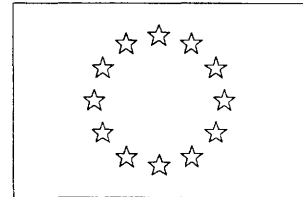


EUROPEAN COMMISSION
DIRECTORATE-GENERAL IV - COMPETITION
Information, communication and multimedia
Telecommunications and Posts ;
Information Society Coordination

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INFORMATION PACKAGE

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- **Agreement on Postal Services 3**
 (Press C/27/325, 6/11/1997)

- **Directive 97/67/EC of the European Parliament 8**
and of the Council of 15th December 1997 on
common rules for the development of the internal
market of Community postal services and the
improvement of quality of service
 (OJ No L15, 21.1.98, p. 14)

- **Notice from the Commission on the application of the 16**
Competition Rules to the postal sector and on the
assessment of certain state measures relating to
postal services
 (Press Dossier, 16/12/1997)

- **Notice 98/C 39/02 from the Commission on the 20**
application of the competition rules to the postal
sector and on the assessment of certain state
measures relating to postal services
 (OJ No C39, 6.2.98, p. 2)

- **Renewed Notification of an Agreement on Terminal 37**
Dues (Reims II) between Postal Operators
 (Case no. IV/36.748 - Reims II).
 (OJ No C53, 20.2.98, p.3)

Brussels, 6 November 1997

11846/97 (Presse 325)
C/97/325

PARLIAMENT – COUNCIL CONCILIATION COMMITTEE

Agreement on Postal Services

Under the co-decision procedure, the Conciliation Committee of representatives of the Council and the European Parliament ⁽¹⁾ reached an agreement between the two institutions on the Directive concerning common rules for development of the internal market of Community postal services and the improvement of quality of service.

The positive outcome of the procedure on this important text was formally recorded at today's meeting of the Committee (convened on another subject, the Directive on product price marking – see relevant communiqué). The two Institutions now have a period of six weeks to approve the outcome of the conciliation (the "joint text"): in the Parliament by a majority of votes cast and by qualified majority in the Council; if this double endorsement is obtained the directive will be adopted.

The Directive creates a common internal market in the postal sector. It establishes common rules to ensure greater harmonization of the conditions governing the postal sector in the Community. It also provides for the gradual and controlled liberalization of the market while guaranteeing a universal postal service to all users throughout the Member States. Furthermore, the directive aims to improve the quality of service.

Political agreement at first reading within the Council (common position) had been reached during a special session on 18 December 1996, at the end of difficult discussions which had even included a contribution from the European Council. This was an agreement by qualified majority, the Finnish, Netherlands and Swedish delegations voting against.

Taking the view that the Council's common position went towards meeting the concerns expressed by it at its first reading, the European Parliament adopted only five amendments at second reading on 16 September 1997. Only one of those amendments caused substantive difficulties for the Council: it raised a doubt as to whether Member States could retain certain special delivery arrangements for rural or outlying areas. The doubt was successfully dispelled, and the final text does maintain a derogation option (delivery to "appropriate installations" instead of home delivery). The other amendments by the European Parliament have been incorporated into the text as they stand.

⁽¹⁾ The Conciliation Committee has 30 members: 15 Members from the European Parliament and 15 representatives of the Council. Today's meeting was co-chaired by Ms Nicole FONTAINE, Vice-President of the European Parliament and by the President in Office of the Council, Ms Mady DELVAUX-STEHRÉS, Minister for Social Security, Transport and Communications of the Grand Duchy of Luxembourg.

The following is a complete summary of the main provisions in the Directive:

Objective, scope and timeframe

The Directive establishes common rules concerning:

- provision of a universal postal service in the Community;
- the criteria defining the services which may be reserved for universal service providers and the conditions governing the provision of non-reserved services;
- tariff principles and transparency of accounts for universal service provision;
- the fixing of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards;
- the harmonization of technical standards;
- the creation of independent national regulatory authorities.

The Directive will not prevent Member States from maintaining or introducing measures which are more liberal than those provided for by the Directive. Such measures must be compatible with the Treaty.

The Directive will be applicable until 31 December 2004 unless otherwise determined. To the extent that they are compatible with the Treaty, the measures taken by Member States to implement the Directive may be maintained when the Directive expires.

Universal service

Member States shall ensure that users benefit from the permanent provision of postal services of a specified quality at all points in their territory and at affordable prices for all users.

The text goes on to define the requirements which universal service must fulfil. Among others, Member States shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- a collection and a delivery every working day at least five days a week (in exceptional circumstances and geographical conditions, derogations are possible; these must be notified to the Commission and to other national regulatory authorities);
- the clearance, transport, sorting and distribution of postal items of up to 2 kg;
- the clearance, transport, sorting and distribution of postal packages of up to 10 kg;
- the services for registered items and insured items.

The limit of universal service coverage for postal packages may be increased up to 20 kg by the national regulatory authorities. All Member States shall ensure that postal packages received from other Member States and weighing up to 20 kg are delivered within their territories.

Each Member State shall ensure that provision of the universal service is guaranteed; it shall determine the obligations and rights of operators assigned to this service.

Services which may be reserved for universal service providers (Article 7)

To the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be the clearance, transport, sorting and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which is less than 5 times the public tariff for an item of correspondence in the first weight step of the swiftest standard category where such a category exists, provided that they weigh less than 350 g. In the case of the free postal service for the blind and partially sighted, derogations from the weight and price limits may be authorized.

To the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may continue to be reserved within the price and weight limits laid down above.

As a further step towards the completion of the internal market of postal services, the Council and the Parliament shall decide not later than 1 January 2000 on the further gradual and controlled liberalization of the postal market, in particular with a view to the liberalization of cross-border and direct mail, as well as on a further review of the price and weight limits, with effect from 1 January 2003, taking into account the developments, in particular economic, social and technological developments, that have occurred by that date, and also taking into account the financial equilibrium of the universal service provider(s), with a view to pursuing the goals of the present Directive.

Those decisions shall be based on a proposal from the Commission, to be tabled before the end of 1998, following a review of the sector.

Provision of non-reserved services and access to the network

The provision of non-reserved services which are outside the scope of the universal service as defined by the Directive may be subject to general authorizations given by the Member States to the extent necessary for guaranteeing compliance with essential requirements.

For non-reserved services within the scope of the universal service, Member States may introduce authorization procedures including individual licences, in order to guarantee compliance with essential requirements and to safeguard the universal service. The procedures for granting authorizations and licences shall be transparent, non-discriminatory, proportionate and based on objective criteria.

Member States may establish a compensation fund (administered by a body independent of the beneficiary or beneficiaries) in order to ensure that the universal service is safeguarded, if they determine that the universal service obligations represent an unfair financial burden for the operators concerned. In that case, the granting of authorizations may be subject to an obligation to make a financial contribution to the fund.

National regulatory authorities

Each Member State shall designate one or more national regulatory authorities (NRA) for the postal sector that are legally separate from and operationally independent of the postal operators. The NRAs will, in particular, have to ensure compliance with the obligations stemming from the Directive. They may also be charged with ensuring compliance with competition rules in the postal sector.

Tariff principles

Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

- prices must be affordable and must be such that all users have access to the services provided;
- prices must be geared to costs; Member States may decide that a uniform tariff should be applied throughout their national territory;
- the application of a uniform tariff shall not exclude the right of universal service providers to conclude individual tariff agreements with customers;
- tariffs must be transparent and non-discriminatory.

In order to ensure the cross-border provision of the universal service, Member States shall encourage their universal service providers to arrange that in their agreements on terminal dues (i.e. the remuneration for the distribution of incoming cross-border mail) for intra-Community mail, the following principles are respected:

- terminal dues shall be fixed in relation to the costs of processing and delivering incoming cross-border mail;
- levels of remuneration shall be related to the quality of service achieved;
- terminal dues shall be transparent and non-discriminatory.

Transparency of accounts

The universal service providers shall keep separate accounts within their internal accounting systems at least for each of the services within the reserved sector on the one hand and for the non-reserved services on the other. The accounts for the non-reserved services should clearly distinguish between services which are part of the universal service and services which are not.

The text also sets out the principles of allocation of costs between services.

Quality of services

Member States shall ensure that quality-of-service targets are set and published in relation to universal service in order to guarantee a postal service of good quality. Quality standards shall focus, in particular, on routing times and on the regularity and reliability of services.

These standards shall be fixed by:

- the Member States in the case of national services;
- the European Parliament and the Council in the case of intra-Community cross-border services.

The quality objective for intra-Community cross-border mail in each country shall be the following: 85% of postal items of the fastest standard category should be delivered within 3 working days after their date of deposit, and 97% within 5 working days after that date. These objectives would have to be achieved not only for each of the bilateral flows between two Member States but also for the total of these for the entirety of intra-Community traffic.

Independent performance monitoring shall be carried out at least once a year by independent bodies.

Where exceptional situations relating to infrastructure or geography so require, the National Regulatory Authorities may determine exemptions from the quality standards laid down in the Directive.

Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints. These procedures must enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation.

Review clause

Apart from the review of the provisions concerning the reserved services (see above) the Commission shall submit not later than 31 December 2000, a report on the application of the Directive, accompanied, where appropriate, by proposals.

Deadline for implementation

Member States would have one year to take the measures necessary to comply with the Directive, starting with the date of its entry into force.

For further information: Press Service, tel. + 32 2 285.62.19 or 285.74.59

DIRECTIVE 97/67/EC OF THE EUROPEAN PARLIAMENT AND OF 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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57 (2), 66 and 100a thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Having regard to the opinion of the Committee of the Regions ⁽³⁾,

Having regard to the resolution of the European Parliament of 22 January 1993 concerning the green paper on the development of the single market for postal services ⁽⁴⁾,

Having regard to the Council resolution of 7 February 1994 on the development of Community postal services ⁽⁵⁾,

Acting in accordance with the procedure laid down in Article 189b of the Treaty, in the light of the joint text approved by the Conciliation Committee on 7 November 1997 ⁽⁶⁾,

- (1) Whereas measures should be adopted with the aim of establishing the internal market in accordance with Article 7a of the Treaty; whereas this market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;
- (2) Whereas the establishment of the internal market in the postal sector is of proven importance for the economic and social cohesion of the Community,

in that postal services are an essential instrument of communication and trade;

- (3) Whereas on 11 June 1992 the Commission presented a Green Paper on the development of the single market for postal services and, on 2 June 1993, a Communication on the guidelines for the development of Community postal services;
- (4) Whereas the Commission has conducted wide-ranging public consultation on those aspects of postal services that are of interest to the Community and the interested parties in the postal sector have communicated their observations to the Commission;
- (5) Whereas the current extent of the universal postal service and the conditions governing its provision vary significantly from one Member State to another; whereas, in particular, performance in terms of quality of services is very unequal amongst Member States;
- (6) Whereas cross-border postal links do not always meet the expectations of users and European citizens, and performance, in terms of quality of service with regard to Community cross-border postal services, is at the moment unsatisfactory;
- (7) Whereas the disparities observed in the postal sector have considerable implications for those sectors of activity which rely especially on postal services and effectively impede the progress towards internal Community cohesion, in that the regions deprived of postal services of sufficiently high quality find themselves at a disadvantage as regards both their letter service and the distribution of goods;
- (8) Whereas measures seeking to ensure the gradual and controlled liberalisation of the market and to secure a proper balance in the application thereof are necessary in order to guarantee, throughout the Community, and subject to the obligations and rights of the universal service providers, the free provision of services in the postal sector itself;
- (9) Whereas action at Community level to ensure greater harmonisation of the conditions governing the postal sector is therefore necessary and steps must consequently be taken to establish common rules;

⁽¹⁾ OJ C 322, 2. 12. 1995, p. 22, and OJ C 300, 10. 10. 1996, p. 22.

⁽²⁾ OJ C 174, 17. 6. 1996, p. 41.

⁽³⁾ OJ C 337, 11. 11. 1996, p. 28.

⁽⁴⁾ OJ C 42, 15. 2. 1993, p. 240.

⁽⁵⁾ OJ C 48, 16. 2. 1994, p. 3.

⁽⁶⁾ Opinion of the European Parliament of 9 May 1996 (OJ C 152, 27. 5. 1996, p. 20), Council Common Position of 29 April 1997 (OJ C 188, 19. 6. 1997, p. 9) and Decision of the European Parliament of 16 September 1997 (OJ C 304, 6. 10. 1997, p. 34); Decision of the European Parliament of 19 November 1997 and Decision of the Council of 1 December 1997.

