfilling the access, tariff and transparency obligation, as described in the previous section, ACM notes that only the fulfilment of the tariff obligation is a distinguishing factor in the quantification of the economic effects, since no alternatives have been defined for the fulfilment of the access and transparency obligation.

550. ACM has assessed four alternatives for the fulfilment of the tariff obligation. These concern a transparent wholesale access offer for 24-hour bulk mail for mail transport companies with the following alternatives for the fulfilment of the tariff obligation:

- A: wholesale tariff is cost-oriented
- B: wholesale tariff is average retail price charged by PostNL
- C: wholesale tariff is equal to the most favourable retail price
- D: wholesale tariff per sender

These alternatives for the tariff obligation lead to different levels of the average wholesale tariffs which mail transport companies pay for access for 24-hour bulk mail. In addition there is scenario Z; the situation of no regulation and hence the absence of *ex ante* obligations and of article 9 of the Dutch Postal Act. Scenario C would be applied if the approach to the application of article 9 of the Dutch Postal Act were continued.

551. Annex 2 of this market analysis decision shows the level of the estimated average wholesale tariffs. ACM bases its quantification of the effects of these options on these average wholesale tariffs.

552. Table 9 shows the results for the producer surplus of PostNL and the other mail transport companies in the various alternatives for the fulfilment of the tariff obligation. The producer surplus of the other mail transport companies includes both the mail transport companies operating in 24-hour bulk mail (Van Straaten Post, Intrapost, etc.) and the mail transport company Sandd, which does not operate in 24-hour bulk mail. The producer surplus is the change in the margin that PostNL and other mail transport companies make compared to the situation without regulation. This table also shows the results of the consumer surplus and the total surplus under the various scenarios compared to the situation without regulation. The surpluses shown are the net present

value of the surplus per year over the entire regulatory period (2018 to 2020)<sup>173</sup>  
discounted at an interest rate of 3 percent<sup>174</sup>.

Option	Producer surplus of PostNL	Producer surplus of others	Consumer surplus	Total surplus
A - cost orientation	-54.8	-1.5	72.2	15.8
B – average retail price	-68.3	-1.5	89.1	19.3
C- most favourable retail price	-77.6	-1.5	100.7	21.6
D – <i>per sender</i>	-5.5	-0.3	7.6	1.8

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**Table 9: Overview of the development of the surplus under the various options compared to the situation without regulation**

Note: values are in EUR millions over the period 2018-2020, discounted to 2017.

553. The results show that all four options for the fulfilment of the obligations contain show a slight deterioration in the producer surplus of other mail transport companies compared to the situation without regulation. The per sender option produces the least negative result. The same pattern is evident at PostNL, but with substantially larger figures. Its profitability decreases most when an access offer is imposed with wholesale tariffs based on the most favourable retail price (option C) and least on the basis of an access offer for 24-hour bulk mail with wholesale tariffs based on the per sender model (option D).

554. The results also indicate that the change in the consumer surplus for each of the options for fulfilment of the obligations compared to the situation without regulation runs in parallel with the negative change in PostNL's producer surplus. This represents an advantage for business senders in all four options due to the lower prices they pay for 24-hour bulk mail, but also to a lesser extent for non-24-hour bulk mail.

555. The loss of producer surplus for the other mail transport companies compared to the situation without regulation can be explained as follows. In the situation without regulation, the competition among mail transport companies decreases for the transport

<sup>173</sup> Since the Frontier model operates on the basis of whole years, a period from 2018 to 2020 has been selected for the determination of the results rather than mid-2017 to mid-2020. ACM's reasoned assumption is that this will not give rise to any large or relevant differences.

<sup>174</sup> Report of the discount rate working group 2015, p. 11,

<https://www.rijksoverheid.nl/documenten/rapporten/2015/11/13/rapport-werkgroep-discontovoet-2015-bijlage>).

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of bulk mail. As a result, prices for 24-hour bulk mail and non-24-hour bulk mail rise. PostNL and Sandd then benefit from both. Other mail transport services operating in 24-hour bulk mail, including at regional level, lose margin because they only have access for 24-hour bulk mail at high tariffs. Since Sandd, due to its position in the transport of bulk mail, weighs heavily in the calculation of the effects compared to the other mail transport companies, there is a positive producer surplus overall compared to the situation without regulation, which is at the expense of business senders.