- (10) Whereas, in accordance with the principle of subsidiarity, a set of general principles should be adopted at Community level, whilst the choice of the exact procedures should be a matter for the Member States, which should be free to choose the system best adapted to their own circumstances;
- (11) Whereas it is essential to guarantee at Community level a universal postal service encompassing a minimum range of services of specified quality to be provided in all Member States at an affordable price for the benefit of all users, irrespective of their geographical location in the Community;
- (12) Whereas the aim of the universal services is to offer all users easy access to the postal network through the provision, in particular, of a sufficient number of access points and by ensuring satisfactory conditions with regard to the frequency of collections and deliveries; whereas the provision of the universal service must meet the fundamental need to ensure continuity of operation, whilst at the same time remaining adaptable to the needs of users as well as guaranteeing them fair and non-discriminatory treatment;
- (13) Whereas universal service must cover national services as well as cross-border services;
- (14) Whereas users of the universal service must be given adequate information on the range of services offered, the conditions governing their supply and use, the quality of the services provided, and the tariffs;
- (15) Whereas the provisions of this Directive relating to universal service provision are without prejudice to the right of universal service operators to negotiate contracts with customers individually;
- (16) Whereas the maintenance of a range of those services that may be reserved, in compliance with the rules of the Treaty and without prejudice to the application of the rules on competition, appears justified on the grounds of ensuring the operation of the universal service under financially balanced conditions; whereas the process of liberalisation should not curtail the continuing supply of certain free services for blind and partially sighted persons introduced by the Member States;
- (17) Whereas items of correspondence weighing 350 grammes and over represent less than 2 % of letter volume and less than 3 % of the receipts of the public operators; whereas the criteria of price (five times the basic tariff) will better permit the distinction between the reserved service and the express service, which is liberalised;
- (18) Whereas, in view of the fact that the essential difference between express mail and universal postal services lies in the value added (whatever form it takes) provided by express services and perceived by customers, the most effective way of determining the extra value perceived is to consider the extra price that customers are prepared to pay, without prejudice, however, to the price limit of the reserved area which must be respected;
- (19) Whereas it is reasonable to allow, on an interim basis, for direct mail and cross-border mail to continue to be capable of reservation within the price and weight limits provided; whereas, as a further step towards the completion of the internal market of postal services, a decision on the further gradual controlled liberalisation of the postal market, in particular with a view to the liberalisation of cross-border and direct mail as well as on a further review of the price and weight limits, should be taken by the European Parliament and the Council not later than 1 January 2000, on a proposal from the Commission following a review of the sector;
- (20) Whereas, for reasons of public order and public security, Member States may have a legitimate interest in conferring on one or more entities designated by them the right to site on the public highway letter-boxes intended for the reception of postal items; whereas, for the same reasons, they are entitled to appoint the entity or entities responsible for issuing postage stamps identifying the country of origin and those responsible for providing the registered mail service used in the course of judicial or administrative procedures in accordance with their national legislation; whereas they may also indicate membership of the European Union by integrating the 12-star symbol;
- (21) Whereas new services (services quite distinct from conventional services) and document exchange do not form part of the universal service and consequently there is no justification for their being reserved to the universal service providers; whereas this applies equally to self-provision (provision of postal services by the natural or legal person who is the originator of the mail, or collection and routing of these items by a third party acting solely on behalf of that person), which does not fall within the category of services;

- (22) Whereas Member States should be able to regulate, by appropriate authorization procedures, on their territory, the provision of postal services which are not reserved to the universal service providers; whereas those procedures must be transparent, non-discriminatory, proportionate and based on objective criteria;
- (23) Whereas the Member States should have the option of making the grant of licences subject to universal service obligations or contributions to a compensation fund intended to compensate the universal service provider for the provision of services representing an unfair financial burden; whereas Member States should be able to include in the authorisations an obligation that the authorised activities must not infringe the exclusive or special rights granted to the universal service providers for the reserved services; whereas an identification system for direct mail may be introduced for the purposes of supervision where direct mail is liberalised;
- (24) Whereas measures necessary for the harmonisation of authorisation procedures laid down by the Member States governing the commercial provision to the public of non-reserved services will have to be adopted;
- (25) Whereas, should this prove necessary, measures shall be adopted to ensure the transparency and non-discriminatory nature of conditions governing access to the public postal network in Member States;
- (26) Whereas, in order to ensure sound management of the universal service and to avoid distortions of competition, the tariffs applied to the universal service should be objective, transparent, non-discriminatory and geared to costs;
- (27) Whereas the remuneration for the provision of the intra-Community cross-border mail service, without prejudice to the minimum set of obligations derived from Universal Postal Union acts, should be geared to cover the costs of delivery incurred by the universal service provider in the country of destination; whereas this remuneration should also provide an incentive to improve or maintain the quality of the cross-border service through the use of quality-of-service targets; whereas this would justify suitable systems providing for an appropriate coverage of costs and related specifically to the quality of service achieved;
- (28) Whereas separate accounts for the different reserved services and non-reserved services are necessary in order to introduce transparency into the actual costs of the various services and in order to ensure that cross-subsidies from the reserved sector to the non-reserved sector do not adversely affect the competitive conditions in the latter;
- (29) Whereas, in order to ensure the application of the principles set out in the previous three recitals, universal service providers should implement, within a reasonable time limit, cost accounting systems, which can be independently verified, by which costs can be allocated to services as accurately as possible on the basis of transparent procedures; whereas such requirements can be fulfilled, for example, by implementation of the principle of fully distributed costing; whereas such cost-accounting systems may not be required in circumstances where genuine conditions of open competition exist;
- (30) Whereas consideration should be given to the interests of users, who are entitled to services of a high quality; whereas, therefore, every effort must be made to improve and enhance the quality of services provided at Community level; whereas such improvements in quality require Member States to lay down standards, to be attained or surpassed by the universal service providers, in respect of the services forming part of the universal service;
- (31) Whereas the quality of service expected by users constitutes an essential aspect of the services provided; whereas the evaluation standards for this quality of service and the levels of quality achieved must be published in the interests of users; whereas it is necessary to have available harmonised quality-of-service standards and a common methodology for measurement in order to be able to evaluate the convergence of the quality of service throughout the Community;
- (32) Whereas national quality standards consistent with Community standards must be determined by Member States; whereas, in the case of intra-Community cross-border services requiring the combined efforts of at least two universal service providers from two different Member States, quality standards must be defined at Community level;
- (33) Whereas compliance with these standards must be independently verified at regular intervals and on a harmonised basis; whereas users must have the right to be informed of the results of this verification and Member States should ensure that corrective action is taken where those results demonstrate that the standards are not being met;

- (34) Whereas Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁽¹⁾ applies to postal operators;
- (35) Whereas the need for improvement of quality of service means that disputes have to be settled quickly and efficiently; whereas, in addition to the forms of legal redress available under national and Community law, a procedure dealing with complaints should be provided, which should be transparent, simple and inexpensive and should enable all relevant parties to participate;
- (36) Whereas progress in the interconnection of postal networks and the interests of users require that technical standardisation be encouraged; whereas technical standardisation is indispensable for the promotion of interoperability between national networks and for an efficient Community universal service;
- (37) Whereas guidelines on European harmonisation provide for specialised technical standardisation activities to be entrusted to the European Committee for Standardisation;
- (38) Whereas a committee should be established to assist the Commission with the implementation of this Directive, particularly in relation to the future work on the development of measures relating to the quality of Community cross-border service and technical standardisation;
- (39) Whereas, in order to ensure the proper functioning of the universal service and to ensure undistorted competition in the non-reserved sector, it is important to separate the functions of the regulator, on the one hand, and the operator, on the other; whereas no postal operator may be both judge and interested party; whereas it is for the Member State to define the statute of one or more national regulatory authorities, which may be chosen from public authorities or independent entities appointed for that purpose;
- (40) Whereas the effects of the harmonised conditions on the functioning of the internal market in postal services will need to be the subject of an assessment; whereas, therefore, the Commission will present a report to the European Parliament and the Council on the application of this Directive, including the appropriate information on developments in the sector, particularly concerning economic, social, employment and technological aspects, as well as on quality of service, three years following the date of its entry into force, and in any event no later than 31 December 2000;
- (41) Whereas this Directive does not affect the application of the rules of the Treaty, and in particular its rules on competition and the freedom to provide services;
- (42) Whereas nothing shall prevent Member States from maintaining in force or introducing measures for the postal sector which are more liberal than those provided for by this Directive, nor, should this Directive lapse, from maintaining in force measures which they have introduced in order to implement it, provided in each case that such measures are compatible with the Treaty;
- (43) Whereas it is appropriate that this Directive should apply until 31 December 2004 unless otherwise decided by the European Parliament and the Council on the basis of a proposal from the Commission;
- (44) Whereas this Directive does not apply to any activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law;
- (45) Whereas this Directive does not, in the case of undertakings which are not established in the Community, prevent the adoption of measures in accordance with both Community law and existing international obligations designed to ensure that nationals of the Member States enjoy similar treatment in third countries; whereas Community undertakings should benefit in third countries from treatment and effective access that is comparable to the treatment and access to the market which is conferred on nationals of the countries concerned within the Community context,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1

Objective and scope

Article 1

This Directive establishes common rules concerning:

- the provision of a universal postal service within the Community,
- the criteria defining the services which may be reserved for universal service providers and the conditions governing the provision of non-reserved services,

⁽¹⁾ OJ L 95, 21. 4. 1993, p. 29.

- tariff principles and transparency of accounts for universal service provision,
- the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards;
- the harmonisation of technical standards,
- the creation of independent national regulatory authorities.

Article 2

For the purposes of this Directive, the following definitions shall apply:

1. *postal services*: services involving the clearance, sorting, transport and delivery of postal items;
2. *public postal network*: the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of:
 - the clearance of postal items covered by a universal service obligation from access points throughout the territory,
 - the routing and handling of those items from the postal network access point to the distribution centre,
 - distribution to the addresses shown on items;
3. *access points*: physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers;
4. *clearance*: the operation of collecting postal items deposited at access points;
5. *distribution*: the process from sorting at the distribution centre to delivery of postal items to their addressees;
6. *postal item*: an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;
7. *item of correspondence*: a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence;
8. *direct mail*: a communication consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number as well as other modifications which do not alter the nature of the message, which is sent to a significant number of addressees, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. The national regulatory authority shall interpret the term 'significant number of addressees' within each Member State and shall publish an appropriate definition. Bills, invoices, financial statements and other non-identical messages shall not be regarded as direct mail. A communication combining direct mail with other items within the same wrapping shall not be regarded as direct mail. Direct mail shall include cross-border as well as domestic direct mail;
9. *registered item*: a service providing a flat-rate guarantee against risks of loss, theft or damage and supplying the sender, where appropriate upon request, with proof of the handing in of the postal item and/or of its delivery to the addressee;
10. *insured item*: a service insuring the postal item up to the value declared by the sender in the event of loss, theft or damage;
11. *cross-border mail*: mail from or to another Member State or from or to a third country;
12. *document exchange*: provision of means, including the supply of ad hoc premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service;
13. *universal service provider*: the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with Article 4;
14. *authorisations*: means any permission setting out rights and obligations specific to the postal sector and allowing undertakings to provide postal services and where applicable, to establish and/or operate postal networks for the provision of such services, in the form of a 'general authorisation' or 'individual licence' as defined below:
 - 'general authorisation' means an authorisation regardless of whether it is regulated by a 'class licence' or under general law and regardless of whether such regulation requires registration or declaration procedures, which does not require the undertaking concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation,

— 'individual licence' means an authorisation which is granted by a national regulatory authority and which gives an undertaking specific rights, or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority;

15. *terminal dues*: the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country;
16. *sender*: a natural or legal person responsible for originating postal items;
17. *users*: any natural or legal person benefiting from universal service provision as a sender or an addressee;
18. *national regulatory authority*: the body or bodies, in each Member State, to which the Member State entrusts, *inter alia*, the regulatory functions falling within the scope of this Directive;
19. *essential requirements*: general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons are the confidentiality of correspondence, security of the network as regards the transport of dangerous goods and, where justified, data protection, environmental protection and regional planning.

Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy.

CHAPTER 2

Universal service

Article 3

1. Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.
2. To this end, Member States shall take steps to ensure that the density of the points of contact and of the access points takes account of the needs of users.
3. They shall take steps to ensure that the universal service provider(s) guarantee(s) every working day and not less than five days a week, save in circumstances or geographical conditions deemed exceptional by the national regulatory authorities, as a minimum:

— one clearance,

— one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations.

Any exception or derogation granted by a national regulatory authority in accordance with this paragraph must be communicated to the Commission and to all national regulatory authorities.

4. Each Member State shall adopt the measures necessary to ensure that the universal service includes the following minimum facilities:

- the clearance, sorting, transport and distribution of postal items up to two kilograms,
- the clearance, sorting, transport and distribution of postal packages up to 10 kilograms,
- services for registered items and insured items.

5. The national regulatory authorities may increase the weight limit of universal service coverage for postal packages to any weight not exceeding 20 kilograms and may lay down special arrangements for the door-to-door delivery of such packages.

Notwithstanding the weight limit of universal service coverage for postal packages established by a given Member State, Member States shall ensure that postal packages received from other Member States and weighing up to 20 kilograms are delivered within their territories.

6. The minimum and maximum dimensions for the postal items in question shall be those laid down in the Convention and the Agreement concerning Postal Parcels adopted by the Universal Postal Union.

7. The universal service as defined in this Article shall cover both national and cross-border services.

Article 4

Each Member State shall ensure that the provision of the universal service is guaranteed and shall notify the Commission of the steps it has taken to fulfil this obligation and, in particular, the identity of its universal service provider(s). Each Member State shall determine in accordance with Community law the obligations and rights assigned to the universal service provider(s) and shall publish them.

Article 5

1. Each Member State shall take steps to ensure that universal service provision meets the following requirements:

- it shall offer a service guaranteeing compliance with the essential requirements,

- it shall offer an identical service to users under comparable conditions,
- it shall be made available without any form of discrimination whatsoever, especially without discrimination arising from political, religious or ideological considerations,
- it shall not be interrupted or stopped except in cases of force majeure,
- it shall evolve in response to the technical, economic and social environment and to the needs of users.

2. The provisions of paragraph 1 shall not preclude measures which the Member States take in accordance with requirements relating to public interest recognized by the Treaty, in particular Articles 36 and 56 thereof, concerning, *inter alia*, public morality, public security, including criminal investigations, and public policy.

Article 6

Member States shall take steps to ensure that users are regularly given sufficiently detailed and up-to-date information by the universal service provider(s) regarding the particular features of the universal services offered, with special reference to the general conditions of access to these services as well as to prices and quality standard levels. This information shall be published in an appropriate manner.

Member States shall notify the Commission, within 12 months of the date of entry into force of this Directive, how the information to be published in accordance with the first subparagraph is being made available. Any subsequent modifications shall be notified to the Commission at the earliest opportunity.

CHAPTER 3

Harmonization of the services which may be reserved

Article 7

1. To the extent necessary to ensure the maintenance of universal service, the services which may be reserved by each Member State for the universal service provider(s) shall be the clearance, sorting, transport and delivery of items of domestic correspondence, whether by accelerated delivery or not, the price of which is less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category where such category exists, provided that they weigh less than 350 grams. In the case of the free postal service for blind and partially sighted persons, exceptions to the weight and price restrictions may be permitted.

2. To the extent necessary to ensure the maintenance of universal service, cross-border mail and direct mail may

continue to be reserved within the price and weight limits laid down in paragraph 1.

3. As a further step towards the completion of the internal market of postal services, the European Parliament and the Council shall decide not later than 1 January 2000 and without prejudice to the competence of the Commission, on the further gradual and controlled liberalisation of the postal market, in particular with a view to the liberalisation of cross-border and direct mail, as well as on a further review of the price and weight limits, with effect from 1 January 2003, taking into account the developments, in particular economic, social and technological developments, that have occurred by that date, and also taking into account the financial equilibrium of the universal service provider(s), with a view to further pursuing the goals of this Directive.

Such decisions shall be based upon a proposal from the Commission to be tabled before the end of 1998, following a review of the sector. Upon request by the Commission, Member States shall provide all the information necessary for completion of the review.

4. Document exchange may not be reserved.

Article 8

The provisions of Article 7 shall be without prejudice to Member States' right to organise the siting of letter boxes on the public highway, the issue of postage stamps and the registered mail service used in the course of judicial or administrative procedures in accordance with their national legislation.