556. The assessment of the per sender option D in the previous section indicates that this method of fulfilment does not solve the potential competition problem for mail transport companies operating in 24-hour bulk mail. The consumer surplus and the total surplus rise to a very limited extent in this option compared to the situation without regulation. When the regulatory costs are taken into account, the total surplus in comparison with the situation without regulation is even negative.
557. The results of this quantitative impact assessment also indicate that the fulfilment of an access offer for 24-hour bulk mail based on cost orientation (option A) leads to a situation in which the total surplus and the consumer surplus do increase compared to a situation without regulation and the potential competition problems for other mail transport companies are addressed as far as possible in a way that is least onerous for PostNL. This fulfilment is the least onerous for PostNL because the margins and hence profitability are least affected by the fulfilment of the tariff obligation based on cost orientation. The other alternatives for the fulfilment of the tariff obligation lead to worse outcomes in the light of the requirements of the Dutch Postal Act and the Policy Rule.
558. This result of the fulfilment choice involving an access offer for 24-hour bulk mail with wholesale tariffs based on cost orientation (option A) is also unaffected by changes in the assumptions used in the model to determine the economic effects or by realistic deviations in the levels of the estimated average wholesale tariffs. The ranking of the options does not change in the event of realistic changes in assumptions.

### **6.5 Welfare analysis of the chosen method of fulfilling the obligations**

559. The assessment of the quantitative impact assessment indicates that of the various alternatives an access offer for 24-hour bulk mail based on cost orientation provides the most proportionate fulfilment of the tariff obligation. However, the Policy Rule also specifies other requirements for the substantiation of the chosen obligations. The obligations must ensure that mail transport companies are able to compete over the long term and the static and dynamic efficiency in the markets for mail transport services is

safeguarded. The regulatory costs involved must also be included in the social consequences of imposing the obligations.

560. The quantitative calculation of the welfare effects on the defined markets is determined by deducting the regulatory costs from the economic effects (the benefits of regulation), expressed in the total surplus. In the event that the total surplus less the regulation costs has a positive value, the imposition of the obligations leads to a welfare gain. This approach is consistent with the way in which OPTA, as the predecessor of ACM, fulfilled the impact assessment when this was still required to substantiate market analysis decisions in the electronic communications sector.

**6.5.1 Economic effects on the defined relevant markets**

561. An important effect of the introduction of an access offer for 24-hour bulk mail based on cost orientation compared to the situation without regulation is the decrease in prices for 24-hour bulk mail for business senders. Table 10 presents the results. These show that the average prices of 24-hour bulk mail for business senders in the small and medium business market are expected to decrease by 5.7 to 9.0 percent.

<b>Markets</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>
Small business market	-6.8%	-6.2%	-5.7%
Medium business market	-9.0%	-8.1%	-7.4%

**Table 10: Average price increase for 24-hour bulk mail compared to the base scenario**

562. ACM concludes from the decrease in the average prices for 24-hour bulk mail that the introduction of tariffs for wholesale access based on cost orientation leads to limited downward adjustments by mail transport companies in their retail prices.

563. In the model developed by Frontier, the small business and medium business markets are modelled separately and the results are determined in terms of the surplus. Frontier has not carried out any modelling for the large business market, as explained in marginal 537.

564. Table 11 sets out the effect on the total surplus and the consumer surplus for the access offer for 24-hour bulk mail based on cost orientation compared to the situation without regulation. The effect, as also presented in Table 9, is broken down here into the annual effects and the effects per relevant market.

<b>Fulfilment of obligations, tariff obligation based on</b>	<b>Consumer surplus</b>	<b>Total surplus</b>
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cost orientation						
	2018	2019	2020	2018	2019	2020
Total markets:	28.8	25.3	22.3	6.3	5.5	4.9
Small business market	12.2	10.7	9.4	2.7	2.4	2.1
Medium business market	16.6	14.5	12.8	3.7	3.2	2.8
Large business market	-	-	-	-	-	-

**Table 11: Calculation of the total surplus and the consumer surplus compared to the situation without regulation**

Note: values are in EUR millions over the period 2018-2020, not discounted to 2017.

565. The results show that the imposition of the obligations on the small business market generates a total surplus of €2.7 million in 2018, €2.4 million in 2019 and €2.1 million in 2020. The net present value (discounted to 2017) of this amounts to €6.7 million in the period 2018-2020. The middle business market generates an annual increase in the surplus of €3.7 million in 2018, €3.2 million in 2019 and €2.8 million in 2020, with a total net present value (discounted to 2017) of €9.1 million in the period 2018-2020.

#### 6.5.2 Regulatory costs

566. Table 12 contains an estimate of the costs for ACM in the three-year regulatory period. The estimated direct regulatory costs for ACM are expected to be €576,000 per year.

Cost components	Costs in EUR per year	Amount in EUR per year
Internal costs of ACM	Calculation: estimated man months (24) used by ACM * €100 per hour (broad estimate of PostNL's costs plus overheads) * 160 hours per month	384,000
Cost of appeal procedures	Calculation: estimated man months (12) used by ACM * €100 per hour (broad estimate of PostNL's costs plus overheads) * 160 hours per month	192,000
Total costs	Calculation: sum of ACM's internal costs and costs of appeal procedures	576,000

**Table 12: estimate of ACM's regulatory costs**

567. The compliance costs for mail transport companies are the costs which mail transport companies would not have to incur if they were not regulated. The relevant costs are therefore the incremental costs of compliance and regulation. The aforementioned research by Oxera shows that the estimated compliance costs of market participants amount to three to four times the direct costs of regulation. This factor is seen as a rule of thumb for the relationship between the regulator's costs and the market participants' costs. With a factor of four the compliance costs for market participants therefore amount to €2,304,000.

568. For the total regulatory costs ACM arrives at a broad estimate totalling €2.9 million per year. ACM notes in this regard that a broad estimate of the regulatory costs has been made from a prudential perspective.

### 6.5.3 Welfare effects

569. The welfare effect of imposing the obligation of an access offer with average wholesale tariffs based on cost orientation is positive. This is shown in Table 13.

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	<b>2018</b>	<b>2019</b>	<b>2020</b>
Total surplus	6.3	5.5	4.9
Regulatory costs	2.9	2.9	2.9
<b>Welfare contribution (total surplus less regulatory costs)</b>	<b>3.4</b>	<b>2.7</b>	<b>2.0</b>

**Table 13: Welfare effects and regulatory costs compared to the situation without regulation**

Note: values are in EUR millions over the period 2018-2020, not discounted to 2017.

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570. It follows from this that the welfare contribution (the total surplus less the regulatory costs) amounts to €3.4 million in 2018, €2.7 million in 2019 and €2.0 million in 2020. The net present value of the total welfare contribution amounts to €7.7 million. If we look only at the consumer surplus, shown in Table 9, the welfare contribution of imposing the obligations is much larger: the consumer surplus amounts to €72.2 million (based on the net present value for the regulatory period 2018-2020). This is because business senders of bulk mail benefit from lower prices as a result of the competition.

**Robustness of the analysis**

571. The results of the welfare analysis have been calculated on the basis of a number of estimates. These relate to the expected declines in the volume of bulk mail, the organic average price development in the transport of bulk mail and the level of price elasticity of demand for bulk mail. Frontier and ACM have based these estimates as far as possible on external sources. This is explained in Annex 2.

572. In order to determine the decline in the volume of mail transport in the years ahead, ACM uses the results of past volume trends and external estimates for the forthcoming years. For the organic price development ACM takes the developments in past years and extrapolates them in the light of the contracting volumes. For the price elasticity of demand for mail transport for bulk mail ACM uses the elasticity of -0.3 proposed by Frontier, which is also consistent with the economic literature.<sup>175</sup>

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<sup>175</sup> Frontier refers to the following academic articles: Optimal pricing of mail in the transactional market and welfare for the wider communications market, by De Donder et al in Multi-modal competition and the future of mail, edited by Michael A. Crew and Paul R. Kleindorfer.