CHAPTER 4

Conditions governing the provision of non-reserved services and access to the network

Article 9

1. For non-reserved services which are outside the scope of the universal service as defined in Article 3, Member States may introduce general authorisations to the extent necessary in order to guarantee compliance with the essential requirements.

2. For non-reserved services which are within the scope of the universal service as defined in Article 3, Member States may introduce authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the essential requirements and to safeguard the universal service.

The granting of authorisations may:

- where appropriate, be made subject to universal service obligations,
- if necessary, impose requirements concerning the quality, availability and performance of the relevant services,

— be made subject to the obligation not to infringe the exclusive or special rights granted to the universal service provider(s) for the reserved postal services under Article 7(1) and (2).

3. The procedures described in paragraphs 1 and 2 shall be transparent, non-discriminatory, proportionate and based on objective criteria. Member States must ensure that the reasons for refusing an authorisation in whole or in part are communicated to the applicant and must establish an appeal procedure.

4. In order to ensure that the universal service is safeguarded, where a Member State determines that the universal service obligations, as provided for by this Directive, represent an unfair financial burden for the universal service provider, it may establish a compensation fund administered for this purpose by a body independent of the beneficiary or beneficiaries. In this case, it may make the granting of authorisation subject to an obligation to make a financial contribution to that fund. The Member State must ensure that the principles of transparency, non-discrimination and proportionality are respected in establishing the compensation fund and when fixing the level of the financial contributions. Only those services set out in Article 3 may be financed in this way.

5. Member States may provide for an identification system for direct mail, allowing the supervision of such services where they are liberalised.

Article 10

1. The European Parliament and the Council, acting on a proposal from the Commission and on the basis of Articles 57(2), 66 and 100a of the Treaty, shall adopt the measures necessary for the harmonisation of the procedures referred to in Article 9 governing the commercial provision to the public of non-reserved postal services.

2. The harmonisation measures referred to in paragraph 1 shall concern, in particular, the criteria to be observed and the procedures to be followed by the postal operator, the manner of publication of those criteria and procedures, as well as the appeal procedures to be followed.

Article 11

The European Parliament and the Council, acting on a proposal from the Commission and on the basis of Articles 57(2), 66 and 100a of the Treaty, shall adopt such harmonisation measures as are necessary to ensure that users and the universal service provider(s) have access to

the public postal network under conditions which are transparent and non-discriminatory.

CHAPTER 5

Tariff principles and transparency of accounts

Article 12

Member States shall take steps to ensure that the tariffs for each of the services forming part of the provision of the universal service comply with the following principles:

- prices must be affordable and must be such that all users have access to the services provided,
- prices must be geared to costs; Member States may decide that a uniform tariff should be applied throughout their national territory,
- the application of a uniform tariff does not exclude the right of the universal service provider(s) to conclude individual agreements on prices with customers,
- tariffs must be transparent and non-discriminatory.

Article 13

1. In order to ensure the cross-border provision of the universal service, Member States shall encourage their universal service providers to arrange that in their agreements on terminal dues for intra-Community cross-border mail, the following principles are respected:

- terminal dues shall be fixed in relation to the costs of processing and delivering incoming cross-border mail,
- levels of remuneration shall be related to the quality of service achieved,
- terminal dues shall be transparent and non-discriminatory.

2. The implementation of these principles may include transitional arrangements designed to avoid undue disruption on postal markets or unfavourable implications for economic operators provided there is agreement between the operators of origin and receipt; such arrangements shall, however, be restricted to the minimum required to achieve these objectives.

Article 14

1. Member States shall take the measures necessary to ensure, within two years of the date of entry into force of this Directive, that the accounting of the universal service providers is conducted in accordance with the provisions of this Article.

2. The universal service providers shall keep separate accounts within their internal accounting systems at least for each of the services within the reserved sector on the one hand and for the non-reserved services on the other. The accounts for the non-reserved services should clearly distinguish between services which are part of the universal service and services which are not. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

3. The accounting systems referred to in paragraph 2 shall, without prejudice to paragraph 4, allocate costs to each of the reserved and to the non-reserved services respectively in the following manner:

(a) costs which can be directly assigned to a particular service shall be so assigned;

(b) common costs, that is costs which cannot be directly assigned to a particular service, shall be allocated as follows:

(i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;

(ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;

(iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the reserved services and, on the other hand, to the other services.

4. Other cost accounting systems may be applied only if they are compatible with paragraph 2 and have been approved by the national regulatory authority. The Commission shall be informed prior to their application.

5. National regulatory authorities shall ensure that compliance with one of the cost accounting systems described in paragraphs 3 or 4 is verified by a competent body which is independent of the universal service provider. Member States shall ensure that a statement concerning compliance is published periodically.

6. The national regulatory authority shall keep available, to an adequate level of detail, information on the cost accounting systems applied by a universal service provider, and shall submit such information to the Commission on request.

7. On request, detailed accounting information arising from these systems shall be made available in confidence to the national regulatory authority and to the Commission.

8. Where a given Member State has not reserved any of the services reservable under Article 7 and as not established a compensation fund for universal service provision, as permitted under Article 9(4), and where the national regulatory authority is satisfied that none of the designated universal service providers in that Member State is in receipt of State subvention, hidden or otherwise, the national regulatory authority may decide not to apply the requirements of paragraphs 2, 3, 4, 5, 6 and 7 of this Article. The national regulatory authority shall inform the Commission of all such decisions.

Article 15

The financial accounts of all universal service providers shall be drawn up, submitted to audit by an independent auditor and published in accordance with the relevant Community and national legislation to commercial undertakings.

CHAPTER 6

Quality of services

Article 16

Member States shall ensure that quality-of-service standards are set and published in relation to universal service in order to guarantee a postal service of good quality.

Quality standards shall focus, in particular, on routing times and on the regularity and reliability of services.

These standards shall be set by:

- the Member States in the case of national services,
- the European Parliament and the Council in the case of intra-Community cross-border services (see Annex). Future adjustment of these standards to technical progress or market developments shall be made in accordance with the procedure laid down in Article 21.

Independent performance monitoring shall be carried out at least once a year by external bodies having no links with the universal service providers under standardised conditions to be specified in accordance with the procedure laid down in Article 21 and shall be the subject of reports published at least once a year.

Article 17

Member States shall lay down quality standards for national mail and shall ensure that they are compatible with those laid down for intra-Community cross-border services.

Member States shall notify their quality standards for national services to the Commission, who will publish them in the same manner as the standards for intra-Community cross-border services referred to in Article 18.

National regulatory authorities shall ensure that independent performance monitoring is carried out in accordance with the fourth subparagraph of Article 16, that the results are justified, and that corrective action is taken where necessary.

Article 18

1. In accordance with Article 16, quality standards for intra-Community cross-border services are laid down in the Annex.

2. Where exceptional situations relating to infrastructure or geography so require, the national regulatory authorities may determine exemptions from the quality standards provided for in the Annex. Where national regulatory authorities determine exemptions in this manner, they shall notify the Commission forthwith. The Commission shall submit an annual report of the notifications received during the previous 12 months to the Committee established under Article 21 for its information.

3. The Commission shall publish in the *Official Journal of the European Communities* any adjustments made to the quality standards for intra-Community cross-border services and shall take steps to ensure the regular independent monitoring and the publication of performance levels certifying compliance with these standards and the progress accomplished. National regulatory authorities shall ensure that corrective action is taken where necessary.

Article 19

Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards.

Member States shall adopt measures to ensure that those procedures enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation.

Without prejudice to other possibilities of appeal under national and Community legislation, Member States shall ensure that users, acting individually or, where permitted by national law, jointly with organisations representing the interests of users and/or consumers, may bring before

the competent national authority cases where users' complaints to the universal service provider have not been satisfactorily resolved.

In accordance with Article 16, Member States shall ensure that the universal service providers publish, together with the annual report on the monitoring of their performance, information on the number of complaints and the manner in which they have been dealt with.

CHAPTER 7

Harmonisation of technical standards

Article 20

The harmonisation of technical standards shall be continued, taking into account in particular the interests of users.

The European Committee for Standardisation shall be entrusted with drawing up technical standards applicable in the postal sector on the basis of remits to it pursuant to the principles set out in Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations⁽¹⁾.

This work shall take account of the harmonisation measures adopted at international level and in particular those decided upon within the Universal Postal Union.

The standards applicable shall be published in the *Official Journal of the European Communities* once a year.

Member States shall ensure that universal service providers refer to the standards published in the *Official Journal* where necessary in the interests of users and in particular when they supply the information referred to in Article 6.

The Committee provided for in Article 21 shall be kept informed of the discussions within the European Committee for Standardisation and the progress achieved in this area by that body.

CHAPTER 8

The committee

Article 21

The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by a representative of the Commission. The committee shall establish its own rules of procedure.

⁽¹⁾ OJ L 109, 26. 4. 1983, p. 8. Directive as last amended by Commission Decision 96/139/EC (OJ L 32, 10. 2. 1996, p. 31).

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken.

The Council shall act by a qualified majority.

If, upon the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

CHAPTER 9

The national regulatory authority

Article 22

Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators.

Member States shall inform the Commission which national regulatory authorities they have designated to carry out the tasks arising from this Directive.

The national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive. They may also be charged with ensuring compliance with competition rules in the postal sector.

CHAPTER 10

Final provisions

Article 23

Without prejudice to Article 7(3), three years after the date of entry into force of this Directive, and in any event no later than 31 December 2000, the Commission shall

submit a report to the European Parliament and the Council on the application of this Directive, including the appropriate information about developments in the sector, particularly concerning economic, social, employment and technological aspects, as well as about quality of service.

The report shall be accompanied where appropriate by proposals to the European Parliament and the Council.

Article 24

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 12 months after the date of its entry into force. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication.

Article 25

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

Article 26

1. This Directive shall not prevent any Member State from maintaining or introducing measures which are more liberal than those provided for by this Directive. Such measures must be compatible with the Treaty.

2. Should this Directive lapse, the measures taken by the Member States to implement it may be maintained, to the extent that they are compatible with the Treaty.

Article 27

The provisions of this Directive, with the exception of Article 26, shall apply until 31 December 2004 unless otherwise decided in accordance with Article 7(3).

Article 28

This Directive is addressed to the Member States.

Done at Brussels, 15 December 1997.

For the European Parliament

The President

J.M. GIL-ROBLES

For the Council

The President

J.-C. JUNCKER

ANNEX

Quality standards for intra-Community cross-border mail

The quality standards for intra-Community cross-border mail in each country are to be established in relation to the time limit for routing measured from end to end (*) for postal items of the fastest standard category according to the formula $D + n$, where D represents the date of deposit (**) and n the number of working days which elapse between that date and that delivery to the addressee.

Quality standards for intra-Community cross-border mail	
Time limit	Objective
D + 3	85 % of items
D + 5	97 % of items

The standards must be achieved not only for the entirety of intra-Community traffic but also for each of the bilateral flows between two Member States.

(*) End-to-end routing is measured from the access point to the network to the point of delivery to the addressee.
 (**) The date of deposit to be taken into account shall be the same day as that on which the item is deposited, provided that deposit occurs before the last collection time notified from the access point to the network in question. When deposit takes place after this time limit, the date of deposit to be taken into consideration will be that of the following day of collection.

15d

PRESS DOSSIER

**NOTICE FROM THE COMMISSION ON THE APPLICATION OF THE
COMPETITION RULES TO THE POSTAL SECTOR AND ON THE
ASSESSMENT OF CERTAIN STATE MEASURES RELATING TO
POSTAL SERVICES**

Subsequent to the submission by the Commission of a Green Paper on the development of the single market for postal services and of a communication to the European Parliament and the Council, setting out the results of the consultations on the Green Paper and the measures advocated by the Commission, a substantial discussion has taken place on the future regulatory environment for the postal sector in the Community. In 1994, the Council invited the Commission to propose measures i.e. defining a harmonised universal service and the postal services which could be reserved. In July 1995, the Commission proposed a package of measures concerning postal services which consisted of a proposal for a European Parliament and Council Directive on common rules for the development of Community postal services and the improvement of quality of service as well as of a draft of the present Notice on the application of the competition rules.

This Notice, which complements the harmonisation measures proposed by the Commission, builds on the results of these discussions in accordance with the principles established in Council Resolution (94/C 48/02) of 7 February 1994 on the development of Community postal services. It takes account of the comments received during the public consultation on the draft of this Notice published in December 1995, of the European Parliament's Resolution on this draft adopted on 12 December 1996, as well as of the discussions on the proposed Directive in the European Parliament and in Council.

The Commission considers that because they are an essential vehicle of communication and trade, postal services are vital for all economic and social activities. New postal services are emerging and market certainty is needed to favour investment and the creation of new employment in the sector. As recognised by the Court of Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the postal sector. The Court explained that "in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition" and that these rules "must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."

Questions are therefore frequently put to the Commission on the attitude it intends to take up, for purposes of the implementation of the competition rules contained in the EC-Treaty, with regard to the behaviour of postal operators and with regard to State measures relating to public undertakings and undertakings to which the Member States grant special or exclusive rights in the postal sector.

This Notice sets out the Commission's interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases, while maintaining the necessary safeguards for the provision of a universal service, and gives to enterprises and Member States clear guidelines so as to avoid infringements of the Treaty. This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

Furthermore, this Notice sets out the approach the Commission intends to take when applying the competition rules to the behaviour of postal operators and when assessing the compatibility of State measures restricting the freedom to provide service and/or to compete in the postal markets with the competition rules and other rules of the Treaty. In addition, it addresses the issue of non-discriminatory access to the postal network and the safeguards required to ensure fair competition in the sector.

Especially on account of the development of new postal services by private and public operators, certain Member States have revised, or are revising, their postal legislation in order to restrict the monopoly of their postal organisations to that considered necessary for the realisation of the public interest objective. At the same time, the Commission is faced with a growing number of complaints and cases under competition law on which it must take position. At this stage, a Notice is therefore the appropriate instrument to provide guidance to Member States and postal operators, including those enjoying special or exclusive rights, to ensure a correct implementation of the competition rules. This Notice, though it cannot be exhaustive, aims to provide the necessary guidance for the correct interpretation, in particular, of Articles 59, 85, 86, 90, and 92 of the EC Treaty in individual cases. By issuing the present Notice, the Commission is taking steps to bring transparency and to facilitate investment decisions of all postal operators, in the interest of the users of postal services in the European Union.