[http://idei.fr/sites/default/files/medias/doc/conf/pos/papers\\_2012/soteri.pdf](http://idei.fr/sites/default/files/medias/doc/conf/pos/papers_2012/soteri.pdf); Letter traffic demand in the UK: some new evidence and review of econometric analysis over the past decade, Jarosik et al, in Reforming the Postal Sector in the Face of Electronic Substitution (2013), edited by Michael A. Crew and Paul R. Kleindorfer.

573. To ensure the robustness of the analysis of the welfare effects, ACM has ascertained on the basis of the model developed by Frontier whether a variation in individual assumptions leads to a situation in which there is no longer any welfare gain. ACM has applied the following variables in the model: the diversion ratios from 24-hour bulk mail for PostNL, an increase in the variable costs for 24-hour bulk mail for PostNL, different volume growth in 24-hour, 48-hour and 72+-hour bulk mail, a higher average revenue for 24-hour bulk mail and for 24-hour, 48-hour and 72+-hour bulk mail, higher upstream operating costs and amended cost ratios between 48-hour and 72+-hour bulk mail compared to 24-hour bulk mail.
574. The results of this robustness analysis, to be found in Annex 2, indicate that the size of the total surplus and the consumer surplus may be higher or lower if there is a variation in individual assumptions. Under the chosen method of fulfilling the obligations, the welfare effect remains positive in comparison with the situation without regulation.

#### 6.5.4 Other aspects

575. The Policy Rule refers to a number of elements that must be included in the assessment of the effects of the prospective obligations. This concerns the effect of imposing obligations on companies entering and leaving the market and on investments and innovation. Although these aspects implicitly form part of the welfare analysis for the regulatory period, ACM deals explicitly with this in the light of the Policy Rule.
576. ACM does not expect many new mail transport companies to enter the market in the years ahead as a result of the obligations. The requirement of the maximum outsourcing of 70 percent of 24-hour bulk mail to PostNL which ACM sets for a mail transport company to be entitled to access a 24-hour bulk mail offer constitutes a barrier to sustained activity as a mail transport company over a somewhat longer term if a company does not yet have a 24-hour offer.
577. ACM does not rule out the possibility that mail transport companies will leave the market in the forthcoming regulatory period. The declining volume of 24-hour bulk mail means that alongside PostNL there is less scope for the other mail transport companies operating in the transport of 24-hour bulk mail. This may have the result that mail transport companies discontinue their activities or that their activities are acquired by other mail transport companies, as the calculation of the joint producer surplus of the other mail transport companies indicates that competition will cause them to lose margin

compared to the situation without regulation. The obligations do nevertheless ensure that the other existing mail transport companies can use access to the PostNL network on a non-discriminatory basis. In this way, ACM creates a level playing field between the other mail transport companies as a result of which efficient mail transport companies must be able to compete. It is not impossible that less efficient mail transport companies will leave the market.

578. The Policy Rule finally also states that the obligations must ensure that there are continued possibilities for investment and innovation in order to achieve dynamic efficiency over the longer term.
579. Under the method of fulfilling the chosen obligations, PostNL retains a margin on 24-hour bulk mail. The cost orientation fulfilment enables PostNL to recoup its costs for the provision of access to 24-hour bulk mail for mail transport companies with a reasonable return. The margin of other mail transport companies will deteriorate slightly overall compared to a situation without regulation (see Table 9).
580. ACM is not sufficiently able to assess whether the obligations contribute to investments and innovation in the 24-hour bulk mail offer. ACM considers that mail transport companies can invest and innovate further in the 24-hour bulk mail offer. Whether mail transport companies actually have the incentive to invest and innovate further remains to be seen. ACM does note, however, that other mail transport companies have invested in recent years in expanding their activities and in production resources such as sorting machines. ACM believes it is plausible that this development will continue and that the competition will continue to incentivise mail transport companies to invest.
581. ACM's welfare analysis indicates that the imposition of the obligations produces positive welfare effects. PostNL and other mail transport companies have and retain a margin to invest further in their network and service innovations in the years ahead.

#### **6.5.5 Conclusion**

582. On the basis of this welfare analysis, ACM concludes that the imposition of the obligations relating to the access offer with the wholesale tariffs based on cost orientation will have a positive welfare effect. The total surplus increases as a result of the imposition of the obligations. The consumer surplus also increases as a result of imposing the obligations, and to a greater extent than the overall surplus.

## 6.6 Effect on the financial stability of PostNL

583. In the notes accompanying the Policy Rule, the Minister of Economic Affairs stated that in addition to the effects on the postal market, the effects on the mail transport company with significant market power should be quantified as much as possible. In this section, ACM assesses the extent to which the financial stability of PostNL will be affected by the financial effect of the obligations.
584. In Table 9, ACM has already shown that in the case of wholesale tariffs based on cost orientation the trend in PostNL's producer surplus would be €-54.8 million for the period 2018-2020 compared to the situation without regulation.
585. In order to analyse the consequences of the obligations for the financial stability of PostNL, it is important to look first at PostNL's producer surplus compared to the situation in which the application of article 9 of the Dutch Postal Act is continued. ACM uses scenario C for this purpose. The breakdown of this per year over the regulatory period (after deduction of regulatory costs for PostNL) is shown in Table 14. These results show that PostNL's financial situation improves as a result of the imposition of cost-oriented tariffs compared to the continued application of article 9 of the Dutch Postal Act. This indicates that ACM will achieve a lighter fulfilment of obligations than in the situation over the last few years in which article 9 of the Dutch Postal Act applied.

Year	2018	2019	2020
Producer surplus of PostNL	7.6	5.6	4.0

**Table 14: Producer surplus of PostNL in the case of tariff obligation based on cost orientation compared to the application of article 9 of the Dutch Postal Act**

Note: values in EUR millions, not discounted to 2017.

586. In Table 15, the decrease in the profitability of PostNL with the imposition of obligations is again shown in comparison with the situation without regulation, but this time for the individual years rather than the total regulatory period.<sup>176</sup>

Year	2018	2019	2020
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<sup>176</sup> The lost production surplus for the various years (excluding rounding differences) amounts to €54.8 million for the regulatory period 2018-2020.

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Producer surplus	-21.9	-19.2	-16.9
Regulatory costs of PostNL	-2.3	-2.3	-2.3
Total effect	-24.2	-21.5	-19.2

**Table 15: Effect on the profitability of PostNL as a result of the obligations compared to the situation without regulation**

Note: values in EUR millions, not discounted to 2017.

587. Compared to the application of article 9, PostNL's profitability improves. Compared to the situation without regulation, PostNL's profitability decreases. In order to gain more insight into the size of these amounts ACM relates them to the profit which PostNL makes on non-USP bulk mail. As part of the assessment of the financial accounts for the USO, PostNL has submitted data on turnover and costs from outside the USO for a number of years. For the years 2014 to 2016 this is shown in Table 16:

**[Confidential:**

	<b>Non-USO: 24-, 48- and 72+-hour bulk mail</b>		
<b>Year</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
Turnover			
Total costs			
Profit			

**Table 16: Turnover, total costs and profit outside the USO for the years 2014-2016 for letter mail]**

Note: values in EUR millions.

588. The effect of applying article 9 of the Dutch Postal Act is evident in the above profit figures. This applies particularly to 2016. The easing of the obligations therefore leads to an increase in this profit. PostNL can thus meet all its financial obligations.

589. ACM also carries out a worst-case analysis. The assumption is that the above figures reflect the situation without regulation and do not yet include the negative impact of the application of article 9. It is also assumed that the profit in 2018 will be the same as in 2016. In 2016, PostNL recorded a margin of [confidential: ] percent on 24-, 48- and 72+-hour bulk mail.<sup>177</sup> *If the profit declines by 24.2 million, this margin will decline from [confidential: ] percent to [confidential: ] percent. This means the loss resulting from the obligations does not cause PostNL to become loss-making.*
590. Since it has been shown above that PostNL will likely remain profitable, ACM concludes that it is implausible that the financial impact of the obligations will have consequences for the business operations and stability of PostNL. PostNL will be able to continue meeting its financial obligations.