As the Commission explained in its communication of 11.09.1996 on "Services of General Interest in Europe", solidarity and equal treatment within a market economy are fundamental Community objectives. These objectives are furthered by services of general interest. Europeans have come to expect high quality services at affordable prices, and many of them even view services of general interest as social rights.

As regards, in particular, the postal sector, consumers are becoming increasingly assertive in exercising their rights and desires. Worldwide competition is forcing companies using these services to seek out better price deals comparable to those enjoyed by their competitors. New technologies, such as fax or electronic mail, are putting enormous pressures on the traditional postal services. These developments have given rise to worries about the future of these services accompanied by concerns over employment and economic and social cohesion. The economic importance of these services is considerable. Hence the importance of modernizing and developing services of general interest, since they contribute so much to European competitiveness, social solidarity and quality of life.

The Community's aim is to support the competitiveness of the European economy in an increasingly competitive world and to give consumers more choice, better quality and lower prices, at the same time as helping, through its policies, to strengthen economic and social cohesion between the Member States and reduce certain inequalities. Postal services have a key role to play here. The Community is committed to promoting their functions of general interest, as solemnly confirmed in the new Article 7d, introduced by the Amsterdam Treaty, while improving their efficiency. Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, these mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion in the Union may not be attained. The public authority must then ensure that the general interest is taken into account.

The traditional structures of some services of general economic interest, which are organized on the basis of national monopolies, constitute a challenge for European economic integration. This includes postal monopolies, even as these are justified, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector.

The real challenge is to ensure smooth interplay between the requirements of the single European market in terms of free movement, economic performance and dynamism, free competition, and the general interest objectives. This interplay must benefit individual citizens and society as a whole. This is a difficult balancing act, since the goalposts are constantly moving: the single market is continuing to expand and public services, far from being fixed, are having to adapt to new requirements.

The basic concept of universal service, which was originated by the Commission, is to ensure the provision of high quality service to all at prices everyone can afford. Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices: openness in management, price-setting and funding and scrutiny by bodies independent of those operating the services. These criteria are not always all met at national level, but where they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services. Universal service is the expression in Europe of the requirements and special features of the European model of society in a policy which combines a dynamic market, cohesion and solidarity.

High quality universal postal services are of great importance for private and business customers alike. In view of the development of electronic commerce their importance will even increase in the very near future. Postal services have a valuable role to play here.

As regards the postal sector, an harmonization Directive has been adopted on 1 December 1997 by the European Parliament and the Council on the basis of a proposal made by the Commission in 1995 and amended subsequently. This Directive aims to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up the markets in a controlled way.

The basis of the proposal is to safeguard the postal service as a universal service in the long term. The Directive imposes on Member States a minimum harmonized standard of universal services including a high quality service countrywide with regular guaranteed deliveries at prices everyone can afford. This involves the collection, transport, sorting and delivery of letters as well as catalogues and parcels within certain price and weight limits. It also covers registered and insured ("valeur déclarée") items and would apply to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability.

To guarantee the funding of the universal service, a sector may be reserved for the operators of this universal service. The scope of the reserved sector has been harmonized in the Directive. According to the Directive, Member States can only grant exclusive rights for the provision of postal services to the extent that this is necessary to guarantee the maintenance of the universal service. Moreover, the Directive establishes the maximum scope that Member States may reserve in order to achieve this objective. Any additional funding which may be required for the universal service may be found by writing certain obligations into commercial operators' franchises; for example, they may be required to make financial contributions to an equalization fund administered for this purpose by a body independent of the beneficiary or beneficiaries, as foreseen in Article 9 of the postal Directive.

The Directive sets up a minimum common standard of universal services and establishes common rules concerning the reserved area. The Directive therefore increases legal certainty as regards the legality of some exclusive and special rights in the postal sector. There are, however, State measures that are not dealt with in the Directive and that can be in conflict with the EC Treaty rules addressed to Member States. The autonomous behaviors of the postal operators also remain subject to the competition rules of the EC Treaty.

Article 90§2 of the Treaty foresees that suppliers of services of general interest may be exempted from the rules in the Treaty, to the extent that the application of these rules would obstruct the performance of the general interest tasks for which they are responsible. This exemption from the Treaty rules is however subject to the principle of proportionality. This principle is designed to ensure the best match between the duty to provide general interest services and the way in which the services are actually provided, so that the means used are in proportion to the ends sought. The principle is formulated to allow for a flexible and context-sensitive balance that takes account of the technical and budgetary constraints that may vary from one sector to another. It also makes for the best possible interaction between market efficiency and general interest requirements, by ensuring that the means used to satisfy the requirements do not unduly interfere with the smooth running of the single European market and do not affect trade to an extent that would be contrary to the Community interest.

The application of the Treaty rules, including the possible application of the Article 90§2 exemption, as regards both behaviors of undertakings and State measures can only be done on a case-by-case basis. It seems however highly desirable, in order to increase legal certainty as regards measures not covered by the Directive, to explain the interpretation of the Treaty that the Commission has and the approach that it aims to follow in its future application of these rules. In particular, the Commission considers that, subject to the provisions of Art 90(2) in relation to the provision of the universal service, the application of the Treaty rules would promote the competitiveness of the undertakings active in the postal sector, benefit consumers and contribute in a positive way to the objectives of general interest.

The postal sector in the EU is characterised by areas which Member States have reserved in order to guarantee universal service and which are now being harmonised by the Directive in order to limit distortive effects between Member States. The Commission must, according to the Treaty, ensure that these postal monopolies conform with the rules of the Treaty, and in particular the competition rules, in order to ensure maximum benefit and limit any distortive effects for the consumers. In pursuing this objective by applying the competition rules to the sector on a case-by-case basis the Commission will ensure that monopoly power is not used for extending a protected dominant position into liberalised activities or for unjustified discrimination in favour of big accounts at the expense of small users. The Commission will also ensure that postal monopolies granted in the area of cross-border services are not used for creating or maintaining illicit price cartels harming the interests of companies and consumers in the European Union.

This Notice explains to the players on the market the practical consequences of the applicability of the competition rules to the postal sector, and the possible exemptions to the principles. It sets out the position the Commission would adopt, in the context set by the continuing existence of special and exclusive rights as harmonised by the postal Directive, in assessing individual cases or before the Court of Justice in cases referred to the Court by national Courts under Article 177 EC.

REVIEW

This Notice is adopted at Community level to facilitate the assessment of certain behaviour of undertakings and certain State measures relating to postal services. It is appropriate that after a certain period of development, possibly by the year 2000, the Commission should carry out an evaluation of the postal sector with regard to the Treaty rules, to establish whether modifications of the views set out in this Notice are required on the basis of social, economical or technological considerations and on the basis of experience with postal cases. In due time the Commission will carry out a global evaluation of the situation in the postal sector in the light of the aims of this Notice.

Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services

(98/C 39/02)

(Text with EEA relevance)

PREFACE

Subsequent to the submission by the Commission of a Green Paper on the development of the single market for postal services⁽¹⁾ and of a communication to the European Parliament and the Council, setting out the results of the consultations on the Green Paper and the measures advocated by the Commission⁽²⁾; a substantial discussion has taken place on the future regulatory environment for the postal sector in the Community. By Resolution of 7 February 1994 on the development of Community postal services⁽³⁾, the Council invited the Commission to propose measures defining a harmonised universal service and the postal services which could be reserved. In July 1995, the Commission proposed a package of measures concerning postal services which consisted of a proposal for a Directive of the European Parliament and the Council on common rules for the development of Community postal services and the improvement of quality of service⁽⁴⁾ and a draft of the present Notice on the application of the competition rules⁽⁵⁾.

This notice, which complements the harmonisation measures proposed by the Commission, builds on the results of those discussions in accordance with the principles established in the Resolution of 7 February 1994. It takes account of the comments received during the public consultation on the draft of this notice published in December 1995, of the European Parliament's resolution⁽⁶⁾ on this draft adopted on 12 December 1996, as well as of the discussions on the proposed Directive in the European Parliament and in Council.

The Commission considers that because they are an essential vehicle of communication and trade, postal services are vital for all economic and social activities. New postal services are emerging and market certainty is needed to favour investment and the creation of new employment in the sector. As recognized by the Court of

Justice of the European Communities, Community law, and in particular the competition rules of the EC Treaty, apply to the post sector⁽⁷⁾. The Court stated that 'in the case of public undertakings to which Member States grant special or exclusive rights, they are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty with regard to competition' and that those rules 'must be read in conjunction with Article 90(2) which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.' Questions are therefore frequently put to the Commission on the attitude it intends to take, for purposes of the implementation of the competition rules contained in the Treaty, with regard to the behaviour of postal operators and with regard to State measures relating to public undertakings and undertakings to which the Member States grant special or exclusive rights in the postal sector.

This notice sets out the Commission's interpretation of the relevant Treaty provisions and the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector in individual cases, while maintaining the necessary safeguards for the provision of a universal service, and gives to enterprises and Member States clear guidelines so as to avoid infringements of the Treaty. This Notice is without prejudice to any interpretation to be given by the Court of Justice of the European Communities.

Furthermore, this Notice sets out the approach the Commission intends to take when applying the competition rules to the behaviour of postal operators and when assessing the compatibility of State measures restricting the freedom to provide service and/or to compete in the postal markets with the competition rules and other rules of the Treaty. In addition, it addresses the issue of non-discriminatory access to the postal network and the safeguards required to ensure fair competition in the sector.

⁽¹⁾ COM(91) 476 final.

⁽²⁾ 'Guidelines for the development of Community postal services' (COM(93) 247 of 2 June 1993).

⁽³⁾ OJ C 48, 16.2.1994, p. 3.

⁽⁴⁾ OJ C 322, 2.12.1995, p. 22.

⁽⁵⁾ OJ C 322, 2.12.1995, p. 3.

⁽⁶⁾ OJ C 20, 20.1.1997, p. 159.

⁽⁷⁾ In particular in Joined Cases C-48/90 and C-66/90, *Netherlands and Koninklijke PTT Nederland and PTT Post BV v. Commission* [1992] ECR I-565 and Case C-320/91 *Procureur du Roi v. Paul Corbeau* [1993] ECR I-2533.

Especially on account of the development of new postal services by private and public operators, certain Member States have revised, or are revising, their postal legislation in order to restrict the monopoly of their postal organisations to what is considered necessary for the realisation of the public-interest objective. At the same time, the Commission is faced with a growing number of complaints and cases under competition law on which it must take position. At this stage, a notice is therefore the appropriate instrument to provide guidance to Member States and postal operators, including those enjoying special or exclusive rights, to ensure correct implementation of the competition rules. This Notice, although it cannot be exhaustive, aims to provide the necessary guidance for the correct interpretation, in particular, of Articles 59, 85, 86, 90, and 92 of the Treaty in individual cases. By issuing the present notice, the Commission is taking steps to bring transparency and to facilitate investment decisions of all postal operators, in the interest of the users of postal services in the European Union.

As the Commission explained in its communication of 11 September 1996 on 'Services of general interest in Europe' (*), solidarity and equal treatment within a market economy are fundamental Community objectives. Those objectives are furthered by services of general interest. Europeans have come to expect high-quality services at affordable prices, and many of them even view services of general interest as social rights.

As regards, in particular, the postal sector, consumers are becoming increasingly assertive in exercising their rights and wishes. Worldwide competition is forcing companies using such services to seek out better price deals comparable to those enjoyed by their competitors. New technologies, such as fax or electronic mail, are putting enormous pressures on the traditional postal services. Those developments have given rise to worries about the future of those services accompanied by concerns over employment and economic and social cohesion. The economic importance of those services is considerable. Hence the importance of modernising and developing services of general interest, since they contribute so much to European competitiveness, social solidarity and quality of life.

The Community's aim is to support the competitiveness of the European economy in an increasingly competitive world and to give consumers more choice, better quality

and lower prices, while at the same time helping, through its policies, to strengthen economic and social cohesion between the Member States and to reduce certain inequalities. Postal services have a key role to play here. The Community is committed to promoting their functions of general economic interest, as solemnly confirmed in the new Article 7d, introduced by the Amsterdam Treaty, while improving their efficiency. Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer, who gets better quality at a lower price. However, those mechanisms sometimes have their limits; as a result the potential benefits might not extend to the entire population and the objective of promoting social and territorial cohesion in the Union may not be attained. The public authority must then ensure that the general interest is taken into account.

The traditional structures of some services of general economic interest, which are organised on the basis of national monopolies, constitute a challenge for European economic integration. This includes postal monopolies, even where they are justified, which may obstruct the smooth functioning of the market, in particular by sealing off a particular market sector.

The real challenge is to ensure smooth interplay between the requirements of the single market in terms of free movement, economic performance and dynamism, free competition, and the general interest objectives. This interplay must benefit individual citizens and society as a whole. This is a difficult balancing act, since the goalposts are constantly moving: the single market is continuing to expand and public services, far from being fixed, are having to adapt to new requirements.

The basic concept of universal service, which was originated by the Commission (*), is to ensure the provision of high-quality service to all prices everyone can afford. Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices: openness in management, price-setting and funding and scrutiny by bodies independent of those operating the services. Those criteria are not always all met at national level, but where they have been introduced using the concept of European universal service, there have been positive effects for the development of general interest services. Universal service is the expression in Europe of the requirements

(*) COM(96) 443 final.

(*) See footnote 8.

and special features of the European model of society in a policy which combines a dynamic market, cohesion and solidarity.

High-quality universal postal services are of great importance for private and business customers alike. In view of the development of electronic commerce their importance will even increase in the very near future. Postal services have a valuable role to play here.

As regards the postal sector, Directive 97/67/EC has been adopted by the European Parliament and the Council (hereinafter referred to as 'the Postal Directive'). It aims to introduce common rules for developing the postal sector and improving the quality of service, as well as gradually opening up the markets in a controlled way.

The aim of the Postal Directive is to safeguard the postal service as a universal service in the long term. It imposes on Member States a minimum harmonised standard of universal services including a high-quality service countrywide with regular guaranteed deliveries at prices everyone can afford. This involves the collection, transport, sorting and delivery of letters as well as catalogues and parcels within certain price and weight limits. It also covers registered and insured (*valeur déclarée*) items and applies to both domestic and cross-border deliveries. Due regard is given to considerations of continuity, confidentiality, impartiality and equal treatment as well as adaptability.