## 6.7 Effect on the provision of the universal postal service

591. In the notes to the Policy Rule, the Minister of Economic Affairs stated that the proportionality requirement meant that any effects of an intended decision on the USO service must be taken into account.
592. A decline in volume outside the USO may affect the USO. To explain this further, the USO tariff regulation according to the 2009 post regulations will first be outlined. This will be followed by an explanation of the way in which a decline in the volume of 24-hour bulk mail (outside the USO) could affect this and what the effect would be on financial sustainability of the USO.

### 6.7.1 USO tariff regulation

593. The USO tariff regulation was prescribed by the Minister of Economic Affairs in the 2009 Postal Regulation. It follows from this that single item tariffs for the USO are regulated by means of tariff headroom. This tariff headroom reflects a weighted average turnover which PostNL can generate as a maximum on the respective USO services. The tariff headroom consists of the once-only calculated basic tariff headroom and an annually calculated supplementary tariff headroom.
594. ACM calculated the basic tariff headroom in 2015. This is based on the financial accounting of cost and revenues of the USO in 2014. If the costs or volumes of the USO change in subsequent years, the basic tariff headroom does not change. It follows from this that the obligations in this market analysis decision have no direct effect on the basic tariff headroom of the USO, unless the basic tariff headroom has to be recalculated. in

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<sup>177</sup> This margin has been calculated by dividing the profit of [confidential: ] million by the turnover of [confidential: ] million.

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ACM's judgement, this market analysis decision provides no grounds for recalculating the basic tariff headroom.

595. ACM calculates a supplementary tariff headroom each year. PostNL's tariff headroom for the USO is expanded annually to take account of the decline in volume within the USO, inflation and a possible correction if the USO has generated an excess return. The correction for the decline in volume in the USO only covers the costs that do not change in line with the volume. For the USO, these costs in the cost allocation system used by PostNL increase in relative terms if, due to a stronger decrease in volume outside the USO than within the USO, relatively lower traffic-independent costs are allocated outside the USO.

596. If the imposed obligations lead to greater scope for competition, this means PostNL may lose more volume outside the USO as a result of this competition. This loss of volume has an indirect impact on the supplementary tariff headroom and the financial sustainability of the USO.

**6.7.2 Analysis using tariff headroom calculation for 2017**

597. In order to estimate the effect on the supplementary tariff headroom, ACM has conducted a sensitivity analysis of the effect of a decline in volume outside the USO on the tariff headroom of the USO based on the tariff headroom calculation for the year 2017. ACM set the tariff headroom for 2017 on 31 August 2016 at €1.4466. This was calculated by multiplying the basic tariff headroom of €1.2844 by the supplementary tariff headroom for 2016 and 2017 of €1.0558 and €1.0667 respectively.<sup>178</sup>

598. The supplementary tariff headroom for 2017 is based on the financial accounting for the USO for the year 2015. The costs allocated to the USO and 24-hour non-USO services were then as follows:

**[Confidential:**

<b>Costs</b>	<b>USO</b>	<b>Non-USO:</b>
Volume (mln.)		
Direct costs (mln.)		
Joint costs (mln.)		
Common costs (mln.)		

<sup>178</sup> ACM decision reference ACM/DTVP/2016/204888.

Total costs		
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**Table 17: summary of allocated USO and non-USO costs for 24-hour mail in 2015**

599. If due to the loss of volume of competing mail transport companies, PostNL obtains less volume outside the USO, this results in lower direct costs and lower turnover outside the USO. According to the cost allocation system, this then leads to an allocation of relatively more joint costs and more common costs to the USO.

600. ACM has calculated the increase in the tariff headroom in the event that all joint and common costs which were allocated to 24-hour bulk mail (and hence outside the USO) in 2015 were allocated to the USO. This is an extreme assumption because this only occurs if PostNL has no residual volume whatsoever for the 24-hour bulk mail. Of course, this is not a realistic situation and it does not follow from the obligations which ACM imposes, but ACM can thus show that in this case the additional tariff headroom with the application of the formulas in Annex 3 to the 2009 Postal Regulation would rise to €1.0821 and the total tariff headroom would amount to €1.4674. That is an increase of 1.4 percent in the total tariff headroom. If a more realistic sensitivity analysis is applied to the tariff headroom for the USO, the effect on the tariff headroom of the USO is less than 0.1 percent.

601. It follows from the above that the tariff headroom of the USO is insensitive to PostNL's loss of volume as a result of competition outside the USO. The tariff headroom of the USO is affected much more by the organic decline in volume within the USO. ACM therefore concludes that the obligations which ACM imposes on PostNL have barely any consequences for the affordability of the USO for end-users.

### **6.7.3 Effect on financial sustainability of USO**

602. The above analysis shows that the affordability of the USO is barely affected by the obligations which ACM imposes on PostNL. It may be, however, that due to the system of cost allocation relatively more traffic-independent costs are allocated to the USO as a result of a volume loss outside the USO. Since the tariff headroom barely changes, a situation may arise whereby PostNL does not increase the tariffs in the USO in order to compensate for this.

603. The additional allocation of costs already took place in 2015 when **[confidential:**

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604. The above effect may also occur to a limited extent as a result of imposed obligations. However, the decline in volume is already much greater than the decline in volume as a result of the obligations, so the extra effect due to the obligations may be marginal. Having regard to the **[confidential:**  
] and the limited extra effect due to the obligations, ACM considers that the financial sustainability of the USO is not threatened by the imposed obligations.

#### **6.8 Article 4 paragraph 3 of the Policy Rule**

605. Article 4, paragraph 3 of the Policy Rule gives PostNL the possibility of demonstrating by means of a quantitative substantiation that an intended decision has the effect that the obligations a) are more far-reaching than is necessary to enable other mail transport companies in the defined relevant market to compete over the long term with the mail transport company with significant market power (article 3, paragraph 2(a)), or b) have the effect of distorting the financial position of the mail transport company with significant market power in such a way as to threaten financial instability (article 3, paragraph 2(b)). If PostNL has demonstrated this, ACM will amend the intended decision accordingly, or will use a quantitative analysis to show that there is no such effect. If PostNL invokes this provision, it must provide information that enables ACM to understand, replicate and calculate the quantitative substantiation. That means PostNL must ensure transparency towards ACM with regard to the data, parameters and assumptions that it uses.

606. PostNL invoked article 4, paragraph 3, of the Policy Rule in its opinion.

607. In this market analysis decision, ACM has proposed the least far-reaching measure in order to resolve the potential competition problems. PostNL argues that there are alternatives for granting mail transport companies access for 24-hour bulk mail that are less far-reaching than the obligations proposed by ACM. In this regard PostNL refers to Annex 9 of its opinion.<sup>179</sup> PostNL has introduced a per sender offer that is available from 1 January 2017 after the UA ruling of the Trade and Industry Appeals Tribunal. This is a less far-reaching measure according to PostNL. This offer is a variant of the fulfilment method described in part III of section 5.4.2. This variant has been assessed as inappropriate because it does not eliminate the competition problems or only does so to an insufficient extent. Hence the situation is not as referred to in article 3, paragraph 2(a), of the Policy Rule.

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<sup>179</sup> PostNL opinion, p. 80, marginal 387.

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608. PostNL included an impact calculation in its opinion. ACM has analysed and assessed that calculation. The calculation is based on a representation of reality (such as homogenous products, pure price competition<sup>180</sup>) that is not accurate. The calculated impact is also based on number of assumptions concerning the prospective obligations that are at variance with ACM's intentions. For example, PostNL assumes an excessively low average wholesale tariff and also assumes that cost savings can no longer be achieved as a result of tight limits on the operational requirements. The obligations have accordingly been adjusted and clarified in a number of respects. These changes are explained in the Memorandum of Findings.
609. ACM has calculated the effects of the obligations in the impact assessment. This leads to a negative financial impact of over €20 million per year for PostNL compared to the situation without regulation (see Table 15). In ACM's opinion, this impact does not lead to the financial instability of PostNL. Taking into account the amended obligations, the impact on PostNL, as estimated using the PostNL model, is also smaller (see **Fout! Verwijzingsbron niet gevonden.**). That impact is greater, however, than the impact determined by ACM. That difference is to a large extent due to a different estimate of the impact of the obligations on the competition in the market. In ACM's opinion, PostNL uses unrealistic assumptions concerning the price behaviour of the other mail transport companies. ACM does not concur with PostNL on that point. These points are dealt with in the Memorandum of Findings (marginal **Fout! Verwijzingsbron niet gevonden.** ff.). ACM therefore finds that the amended obligations do not lead to financial instability as referred to in article 3, paragraph 2(b), of the Policy Rule.
610. ACM concludes on the basis of the above that PostNL has not demonstrated that the market analysis decision has any of the effects referred to in article 3, paragraph 2(a) or (b). ACM has shown by means of a quantitative analysis that these effects will not occur.