To guarantee the funding of the universal service, a sector may be reserved for the operators of this universal service. The scope of the reserved sector has been harmonised in the Postal Directive. According to the Postal Directive, Member States can only grant exclusive rights for the provision of postal services to the extent that this is necessary to guarantee the maintenance of the universal service. Moreover, the Postal Directive establishes the maximum scope that Member States may reserve in order to achieve this objective. Any additional funding which may be required for the universal service may be found by writing certain obligations into commercial operator's franchises; for example, they may be required to make financial contributions to a competition fund administered for this purpose by a body independent of the beneficiary or beneficiaries, as foreseen in Article 9 of the Postal Directive.

The Postal Directive lays down a minimum common standard of universal services and establishes common

rules concerning the reserved area. It therefore increases legal certainty as regards the legality of some exclusive and special rights in the postal sector. There are, however, State measures that are not dealt with in it and that can be in conflict with the Treaty rules addressed to Member States. The autonomous behaviour of the postal operators also remains subject to the competition rules in the Treaty.

Article 90(2) of the Treaty provides that suppliers of services of general interest may be exempted from the rules in the Treaty, to the extent that the application of those rules would obstruct the performance of the general interest tasks for which they are responsible. That exemption from the Treaty rules is however subject to the principle of proportionality. That principle is designed to ensure the best match between the duty to provide general interest services and the way in which the services are actually provided, so that the means used are in proportion to the ends pursued. The principle is formulated to allow for a flexible and context-sensitive balance that takes account of the technical and budgetary constraints that may vary from one sector to another. It also makes for the best possible interaction between market efficiency and general interest requirements, by ensuring that the means used to satisfy the requirements do not unduly interfere with the smooth running of the single European market and do not affect trade to an extent that would be contrary to the Community interest⁽¹⁰⁾.

The application of the Treaty rules, including the possible application of the Article 90(2) exemption, as regards both behaviour of undertakings and State measures can only be done on a case-by-case basis. It seems, however, highly desirable, in order to increase legal certainty as regards measures not covered by the Postal Directive, to explain the Commission's interpretation of the Treaty and the approach that it aims to follow in its future application of those rules. In particular, the Commission considers that, subject to the provisions of Article 90(2) in relation to the provision of the universal service, the application of the Treaty rules would promote the competitiveness of the undertakings active in the postal sector, benefit consumers and contribute in a positive way to the objectives of general interest.

The postal sector in the European Union is characterised by areas which Member States have reserved in order to guarantee universal service and which are now being

⁽¹⁰⁾ See judgment of 23 October 1997 in Cases C-157/94 to C-160/94 'Member State Obligations — Electricity' *Commission v. Netherlands* (157/94), *Italy* (158/94), *France* (154/94), *Spain* (160/94).

harmonised by the Postal Directive in order to limit distortive effects between Member States. The Commission must, according to the Treaty, ensure that postal monopolies comply with the rules of the Treaty, and in particular the competition rules, in order to ensure maximum benefit and limit any distortive effects for the consumers. In pursuing this objective by applying the competition rules to the sector on a case-by-case-basis, the Commission will ensure that monopoly power is not used for extending a protected dominant position into liberalised activities or for unjustified discrimination in favour of big accounts at the expense of small users. The Commission will also ensure that postal monopolies granted in the area of cross-border services are not used for creating or maintaining illicit price cartels harming the interest of companies and consumers in the European Union.

This notice explains to the players on the market the practical consequences of the applicability of the competition rules to the postal sector, and the possible derogations from the principles. It sets out the position the Commission would adopt, in the context set by the continuing existence of special and exclusive rights as harmonised by the Postal Directive, in assessing individual cases or before the Court of Justice in cases referred to the Court by national courts under Article 177 of the Treaty.

1. DEFINITIONS

In the context of this notice, the following definitions shall apply⁽¹⁾:

'postal services': services involving the clearance, sorting, transport and delivery of postal items;

'public postal network': the system of organisation and resources of all kinds used by the universal service provider(s) for the purposes in particular of:

- the clearance of postal items covered by a universal service obligation from access points throughout the territory,
- the routing and handling of those items from the postal network access point to the distribution centre,
- distribution to the addresses shown on items;

'access points': physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the universal service provider, where postal items may be deposited with the public postal network by customers;

'clearance': the operation of collecting postal items deposited at access points;

'distribution': the process from sorting at the distribution centre to delivery of postal items to their addresses;

'postal item': an item addressed in the final form in which it is to be carried by the universal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;

'item of correspondence': a communication in written form on any kind of physical medium to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence;

'direct mail': a communication consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number as well as other modifications which do not alter the nature of the message, which is sent to a significant number of addressees, to be conveyed and delivered at the address indicated by the sender on the item itself or on its wrapping. The National Regulatory Authority should interpret the term 'significant number of addressees' within each Member State and publish an appropriate definition. Bills, invoices, financial statements and other non-identical messages should not be regarded as direct mail. A communication combining direct mail with other items within the same wrapping should not be regarded as direct mail. Direct mail includes cross-border as well as domestic direct mail;

⁽¹⁾ The definitions will be interpreted in the light of the Postal Directive and any changes resulting from review of that Directive.

'document exchange': provision of means, including the supply of *ad hoc* premises as well as transportation by a third party, allowing self-delivery by

mutual exchange of postal items between users subscribing to this service;

'*express mail service*': a service featuring, in addition to greater speed and reliability in the collection, distribution, and delivery of items, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from point of origin; personal delivery to addressee; possibility of changing the destination and addressee in transit; confirmation to sender of receipt of the item dispatched; monitoring and tracking of items dispatched; personalised service for customers and provision of an *à la carte* service, as and when required. Customers are in principle prepared to pay a higher price for this service;

'*universal service provider*': the public or private entity providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission;

'*exclusive rights*': rights granted by a Member State which reserve the provision of postal services to one undertaking through any legislative, regulatory or administrative instrument and reserve to it the right to provide a postal service, or to undertake an activity, within a given geographical area;

'*special rights*': rights granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area:

- limits, on a discretionary basis, to two or more the number of such undertakings authorised to provide a service or undertake an activity, otherwise than according to objective, proportional and non-discriminatory criteria, or
- designates, otherwise than according to such criteria, several competing undertakings as undertakings authorised to provide a service or undertake an activity, or
- confers on any undertaking or undertakings, otherwise than according to such criteria, legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or undertake the same activity in the same geographical area under substantially comparable conditions;

'*terminal dues*': the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country;

'*intermediary*': any economical operator who acts between the sender and the universal service provider, by clearing, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or of another country;

'*national regulatory authority*': the body or bodies, in each Member State, to which the Member State entrusts, *inter alia*, the regulatory functions falling within the scope of the Postal Directive;

'*essential requirements*': general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services⁽¹²⁾. These reasons are: the confidentiality of correspondence, security of the network as regards the transport of dangerous goods and, where justified, data protection, environmental protection and regional planning.

Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy.

2. MARKED DEFINITION AND POSITION ON THE POSTAL MARKET

a) Geographical and product market definition

- 2.1. Articles 85 and 86 of the Treaty prohibit as incompatible with the common market any conduct by one or more undertakings that may negatively affect trade between Member States which involves the prevention, restriction, or distortion of competition and/or an abuse of a dominant position within the common market or a substantial part of it. The territories of the Member States constitute separate geographical markets with regard to the delivery of domestic mail and also with regard to the domestic delivery of inward cross-border mail, owing primarily to the exclusive rights of the operators

⁽¹²⁾ The meaning of this important phrase in the context of Community competition law is explained in paragraph 5.3.

referred to in point 4.2 and to the restrictions imposed on the provision of postal services. Each of the geographical markets constitutes a substantial part of the common market. For the determination of 'relevant market', the country of origin of inward cross-border mail is immaterial.

2.2. As regards the product markets, the differences in practice between Member States demonstrate that recognition of several distinct markets is necessary in some cases. Separation of different product-markets is relevant, among, other things, to special or exclusive rights granted. In its assessment of individual cases on the basis of the different market and regulatory situations in the Member States and on the basis of a harmonised framework provided by the Postal Directive, the Commission will in principle consider that a number of distinct product markets exist, like the clearance, sorting, transport and delivery of mail, and for example direct mail, and cross-border mail. The Commission will take into account the fact that these markets are wholly or partly liberalised in a number of Member States. The Commission will consider the following markets when assessing individual cases.

2.3. The general letter service concerns the delivery of items of correspondence to the addresses shown on the items.

It does not include self-provision, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail.

Also excluded, in accordance with practice in many Member States, are such postal items as are not considered items of correspondence, since they consist of identical copies of the same written communication and have not been altered by additions, deletions or indications other than the name of the addressee and his address. Such items are magazines, newspapers, printed periodicals catalogues, as well as goods or documents accompanying and relating to such items.

Direct mail is covered by the definition of items of correspondence. However, direct mail items do not contain personalised messages. Direct mail addresses the needs of specific operators for commercial

communications services, as a complement to advertising in the media. Moreover, the senders of direct mail do not necessarily require the same short delivery times, priced at first-class letter tariffs, asked for by customers requesting services on the market as referred to above. The fact that both services are not always directly interchangeable indicates the possibility of distinct markets.

2.4. Other distinct markets include, for example, the express mail market, the document exchange market, as well as the market for new services (services quite distinct from conventional services). Activities combining the new telecommunications technologies and some elements of the postal services may be, but are not necessarily, new services within the meaning of the Postal Directive. Indeed, they may reflect the adaptability of traditional services.

A document exchange differs from the market referred to in point 2.3 since it does not include the collection and the delivery to the addressee of the postal items transported. It involves only means, including the supply of *ad hoc* premises as well as transportation by a third party, allowing self-delivery by mutual exchange of postal items between users subscribing to this service. The users of a document exchange are members of a closed user group.

The express mail service also differs from the market referred to in point 2.3 owing to the value added by comparison with the basic postal service⁽¹⁾. In addition to faster and more reliable collection, transportation and delivery of the postal items, an express mail service is characterised by the provision of some or all of the following supplementary services: guarantee of delivery by a given date; collection from the sender's address; delivery to the addressee in person; possibility of a change of destination and addressee in transit; conformation to the sender of delivery; tracking and tracing; personalised treatment for customers and the offer of a range of services according to requirements. Customers are in principle prepared to pay a higher price for this service. The reservable services as defined in the Postal Directive may include accelerated delivery of items of domestic correspondence falling within the prescribed price and weight limits.

⁽¹⁾ Commission Decisions 90/16/EEC (OJ L 10, 12.1.1990, p. 47) and 90/456/EEC (OJ L 233, 28.8.1990, p. 19).

2.5. Without prejudice to the definition of reservable services given in the Postal Directive, different activities can be recognised, within the general letter service, which meet distinct needs and should in principle be considered as different markets; the markets for the clearance and for the sorting of mail, the market for the transport of mail and, finally, the delivery of mail (domestic or inward cross-border). Different categories of customers must be distinguished in this respect. Private customers demand the distinct products or services as one integrated service. However, business customers, which represent most of the revenues of the operators referred to in point 4.2, actively pursue the possibilities of substituting for distinct components of the final service alternative solutions (with regard to quality of service levels and/or costs incurred) which are in some cases provided by, or sub-contracted to, different operators. Business customers want to balance the advantages and disadvantages of self-provision versus provision by the postal operator. The existing monopolies limit the external supply of those individual services, but they would otherwise limit the external supply of those individual according to market conditions. That market reality supports the opinion that clearance, sorting, transport and delivery of postal items constitute different markets⁽¹⁴⁾. From a competition-law point of view, the distinction between the four markets may be relevant.

That is the case for cross-border mail where the clearance and transport will be done by a postal operator other than the one providing the distribution. This is also the case as regards domestic mail, since most postal operators permit major customers to undertake sorting of bulk traffic in return for discounts, based on their public tariffs. The deposit and collection of mail and method of payment also vary in these circumstances. Mail rooms of larger companies are now often operated by intermediaries, which prepare and pre-sort mail before handing it over to the postal operator for final distribution. Moreover, all postal operators allow some kind of downstream access to distribution. Moreover, all postal operators allow some kind of downstream access to their postal network, for instance by allowing or even demanding (sorted) mail to be deposited at an expediting or sorting centre. This permits in many cases a higher reliability (quality of service) by bypassing any sources of failure in the postal network upstream.

⁽¹⁴⁾ See Commission Notice on the definition of the relevant market for the purpose of the application of Community competition law (OJ C 372, 9.12.1997, p. 5).

(b) Dominant position

2.6. Since in most Member States the operator referred to in point 4.2 is, by virtue of the exclusive rights granted to him, the only operator controlling a public postal network covering the whole territory of the Member State, such an operator has a dominant position within the meaning of Article 86 of the Treaty on the national market for the distribution of items of correspondence. Distribution is the service to the user which allows for important economies of scale, and the operator providing this service is in most cases also dominant on the markets for the clearance, sorting and transport of mail. In addition, the enterprise which provides distribution, particularly if it also operates post office premises, has the important advantage of being regarded by the users as the principal postal enterprise, because it is the most conspicuous one, and is therefore the natural first choice. Moreover, this dominant position also includes, in most Member States, services such as registered mail or special delivery services, and/or some sectors of the parcels market.

(c) Duties of dominant postal operators

2.7. According to point (b) of the second paragraph of Article 86 of the Treaty, an abuse may consist in limiting the performance of the relevant service to the prejudice of its consumers. Where a Member State grants exclusive rights to an operator referred to in point 4.2 for services which it does not offer, or offers in conditions not satisfying the needs of customers in the same way as the services which competitive economic operators would have offered, the Member State induces those operators, by the simple exercise of the exclusive right which has been conferred on them, to limit the supply of the relevant service, as the effective exercise of those activities by private companies is, in this case, impossible. This is particularly the case where measures adopted to protect the postal service restrict the provision of other distinct services on distinct or neighbouring markets such as the express mail market. The Commission has requested several Member States to abolish restrictions resulting from exclusive rights regarding the provision of express mail services by international couriers⁽¹⁵⁾.

⁽¹⁵⁾ See footnote 13.

Another type of possible abuse involves providing a seriously inefficient service and failing to take advantage of technical developments. This harms customers who are prevented from choosing between alternative suppliers. For instance, a report prepared for the Commission⁽¹⁶⁾ in 1994 showed that, where they have not been subject to competition, the public postal operators in the Member States have not made any significant progress since 1990 in the standardisation of dimensions and weights. The report also showed that some postal operators practised hidden cross-subsidies between reserved and non-reserved services (see points 3.1 and 3.4), which explained, according to that study, most of the price disparities between Member States in 1994, especially penalising residential users who do not qualify for any discounts schemes, since they make use of reserved services that are priced at a higher level than necessary.