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<sup>180</sup> See the discussion on PostNL's criticism of the Frontier model in the section on the Impact Analysis in the Memorandum of Findings.

## 7 Provisions

- I. ACM notes that PostNL N.V. and its group companies as referred to in article 2:24b of the Netherlands Civil Code (hereinafter: PostNL) have significant market power as defined in article 13a of the Dutch Postal Act in the relevant small business, medium business and large business postal markets defined in section 2 of this market analysis decision.
- II. In view of PostNL's significant market power in the aforementioned markets, ACM, having regard to the potential competition problems identified in section 4 of this market analysis decision, imposes on PostNL the following obligations on the basis of article 13b, paragraph 1, of the Dutch Postal Act, as described in greater detail in section 5 of this market analysis decision.

### *Access obligation*

- III. On the basis of article 13e, paragraph 1, of the Dutch Postal Act, ACM imposes on PostNL the obligation to fulfil reasonable requests from mail transport companies for access to the mail transport network and associated facilities of PostNL, as described in sections 5.3.3 and 5.3.4 of this market analysis decision.
- IV. This obligation applies to 24-hour bulk mail, as described in section 5.3.2 of this market analysis decision.
- V. Pursuant to article 13e, paragraph 2, of the Dutch Postal Act, PostNL must grant this access in a non-discriminatory manner and under non-discriminatory conditions, as described in section 5.3.6 of this market analysis decision.
- VI. On the basis of article 13e, paragraphs 3 and 4, of the Dutch Postal Act ACM attaches to the imposed obligation to fulfil reasonable access requests the rules included in section 5.3.5, and 5.6 of this market analysis decision.

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*Tariff obligation*

- VII. On the basis of article 13f, paragraphs 1 and 2, of the Dutch Postal Act, ACM imposes on PostNL the obligation to calculate in accordance with section 5.4 of this market analysis decision the tariffs to be charged by it to mail transport companies for access to its mail transport network and associated facilities on the basis of costs and a reasonable return and to apply the cost allocation system approved by ACM.
- VIII. On the basis of article 13f, paragraph 4, of the Dutch Postal Act, ACM attaches to the imposed obligation with regard to the calculation of the tariffs for access and the cost allocation to be applied the rules included in section 5.4.11 and 5.6 of this market analysis.

*Obligation to publish information and a reference offer*

- IX. On the basis of article 13g, paragraphs 1 and 2, of the Dutch Postal Act, ACM imposes on PostNL the obligation to publish the information referred to in section 5.5.2 of this market analysis decision and to publish the reference offer referred to in section 5.5.3 in the manner described therein.
- X. On the basis of article 13g, paragraph 3, of the Dutch Postal Act, ACM attaches to the obligation to publish information and make a reference offer the rules included in section 5.5.4 and 5.6 of this market analysis decision.

*Entry into force of the decision*

- XI. This market analysis decision comes into force on 1 August 2017.

The Netherlands Authority for Consumers and Markets  
on its behalf,

original signed  
C.A. Fonteijn  
Chairman of the Board

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**Right of appeal**

Interested parties who do not agree with this decision may lodge an appeal with the Trade and Industry Appeals Tribunal in The Hague no later than six weeks after its publication date.

The postal address is: College van Beroep voor het bedrijfsleven, Postbus 20021, 2500 EA 's-Gravenhage.

The appeal must be signed and must include at least the name and address of the submitter, the date and a description of the decision against which the appeal is being lodged. The appeal must also contain the grounds of the appeal and a copy of the disputed decision must be enclosed.

Registry fees are payable for the lodging of the appeal. Further information can be obtained from the registry of the Tribunal, which can be contacted by telephone on +31 (0)70 381 39 10 or +31 (0)70 381 39 30.

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