The examples given illustrate the possibility that, where they are granted special or exclusive rights, postal operators may let the quality of the service decline⁽¹⁷⁾ and omit to take necessary steps to improve service quality. In such cases, the Commission may be induced to act taking account of the conditions explained in point 8.3.

As regards cross-border postal services, the study referred to above showed that the quality of those services needed to be improved significantly in order to meet the needs of customers, and in particular of residential customers who cannot afford to use the services of courier companies or facsimile transmission instead. Independent measurements carried out in 1995 and 1996 show an improvement of quality of service since 1994. However, those

measurements only concern first class mail, and the most recent measurements show that the quality has gone down slightly again.

The majority of Community public postal operators have notified an agreement on terminal dues to the Commission for assessment under the competition rules of the Treaty. The parties to the agreement have explained that their aim is to establish fair compensation for the delivery of cross-border mail reflecting more closely the real costs incurred and to improve the quality of cross-border mail services.

2.8. Unjustified refusal to supply is also an abuse prohibited by Article 86 of the Treaty. Such behaviour would lead to a limitation of services within the meaning of Article 86, second paragraph, (b) and, if applied only to some users, result in discrimination contrary to Article 86, second paragraph, (c), which requires that no dissimilar conditions be applied to equivalent transactions. In most of the Member States, the operators referred to in point 4.2 provide access at various access points of their postal networks to intermediaries. Conditions of access, and in particular the tariffs applied, are however, often confidential and may facilitate the application of discriminatory conditions. Member States should ensure that their postal legislation does not encourage postal operators to differentiate unjustifiably as regards the conditions applied or to exclude certain companies.

2.9. While a dominant firm is entitled to defend its position by competing with rivals, it has a special responsibility not to further diminish the degree of competition remaining on the market. Exclusionary practices may be directed against existing competitors on the market or intended to impede market access by new entrants. Examples of such illegal behaviour include: refusal to deal as a means of eliminating a competitor by a firm which is the sole or dominant source of supply of a product or controls access to an essential technology or infrastructure; predatory pricing and selective price cutting (see section 3); exclusionary dealing agreements; discrimination as part of a wider pattern of monopolizing conduct designed to exclude competitors; and exclusionary rebate schemes.

⁽¹⁶⁾ UFC — Que Choisir, Postal services in the European Union, April 1994.

⁽¹⁷⁾ In many Member States users could, some decades ago, still rely on this service to receive in the afternoon, standard letters posted in the morning. Since then, a continuous decline in the quality of the service has been observed, and in particular of the number of daily rounds of the postmen, which were reduced from five to one (or two in some cities of the European Union). The exclusive rights of the postal organisations favoured a fall in quality, since they prevented other companies from entering the market. As a consequence the postal organisations failed to compensate for wage increases and reduction of the working hours by introducing modern technology, as was done by enterprises in industries open to competition.

3. CROSS-SUBSIDISATION

(b) Consequences

(a) Basic principles

3.1. Cross-subsidisation means that an undertaking bears or allocates all or part of the costs of its activity in one geographical or product market to its activity in another geographical or product market. Under certain circumstances, cross-subsidisation in the postal sector, where nearly all operators provide reserved and non-reserved services, can distort competition and lead to competitors being beaten by offers which are made possible not by efficiency (including economies of scope) and performance but by cross-subsidies. Avoiding cross-subsidisation leading to unfair competition is crucial for the development of the postal sector.

3.2. Cross-subsidisation does not distort competition when the costs of reserved activities are subsidised by the revenue generated by other reserved services since there is no competition possible as to these services. This form of subsidisation may sometimes be necessary, to enable the operators referred to in point 4.2 to perform their obligation to provide a service universally, and on the same conditions to everybody^(*). For instance, unprofitable mail delivery in rural areas is subsidised through revenues from profitable mail delivery in urban areas. The same could be said of subsidising the provision of reserved services through revenues generated by activities open to competition. Moreover, cross-subsidisation between non-reserved activities is not in itself abusive.

3.3. By contrast, subsidising activities open to competition by allocating their costs to reserved services is likely to distort competition in breach of Article 86. It could amount to an abuse by an undertaking holding a dominant position within the Community. Moreover, users of activities covered by a monopoly would have to bear costs which are unrelated to the provision of those activities. Nonetheless, dominant companies too many compete on price, or improve their cash flow and obtain only partial contribution to their fixed (overhead) costs, unless the prices are predatory or go against relevant national or Community regulations.

^(*) See these Postal Directive, recitals 16 and 28, and Chapter 5.

3.4. A reference to cross-subsidisation was made in point 2.7; duties of dominant postal operators. The operators referred to in point 4.2 should not use the income from the reserved area to cross-subsidise activities in areas open to competition. Such a practice could prevent, restrict or distort competition in the non-reserved area. However, in some justified cases, subject to the provisions of Article 90(2), cross-subsidisation can be regarded as lawful, for example for cultural mail^(**), as long as it is applied in a non discriminatory manner, or for particular services to the socially, medically and economically disadvantaged. When necessary, the Commission will indicate what other exemptions the Treaty would allow to be made. In all other cases, taking into account the indications given in point 3.3, the price of competitive services offered by the operator referred to in point 4.2 should, because of the difficulty of allocating common costs, in principle be at least equal to the average total costs of provision. This means covering the direct costs plus an appropriate proportion of the common and overhead costs of the operator. Objective criteria, such as volumes, time (labour) usage, or intensity of usage, should be used to determine the appropriate proportion. When using the turnover generated by the services involved as a criterion in a case of cross-subsidisation, allowance should be made for the fact that in such a scenario the turnover of the relevant activity is being kept artificially low. Demand-influenced factors, such as revenues or profits, are themselves influenced by predation. If services were offered systematically and selectively at a price below average total cost, the Commission would, on a case-by-case basis, investigate the matter under Article 86, or under Article 86 and Article 90(1) or under Article 92.

4. PUBLIC UNDERTAKINGS AND SPECIAL OR EXCLUSIVE RIGHTS

4.1. The treaty obliges the Member States, in respect of public undertakings and undertakings to which they grant special or exclusive rights, neither to enact nor maintain in force any measures contrary to the

^(**) Referred to by UPU as 'work of the mind', comprising books, newspapers, periodicals and journals.

Treaty rules (Article 90(1)). The expression 'undertaking' includes every person or legal entity exercising an economic activity, irrespective of the legal status of the entity and the way in which it is financed. The clearance, sorting, transportation and distribution of postal items constitute economic activities, and these services are normally supplied for reward.

The term 'public undertaking' includes every undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of ownership of it, their financial participation in it or the rules which govern it⁽²⁰⁾. A dominant influence on the part of the public authorities may in particular be presumed when the public authorities hold, directly or indirectly, the majority of the subscribed capital of the undertaking, control the majority of the voting rights attached to shares issued by the undertaking or can appoint more than half of the members of the administrative, managerial or supervisory body. Bodies which are part of the Member State's administration and which provide in an organised manner postal services for third parties against remuneration are to be regarded as such undertakings. Undertakings to which special or exclusive rights are granted can, according to Article 90(1), be public as well as private.

- 4.2. National regulations concerning postal operators to which the Member States have granted special or exclusive rights to provide certain postal services are 'measures' within the meaning of Article 90(1) of the Treaty and must be assessed under the Treaty provisions to which that Article refers.

In addition to Member States' obligations under Article 90(1), public undertakings and undertakings that have been granted special or exclusive rights are subject to Articles 85 and 86.

- 4.3. In most Member States, special and exclusive rights apply to services such as the clearance, transportation and distribution of certain postal items, as well as the way in which those services are provided, such as the exclusive right to place letter boxes along the public highway or to issue stamps bearing the name of the country in question.

⁽²⁰⁾ Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 195, 29.7.1980, p. 35.

5. FREEDOM TO PROVIDE SERVICES

(a) Basic principles

- 5.1. The granting of special or exclusive rights to one or more operators referred to in point 4.2 to carry out the clearance, including public collection, transport and distribution of certain categories of postal items inevitably restricts the provision of such services, both by companies established in other Member States and by undertakings established in the Member State concerned. This restriction has a transborder character when the addresses or the senders of the postal items handled by those undertakings are established in other Member States. In practice, restrictions on the provision of postal services, within the meaning of Article 59 of the Treaty⁽²¹⁾, comprise prohibiting the conveyance of certain categories of postal items to other Member States including by intermediaries, as well as the prohibition on distributing gross-border mail. The Postal Directive lays down the justified restrictions on the provision of postal services.
- 5.2. Article 66, read in conjunction with Article 55 and 56 of the Treaty, sets out exceptions from Article 59. Since they are exceptions to a fundamental principle, they must be interpreted restrictively. As regards postal services, the exception under Article 55 only applies to the conveyance and distribution of a special kind of mail, that is mail generated in the course of judicial or administrative procedures, connected, even occasionally, with the exercise of official authority, in particular notifications in pursuance of any judicial or administrative procedures. The conveyance and distribution of such items on a Member State's territory may therefore be subjected to a licensing requirement (see point 5.5) in order to protect the public interest. The conditions of the other derogations from the Treaty listed in those provisions will not normally be fulfilled in relation to postal services. Such services cannot, in themselves, threaten public policy and cannot affect public health.
- 5.3. The case-law of the Court of Justice allows, in principle, further derogations on the basis of mandatory requirements, provided that they fulfil non-economic essential requirements in the general interest, are applied without discrimination, and are appropriate and proportionate to the objective to

⁽²¹⁾ For a general explanation of the principles deriving from Article 59, see Commission interpretative communication concerning the free movement of services across frontiers (OJ C 334, 9.12.1993, p. 3).

be achieved. As regards postal services, the essential requirements which the Commission would consider as justifying restrictions on the freedom to provide postal services are data protection subject to approximation measures taken in this field, the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, as well as, where justified under the provisions of the Treaty, environmental protection and regional planning. Conversely, the Commission would not consider it justified to impose restrictions on the freedom to provide postal services for reasons of consumer protection since this general interest requirement can be met by the general legislation on fair trade practices and consumer protection. Benefits to consumers are enhanced by the freedom to provide postal services, provided that universal service obligations are well defined on the basis of the Postal Directive and can be fulfilled.

5.4. The Commission therefore considers that the maintenance of any special or exclusive right which limits cross-border provision of postal services needs to be justified in the light of Articles 90 and 59 of the Treaty. At present, the special or exclusive rights whose scope does not go beyond the reserved services as defined in the Postal Directive are *prima facie* justified under Article 90(2). Outward cross-border mail is *de jure* or *de facto* liberalised in some Member States, such as Denmark, the Netherlands, Finland, Sweden, and the United Kingdom.

(b) Consequences

5.5. The adoption of the measures contained in the Postal Directive requires Member States to regulate postal services. Where Member States restrict postal services to ensure the achievement of universal service and essential requirements, the content of such regulation must correspond to the objective pursued. Obligations should, as a general rule, be enforced within the framework of class licences and declaration procedures by which operators of postal services supply their name, legal form, title and address as well as a short description of the services they offer to the public. Individual licensing should only be applied for specific postal services, where it is demonstrated that less restrictive procedures cannot ensure those objectives. Member States may be invited, on a case-by-case basis, to notify the

measures they adopt to the Commission to enable it to assess their proportionality.

6. MEASURES ADOPTED BY MEMBER STATES

(a) Basic principles

6.1. Member States have the freedom to define what are general interest services, to grant the special or exclusive rights that are necessary for providing them, to regulate their management and, where appropriate, to fund them. However, under Article 90(1) of the Treaty, Member States must, in the case of public undertakings and undertakings to which they have granted special or exclusive rights, neither enact nor maintain in force any measure contrary to the Treaty rules, and in particular its competition rules.

(b) Consequences

6.2. The operation of a universal clearance and distribution network confers significant advantages on the operator referred to in point 4.2 in offering not only reserved or liberalised services falling within the definition of universal service, but also other (non-universal postal) services. The prohibition under Articles 90(1), read in conjunction with Article 86(b), applies to the use, without objective justification, of a dominant position on one market to obtain market power on related or neighbouring markets which are distinct from the former, at the risk of eliminating competition on those markets. In countries where local delivery of items of correspondence is liberalised, such as Spain, and the monopoly is limited to inter-city transport and delivery, the use of a dominant position to extend the monopoly from the latter market to the former would therefore be incompatible with the Treaty provisions, in the absence of specific justification, if the functioning of services in the general economic interest was not previously endangered. The Commission considers that it would be appropriate for Member States to inform the Commission of any extension of special or exclusive rights and of the justification therefor.

6.3. There is a potential effect on the trade between Member States from restrictions on the provision of postal services, since the postal services offered by operators other than the operators referred to in

point 4.2 can cover mailings to or from other Member States, and restrictions may impede cross-border activities of operators in other Member States.

- 6.4. As explained in point 8(b)(vii), Member States must monitor access conditions and the exercise of special and exclusive rights. They need not necessarily set up new bodies to do this but they should not give to their operator⁽²²⁾ as referred to in point 4.2, or to a body which is related (legally, administratively and structurally) to that operator, the power of supervision of the exclusive rights granted and of the activities of postal operators generally. An enterprise in a dominant position must not be allowed to have such a power over its competitors. The independence, both in theory and in practice, of the supervisory authority from all the enterprise supervised is essential. The system of undistorted competition required by the Treaty can only be ensured if equal opportunities for the different economic operators, including confidentiality of sensitive business information, are guaranteed. To allow an operator to check the declarations of its competitors or to assign to an undertaking the power to supervise the activities of its competitors or to be associated in the granting of licences means that such undertaking is given commercial information about its competitors and thus has the opportunity to influence the activity of those competitors.

7. POSTAL OPERATORS AND STATE AID

(a) Principles

While a few operators referred to in point 4.2 are highly profitable, the majority appear to be operating either in financial deficit or at close to break-even in postal operations, although information on underlying financial performance is limited, as relatively few operators publish relevant information of an auditable standard on a regular basis. However, direct financial support in the form of subsidies or indirect support such as tax exemptions is being given to fund some postal services, even if the actual amounts are often not transparent.

The Treaty makes the Commission responsible for enforcing Article 92, which declares State aid that affects trade between Member States of the Community to be incompatible with the common market except in certain circumstances where an

exemption is, or may be, granted. Without prejudice to Article 90(2), Articles 92 and 93 are applicable to postal services⁽²³⁾.

Pursuant to Article 93(3), Member States are required to notify to the Commission for approval all plans to grant aid or to alter existing aid arrangements. Moreover, the Commission is required to monitor aid which it has previously authorised or which dates from before the entry into force of the Treaty or before the accession of the Member State concerned.

All universal service providers currently fall within the scope of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings⁽²⁴⁾, as last amended by Directive 93/84/EEC⁽²⁵⁾. In addition to the general transparency requirement for the accounts of operators referred to in point 4.2 as discussed in point 8(b)(vi), Member States must therefore ensure that financial relations between them and those operators are transparent as required by the Directive, so that the following are clearly shown:

- (a) public funds made available directly, including tax exemptions or reductions;
- (b) public funds made available through other public undertakings or financial institutions;
- (c) the use to which those public funds are actually put.

The Commission regards, in particular, the following as making available public funds:

- (a) the setting-off of operating losses;
- (b) the provision of capital;

⁽²²⁾ See in particular, Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5981, paragraphs 25 to 28.

⁽²³⁾ Case C-387/92 *Banco de Credito Industrial v. Ayuntamiento Valencia* [1994] ECR I-877.

⁽²⁴⁾ OJ L 195, 29.7.1980, p. 35.

⁽²⁵⁾ OJ L 254, 12.10.1993, p. 16.

- (c) non-refundable grants or loans on privileged terms;
- (d) the granting of financial advantages by forgoing profits or the recovery of sums due;
- (e) the forgoing of a normal return on public funds used;
- (f) compensation for financial burdens imposed by the public authorities.

(b) Application of Articles 90 and 92

The Commission has been called upon to examine a number of tax advantages granted to a postal operator on the basis of Article 92 in connection with Article 90 of the Treaty. The Commission sought to check whether that privileged tax treatment could be used to cross-subsidize that operator's operations in sectors open to competition. At that time, the postal operator did not have an analytical cost-accounting system serving to enable the Commission to distinguish between the reserved activities and the competitive ones. Accordingly, the Commission, on the basis of the findings of studies carried out in that area, assessed the additional costs due to universal-service obligations borne by that postal operator and compared those costs with the tax advantages. The Commission concluded that the costs exceeded those advantages and therefore decided that the tax system under examination could not lead to cross-subsidization of that operator's operations in the competitive areas⁽²⁴⁾.

It is worth noting that in its decision the Commission invited the Member State concerned to make sure that the postal operator adopted an analytical cost-accounting system and requested an annual report which would allow the monitoring of compliance with Community law.

The Court of First Instance has endorsed the Commission's decision and has stated that the tax advantages to that postal operator are State aid

which benefit from an exemption from the prohibition set out in Article 92(1) on the basis of Article 90(2)⁽²⁷⁾.

8. SERVICE OF GENERAL ECONOMIC INTEREST

(a) Basic principles

8.1. Article 90(2) of the Treaty allows an exception from the application of the Treaty rules where the application of those rules obstructs, in law or in fact, the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of general economic interest. Without prejudice to the rights of the Member States to define particular requirements of services of general interest, that task consists primarily in the provision and the maintenance of a universal public postal service, guaranteeing at affordable, cost-effective and transparent tariffs nationwide access to the public postal network within a reasonable distance and during adequate opening hours, including the clearance of postal items from accessible postal boxes or collection points throughout the territory and the timely delivery of such items to the address indicated, as well as associated services entrusted by measures of a regulatory nature to those operators for universal delivery at a specified quality. The universal service is to evolve in response to the social, economical and technical environment and to the demands of users.

The general interest involved requires the availability in the Community of a genuinely integrated public postal network, allowing efficient circulation of information and thereby fostering, on the one hand, the competitiveness of European industry and the development of trade and greater cohesion between the regions and Member States, and on the other, the improvement of social contacts between the citizens of the Union. The definition of the reserved area has to take into account the financial resources necessary for the provision of the service of general economic interest.

8.2. The financial resources for the maintenance and improvement of that public network still derive mainly from the activities referred to in point 2.3.

⁽²⁴⁾ Case NN 135/92, OJ C 262, 7.10.1995, p. 11.

⁽²⁷⁾ Case T-106/95 *FFSA v. Commission* [1997] ECR II-229.

Currently, and in the absence of harmonisation at Community level, most Member States have fixed the limits of the monopoly by reference to the weight of the item. Some Member States apply a combined weight and price limit whereas one Member State applies a price limit only. Information collected by the Commission on the revenues obtained from mail flows in the Member States seems to indicate that the maintenance of special or exclusive rights with regard to this market could, in the absence of exceptional circumstances, be sufficient to guarantee the improvement and maintenance of the public postal network.

The service for which Member States can reserve exclusive or special rights, to the extent necessary to ensure the maintenance of the universal service, is harmonised in the Postal Directive. To the extent to which Member States grant special or exclusive rights for this service, the service is to be considered a separate product-market in the assessment of individual cases in particular with regard to direct mail, the distribution of inward cross-border mail, outward cross-border mail, as well as with regard to the collection, sorting and transport of mail. The Commission will take account of the fact that those markets are wholly or partly liberalised in a number of Member States.

8.3. When applying the competition rules and other relevant Treaty rules to the postal sector, the Commission, acting upon a complaint or upon its own initiative, will take account of the harmonized definition set out in the Postal Directive in assessing whether the scope of the reserved area can be justified under Article 90(2). The point of departure will be a presumption that, to the extent that they fall within the limits of the reserved area as defined in the Postal Directive, the special or exclusive rights will be *prima facie* justified under Article 90(2). That presumption can, however, be rebutted if the facts in a case show that a restriction does not fulfil the conditions of Article 90(2) ^(*).

8.4. The direct mail market is still developing at a different pace from one Member State to the other,

^(*) In relation to the limits on the application of the exception set out in Article 90(2), see the position taken by the Court of Justice in the following cases: Case C-179/90 *Merci convenzionali porto di Genova v. Siderurgica Gabrielli* [1991] ECR I-1979; Case C-41/90 *Klaus Höfner and Fritz Elser v. Macroton* [1991] ECR I-5889.

which makes it difficult for the Commission, at this stage, to specify in a general way the obligations of the Member States regarding that service. The two principal issues in relation to direct mail are potential abuse by customers of its tariffication and of its liberalisation (reserved items being delivered by an alternative operators as if they were non-reserved direct mail items) so as to circumvent the reserved services referred to in point 8.2. Evidence from the Member States which do not restrict direct mail services, such as Spain, Italy, the Netherlands, Austria, Sweden and Finland, is still inconclusive and does not yet allow a definitive general assessment. In view of that uncertainty, it is considered appropriate to proceed temporarily on a case-by-case basis. If particular circumstances make it necessary, and without prejudice to point 8.3, Member States may maintain certain existing restrictions on direct mail services or introduce licensing in order to avoid artificial traffic distortions and substantial destabilization of revenues.

8.5. As regards the distribution of inward cross-border mail, the system of terminal dues received by the postal operator of the Member State of delivery of cross-border mail from the operator of the Member State of origin is currently under revision to adapt terminal dues, which are in many cases too low, to actual costs of delivery.

Without prejudice to point 8.3, Member States may maintain certain existing restrictions on the distribution of inward cross-border mail ^(**), so as to avoid artificial diversion of traffic, which would inflate the share of cross-border mail in Community traffic. Such restrictions may only concern items falling under the reservable area of services. In assessing the situation in the framework of individual cases, the Commission will take into account the relevant, specific circumstances in the Member States.

8.6. The clearance, sorting and transport of postal items has been or is currently increasingly being opened up to third parties by postal operators in a number

^(**) This may in particular concern mail from one State which has been conveyed by commercial companies to another State to be introduced in the public postal network via a postal operator of that other State.

of Member States. Given that the revenue effects of such opening up may vary according to the situation in the different Member States, certain Member States may, if particular circumstances make it necessary, and without prejudice to point 8.3, maintain certain existing restrictions on the clearance, sorting and transport of postal items by intermediaries⁽¹⁰⁾, so as to allow for the necessary restructuring of the operator referred to in point 4.2. However, such restrictions should in principle be applied only to postal items covered by the existing monopolies, should not limit what is already accepted in the Member State concerned, and should be compatible with the principle of non-discriminatory access to the postal network as set out in point 8(b)(vii).

(b) Conditions for the application of Article 90(2) to the postal sector

The following conditions should apply with regard to the exception under Article 90(2):

(i) Liberalisation of other postal services

Except for those services for which reservation is necessary, and which the Postal Directive allows to be reserved, Member States should withdraw all special or exclusive rights for the supply of postal services to the extent that the performance of the particular task assigned to the operators referred to in point 4.2 for the provision of a service of a general economic interest is not obstructed in law or in fact, with the exception of mail connected to the exercise of official authority, and they should take all necessary measures to guarantee the right of all economic operators to supply postal services.

This does not prevent Member States from making, where necessary, the supply of such services subject to declaration procedures or class licences and, when necessary, to individual licensing procedures aimed at the enforcement of essential requirements and at safeguarding the universal service. Member States

⁽¹⁰⁾ Even in a monopoly situation, senders will have the freedom to make use of particular services provided by an intermediary, such as (pre-)sorting before deposit with the postal operator.

should, in that event, ensure that the conditions set out in those procedures are transparent, objective, and without discriminatory effect, and that there is an efficient procedure of appealing to the courts against any refusal.

(ii) Absence of less restrictive means to ensure the services in the general economic interest

Exclusive rights may be granted or maintained only where they are indispensable for ensuring the functioning of the tasks of general economic interest. In many areas the entry of new companies into the market could, on the basis of their specific skills and expertise, contribute to the realisation of the services of general economic interest.

If the operator referred to in point 4.2 fails to provide satisfactorily all of the elements of the universal service required by the Postal Directive (such as the possibility of every citizen in the Member State concerned, and in particular those living in remote areas, to have access to newspapers, magazines and books), even with the benefit of a universal postal network and of special or exclusive rights, the Member State concerned must take action⁽¹¹⁾. Instead of extending the rights already granted, Member States should create the possibility that services are provided by competitors and for this purpose may impose obligations on those competitors in addition to essential requirements. All of those obligations should be objective, non-discriminatory and transparent.

(iii) Proportionality

Member States should moreover ensure that the scope of any special and exclusive rights granted is in proportion to the general economic interest which is pursued through those rights. Prohibiting self-delivery, that is the provision of postal services by the natural or legal person (including a sister or subsidiary organisation) who is the originator of the mail, or collection and transport of such items by a third party acting solely on its behalf, would for

⁽¹¹⁾ According to Article 3 of the Postal Directive, Member States are to ensure that users enjoy the right to a universal service.

example not be proportionate to the objective of guaranteeing adequate resources for the public postal network. Member States must also adjust the scope of those special or exclusive rights, according to changes in the needs and the conditions under which postal services are provided and taking account of any State aid granted to the operator referred to in point 4.2.

(iv) *Monitoring by an independent regulatory body*

The monitoring of the performance of the public-service tasks of the operators referred to in point 4.2 and of open access to the public postal network and, where applicable, the grant of licences or the control of declarations as well as the observance by economic operators of the special or exclusive rights of operators referred to in point 4.2 should be ensured by a body or bodies independent of the latter ⁽²²⁾.

That body should in particular ensure: that contracts for the provision of reserved services are made fully transparent, are separately invoiced and distinguished from non-reserved services, such as printing, labelling and enveloping; that terms and conditions for services which are in part reserved and in part liberalised are separate; and that the reserved element is open to all postal users, irrespective of whether or not the non-reserved component is purchased.

(v) *Effective monitoring of reserved services*

The tasks excluded from the scope of competition should be effectively monitored by the Member State according to published service targets and performance levels and there should be regular and public reporting on their fulfilment.

(vi) *Transparency of accounting*

Each operator referred to in point 4.2 uses a single postal network to compete in a variety of markets.

⁽²²⁾ See in particular Articles 9 and 22 of the Postal Directive.

Price and service discrimination between or within classes of customers can easily be practised by operators running a universal postal network, given the significant overheads which cannot be fully and precisely assigned to any one service in particular. It is therefore extremely difficult to determine cross-subsidies within them, both between the different stages of the handling of postal items in the public postal network and between the reserved services and the services provided under conditions of competition. Moreover, a number of operators offer preferential tariffs for cultural items which clearly do not cover the average total costs. Member States are obliged by Article 5 and 90 to ensure that Community law is fully complied with. The Commission considers that the most appropriate way of fulfilling that obligation would be for Member States to require operators referred to in point 4.2 to keep separate financial records, identifying separately, *inter alia*, costs and revenues associated with the provision of the services supplied under their exclusive rights and those provided under competitive conditions, and making it possible to assess fully the conditions applied at the various access points of the public postal network. Services made up of elements falling within the reserved and competitive services should also distinguish between the costs of each element. Internal accounting systems should operate on the basis of consistently applied and objectively justified cost-accounting principles. The financial accounts should be drawn up, audited by an independent auditor, which may be appointed by the National Regulatory Authority, and be published in accordance with the relevant Community and national legislation applying to commercial organisations.

(vii) *Non-discriminatory access to the postal network*

Operators should provide the universal postal service by affording non-discriminatory access to customers or intermediaries at appropriate public points of access, in accordance with the needs of those users. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.

Preferential tariffs appear to be offered by some operators to particular groups of customers in a non-transparent fashion. Member States should monitor the access conditions to the network with a view to, ensuring that there is no discrimination

either in the conditions of use or in the charges payable. It should in particular be ensured that intermediaries, including operators from other Member States, can choose from amongst available access points to the public postal network and obtain access within a reasonable period at price conditions based on costs, that take into account the actual services required.

The obligation to provide non-discriminatory access to the public postal network does not mean that Member States are required to ensure access for items of correspondence from its territory, which were conveyed by commercial companies to another State, in breach of a postal monopoly, to be introduced in the public postal network via a postal operator of that other State, for the sole purpose of taking advantage of lower postal tariffs. Other economic reasons, such as production costs and facilities, added values or the level of service offered in other Member States are not regarded as improper. Fraud can be made subject to penalties by the independent regulatory body.

At present cross-border access to postal networks is occasionally rejected, or only allowed subject to conditions, for postal items whose production process includes cross-border data transmission before those postal items were given physical form. Those cases are usually called non-physical remail. In the present circumstances there may indeed be an economic problem for the postal operator that

delivers the mail, due to the level of terminal dues applied between postal operators. The operators seek to resolve this problem by the introduction of an appropriate terminal dues system.

The Commission may request Member States, in accordance with the first paragraph of Article 5 of the Treaty, to inform the Commission of the conditions of access applied and of the reasons for them. The Commission is not to disclose information acquired as a result of such requests to the extent that it is covered by the obligation of professional secrecy.

9. REVIEW

This notice is adopted at Community level to facilitate the assessment of certain behaviour of undertakings and certain State measures relating to postal services. It is appropriate that after a certain period of development, possibly by the year 2000, the Commission should carry out an evaluation of the postal sector with regard to the Treaty rules, to establish whether modifications of the views set out in this notice are required on the basis of social, economic or technological considerations and on the basis of experience with cases in the postal sector. In due time the Commission will carry out a global evaluation of the situation in the postal sector in the light of the aims of this notice.

Renewed Notification of an Agreement on Terminal Dues (REIMS II) between Postal Operators

(Caso No IV/36.748 — REIMS II)

(98/C 53/03)

(Text with EEA relevance)

1. Introduction

On 31 October 1997, thirteen public postal operators notified to the Commission for examination under the competition rules a new version, called REIMS II and dated 9 July 1997⁽¹⁾, of the original REIMS I (remuneration of mandatory deliveries of cross-border mails) terminal dues agreement. The purpose of both agreements is to replace the CEPT terminal dues system, as explained under point 4. Terminal dues are the remunerations applied between public postal operators (PPOs) for the delivery of incoming cross-border mail. The earlier version of this agreement, dated 31 December 1995, was notified in December 1995. However, this agreement expired on 30 September 1997 since one of its provisions, that the Spanish postal operator should have acceded to the Agreement by 31 May 1997, was not fulfilled.

2. Reasons to change the Agreement

The Parties have changed the terms of the agreement for two principal reasons:

- First, the signatories had assumed that the terminal dues increases would be balanced by the benefits of quality of service improvements, and that a transitional period for (gradual) increases of terminal dues would be acceptable if no radical changes to the existing market situation would occur. This last assumption turned out, according to the Parties, to be unfounded. The low terminal dues that would still be applicable for several years under REIMS I are said to have caused an unexpected development of non-physical ABA-remailing.
- Second, the strict cut-off quality of service thresholds agreed under REIMS I turned out to be counter-productive. Even if considerable quality of service improvement was reached, however, without reaching the agreed quality of service targets, the rules would prevent any terminal dues increase during the transitional period.

⁽¹⁾ As amended by the first amendment agreement of 5 September 1997 and the second amendment agreement of 30 September 1997)

3. Parties to the Agreement

The parties (13) to the agreement are the following PPOs: Austrian Post, Post Denmark, Finland Post Ltd, La Poste (France), Deutsche Post AG, Hellenic Posts ELTA, Ente Poste Italiane, Entreprise des Postes & Télécommunications (Luxembourg), CTT Correios de Portugal SA, Correos y Telégrafos (Spain), The Post Office (United Kingdom), Norway Post, and Post and Telecom Iceland Ltd.

A number of PPOs (4) of EU Member States who were parties to the earlier REIMS I Agreement, La Poste/De Post (Belgium), Posten AB (Sweden), An Post (Ireland), PTT Post BV (The Netherlands), have not signed the REIMS II Agreement, nor did the Swiss postal operator re-sign the agreement. According to the notification, only the operators of the Netherlands and Switzerland have declared that they are not prepared to enter into negotiations at all.

Public and private operators of a mandatory universal postal delivery service can accede to the agreement, provided they are obliged, or agree, to provide this service to the other Parties.

4. Background

In 1993, following a complaint from the International Express Carriers Conference (IECC), the Commission issued a Statement of Objections with regard to the terminal dues agreement which was then in force between PPOs, the 1987 CEPT-agreement. The Statement of Objections was issued because, *inter alia*, the level of remuneration had no relation to the actual costs of providing the international service and it therefore artificially hampered the activities of commercial remailing companies. Stimulated by the Commission's action, EU PPOs (who are also members of IPC, International Post Corporation) first developed the REIMS I terminal dues scheme and now the REIMS II scheme, which, the notification claims, meets the demands of the Commission with regard to the level of remuneration and the effects on quality of service.

5. Entering into force

The REIMS II Agreement technically entered into force on 1 October 1997 and it will effectively enter into force on 1 January 1998. The most important articles of the REIMS I Agreement, dealing with the levels of remuneration and with quality of service, continue to apply between the parties until 31 December 1997.

Withdrawal from the agreement will take effect at the end of the first full calendar year following notice of such withdrawal by a Party. A Party may also withdraw by giving six months notice to the end of a calendar month in case of a final decision of a competent EU authority concerning the agreement or affecting cross-border mail that poses, in the opinion of that Party, a threat to its vital interest.

6. Aims of the Agreement

According to the Parties, the main aims of the agreement are:

- to provide the Parties with fair compensation for the delivery of cross-border mail, which reflects more closely the real costs of delivery of each Party,
- to improve the quality of the cross-border mail service.

The agreement is based on the Nordic System, which was established in 1989 between the five member countries of the Nordic Postal Union.

7. Differences between REIMS I and REIMS II

A main difference between REIMS I and REIMS II is that, according to the Parties, REIMS II leads to a more regular line of increases of terminal dues during the transitional period, thus avoiding a 'jump' at the end of that period (in the year 2001) to reach the ultimate level of 80 % of domestic tariffs (this only concerns Level 1, see point 8). The methodology presented under REIMS I was based on four yearly, fixed percentile (either 15 % or 20 %) increases of terminal dues on top of the current level of terminal dues applied. If the 80 % of domestic tariff level was still not reached after this period, terminal dues would be increased to 80 % in one 'jump'. The principles of REIMS II are explained below. The terminal dues level is subject to a quality of service penalty system that is explained below under point 10. Under REIMS I the yearly increases were strictly conditional to complete achievement of the applicable quality of service targets. The Parties have now, as was announced in the REIMS I Agreement, decided to introduce a non-priority terminal dues level.

8. Terminal Dues

The agreement encompasses four levels of remuneration.

- (1) Level 1 remuneration is based on a percentage of the receiving Party's domestic tariff for a single letter item. This percentage will increase during the course of the transitional period; starting from the current CEPT rate, this remuneration will be raised to 55 % of domestic rates in 1998, to 65 % in 1999, to 70 % in 2000, and ultimately, in 2001, to 80 % of the domestic tariff (*). A penalty system is applied when specific quality of service targets are not achieved as agreed.
- (2) Level 2 remuneration consists of possible discounts on the Level 1 remuneration, on the basis that preparation of the mail by the sending Party results in cost-savings for the receiving Party, which must be taken into account. Examples of such work-sharing are: presentation by formats or in trays, segregation to offices of exchange (postal sorting offices which specialise in receiving and sending cross-border mail), segregation of machinable or OCR readable items, of pre-sorted items, etc.

The possible discounts have not yet been finalised. Each Party shall inform IPC of the rates and conditions for rebates by 31 December 1998.

- (3) Parties will have access to all favourable domestic rates, such as bulk rates for direct mail, printed matter or periodicals. Under level 3, the full domestic rates (100 % of discounted rates) will be applied. The Parties intend to relax those conditions which are not related to costs and could bar other Parties from access to domestic rates (*). A data base containing all rates, and conditions made available by the Parties to their customers is managed by IPC.
- (4) Special terminal dues apply for non-priority mail. These terminal dues are 10 % less than those for priority mail (*).

(*) Ente Poste Italiane, Correos y Telegrafos (Spain), and Hellenic Posts ELTA, are allowed to pay according to lower increases of terminal dues during the transitional period.

(*) The notification does not include the conditions of access to this level.

(*) An exception is made for Greece, Spain, Luxembourg, and Iceland, who are authorised to treat all incoming mail as priority mail and will receive priority terminal dues. In view of the low domestic rates for priority mail applied by the UK post office the terminal dues payable for non-priority mail delivered by this operator will be reduced by only 5 %.

Changes in a PPO's domestic tariff, unless communicated and applied before 1 September 1997, will not be taken into account for the calculation of terminal dues in 1998 and 1999 (*). The agreement does not cover M-bags (an entire bag of mail addressed to one recipient) and parcels.

Special transitional arrangements have been negotiated and agreed that reduce the financial impact of the agreement for some Parties (*). In order to prevent abuse of that situation a so-called 'cap-system' is developed. This system enables application of lower terminal dues to postcards (?), to the other current level of outward volumes of these Parties, and to some foreseen growth, the so-called 'organic growth'. Regular terminal dues are payable for any additional mail sent by these Parties.

The Parties state they are free to deviate bilaterally from the terminal dues set under the agreement. Since terminal dues are just a cost element, the Parties claim that they do not have a direct relationship with the rates applied by the operators. IPC will inform the Parties on new terminal dues levels for the next year before 1 October.

9. Transitional Period

The transitional period applies to mail which will be exchanged under level 1 and 2 remuneration conditions and to non-priority mail. The length of this period, as from 1 January 1998, is four years (*).

10. Quality of service

Independent third parties will measure the performance of each Party against minimum standards. The standard

to be achieved is the delivery of a specified percentage of incoming cross-border mail within one working day (*) of receipt in the office of exchange of the receiving Party. So, for example, a quality standard of 80 %/J+1 means that 80 % of the mail entering a given country will be delivered to its final destination, within one day (J = jour) after the mail has entered that country (for example, receipt before LAT⁽¹⁰⁾) in an office of exchange of that country). The Parties have been divided into three groups, on the basis of geographical conditions and demographic factors⁽¹¹⁾. Members of a group A are Denmark, Luxembourg, Austria, Finland, Iceland and Norway. Members of a group B are Germany, France, Italy, Portugal and the United Kingdom. Members of Group C are Greece and Spain⁽¹²⁾.

Members of group C may be allowed to establish a premium service with a higher tariff than their traditional first class service, in order to achieve the quality of service standard. This tariff will then be used as the domestic tariff for the purpose of calculating terminal dues, and the Party will be placed in group B.

Different quality standards have been set for each group, for 1998 (A-90 %, B-85 %, C-80 %) and for 1999 and 2000 (A-95 %, B-90 %, C-85 %). The grouping and the standards will be reviewed and renegotiated before 1 January 2001, with the aim of improving the quality of service.

The terminal dues payable on the basis of Level 1 and 2 will be subject to specified quality of service penalties according to a penalty curve. If the quality of service standard is not fully met but a Party has achieved over 90 % of the target, the terminal dues are lowered by 1,5 % for each percent quality loss. If a Party

(*) Except for increases made by Entreprise des Postes & Télécommunications (Luxembourg) in 1998. Increases made in 1999 will not be taken into account.

(*) Such arrangements apply to mail sent from Greece, Spain and Italy to the other Parties. The arrangements do not apply to mail exchanged between these Parties. The arrangements include a slower increase of terminal dues to be paid by Greece, fixed percentile increases of terminal dues (as under REIMS I, with, however, additional arrangements to reward any improvements of quality of service) to be paid by Italy, and fixed percentile increases plus a longer transitional period for Spain. The notification does not explain in detail why a number of Parties have been granted such exceptions.

(*) Portugal is, exceptionally, allowed to pay the same lowered remuneration for postcards as allowed to Spain.

(*) The transitional period for Hellenic Post — ELTA ends in 2003. For Correos y Telegrafos Spain this period ends in 2006.

(*) This includes Saturdays for those Parties that offer regular Saturday delivery.

(10) LAT means Latest Arrival Time. The Parties will also set, after consultation with other Parties, Critical Entry Times (CET) and Critical Tag Times (CTT).

(11) The notification does not include the conditions and factors applied.

(12) Special, lower, quality of service targets and terminal dues levels are set for inbound mail to Greece until 2003. The quality of service standards for Hellenic Posts ELTA are 50 % for 1998, 60 % for 1999, 70 % for 2000, and 80 % for 2001. The terminal dues increases are 7 % in 1998, 10 % in 1999, 15 % in 2000 and 2001, 20 % in 2002, and a final jump to 80 % of domestic tariffs in 2003.

has only achieved between 90 % and 80 % of the target, the terminal dues are lowered by 3,5 % for each percent quality loss. The lowest value could thus be 40 % of the domestic tariff, however, it will not be below the current CEPT rate or below 80 % of the domestic tariff of the receiving Party, if this value (i.e. 80 % of the domestic tariff) is lower than the current CEPT rate. The effect of the penalty curve is that it produces a strong incentive where it is needed most, namely for Parties whose quality of service levels are low.

The Parties will use their best efforts to negotiate quality of service standards for non-priority mail.

11. Linear Tariffs

Level 1 remuneration will be based on domestic tariffs for single letter items. For practical reasons, the tariffs per weight step have been converted into linear tariffs, for 3 distinct formats. Letters up to format C5 and a maximum weight of 100 grams; flats (flat items) up to format C4 and a maximum weight of 500 grams; packets of all shapes up to UPU limits of weight and size.

Changes in the domestic tariffs will be reflected in the linear tariffs to the extent that they have been notified by September of the year preceding application.

The starting point for the linear tariffs is the current CEPT remuneration level. During the transitional period Parties may, subject to application of the penalty curve, increase their terminal dues to 55 % of domestic tariffs in 1998, to 65 % in 1999, to 70 % in 2000, and finally in 2001 to the maximum level of 80 % of the domestic tariff. This is considered to be the best available approximation of costs incurred by receiving postal operators.

The level 1 and 2 tariffs may, under specific conditions, be increased by a certain percentage of domestically applicable VAT. This would currently only apply in Finland.

12. Articles 25 and 49(4) of the UPU Convention

Article 25 of the UPU Convention provides PPOs with guidelines on the treatment of domestic mail posted

abroad (re-mail), once it re-enters a PPO's territory. Article 49(4) concerns the application of terminal dues which are related to domestic tariffs, for incoming bulk mail. The Parties will not apply these articles as between themselves following the transitional period. The agreement does not address the application of these Articles between themselves or with third Parties during the transitional period.

13. Amendment and Governing Law

The REIMS Agreement is of indefinite duration. It may be amended by the Parties at any time. It shall be governed by and construed in accordance with the laws of the Netherlands.

14. Preliminary considerations

After preliminary scrutiny, the Commission considers that the agreement must be examined under the provisions of Council Regulation No 17⁽¹⁾.

15. Observations

The Commission invites interested third parties to send any observations they may have regarding this agreement. In accordance with Article 20 of Regulation No 17, such observations will be protected by professional secrecy. Observations must reach the Commission within 20 days of the date of this notice, quoting the reference: IV/36.748 — REIMS II.

Send observations to:

European Commission
Directorate-General for Competition (DG IV),
Directorate for Information, Communication and
Multimedia,
Rue de la Loi/Wetstraat 200
B-1049 Brussels
fax: (32-2) 296 70 81.

⁽¹⁾ OJ L3, 21.2.1962, p. 204/62.