

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 September 1999

relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

(Case No IV/36.748 — REIMS II)

(notified under document number C(1999) 2596)

(Text with EEA relevance)

(1999/695/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Articles 6 and 8 thereof,

Having regard to the application for negative clearance and the notification for exemption submitted pursuant to Articles 2 and 4 of Regulation No 17 on 31 October 1997 and the supplementary notifications submitted on 12 January 1998, 2 February 1998 and 28 September 1998,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17 ⁽³⁾,

After consultation with the Advisory Committee for Restrictive Practices and Dominant Positions,

Whereas:

A. FACTS

I. INTRODUCTION

- (1) On 31 October 1997, an agreement on terminal dues between postal operators (the REIMS II Agreement) was notified to the Commission pursuant to Regulation No

17 with a view to obtaining a negative clearance or an exemption under Article 81(3) of the EC Treaty. Following the accession of several other postal operators to the Agreement, the information contained in that notification was supplemented and amended by letters dated 12 January 1998 and 2 February 1998 respectively. Finally, a first supplementary agreement was notified to the Commission by a letter dated 28 September 1998. In a letter of 30 July 1998 the parties have clarified that their application is also based on the relevant rules of the EEA Agreement (Article 53).

II. THE PARTIES

- (2) At the date of its notification, 13 public postal operators (PPOs) had signed the REIMS II Agreement. Three more PPOs have since joined the Agreement. The parties now comprise the PPOs of all the Member States of the Community other than the Netherlands, and the PPOs of Norway and Iceland: Austrian Post, La Poste/De Post (Belgium), Post Danmark, Finland Post, La Poste (France), Deutsche Post, Hellenic Post ELTA, Iceland Post, An Post (Ireland), Poste Italiane, Entreprise des Postes & Télécommunications (Luxembourg), Norway Post, CTT Correios de Portugal, Correos y Telégrafos (Spain), Sweden Post and The Post Office (United Kingdom). The parties are the incumbent postal operators in their respective states.

⁽¹⁾ OJ L 13, 21.2.1962, p.204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ C 371, 1.12.1998, p. 7.

- (3) So far, only two of the Member States of the Community (Sweden and Finland) have fully liberalised the postal sector. The PPOs in all the other countries concerned dispose of a reserved area by virtue of national law in which they have the exclusive right to provide postal services. Directive 97/67/EC of 15 December 1997⁽⁴⁾ of the European Parliament and of the Council on common rules for the development of the internal market of Community postal services and the improvement of quality of service (the Postal Directive) provides in Article 7(1) and (2):

‘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 g. 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, crossborder mail and direct mail may continue to be reserved within the price and weight limits laid down in paragraph 1.’

At least part of the postal services (in particular express courier services) is thus open to competition in all the countries concerned. Each of the parties is by far the most important postal operator in its state. Some of the parties have a very large turnover. In 1997, for example, the largest of these operators, Deutsche Post AG, achieved a turnover of DEM 27,136 billion (EUR 13,874 billion).

III. THE MARKETS CONCERNED

- (4) The notified Agreement concerns the markets for normal (as opposed to express) cross-border mail between the countries concerned, i.e. mail sent from one of those countries to one of the other countries. More specifically, the Agreement covers all letter-post items as defined in Article 8 of the Universal Postal Convention (see recital 7) with the exception of ‘M bags’⁽⁵⁾. This definition comprises items which in general weigh up to 2 kg⁽⁶⁾. According to a study recently commissioned by

the Commission⁽⁷⁾, the Community market for cross-border mail comprises 5,5 billion letter items (1996) with an estimated value of ECU 1 to 1,2 billion (65 % of the total cross-border market). The importance of cross-border mail varies from country to country. In smaller Member States, cross-border mail generally represents a higher share of the overall mail market than in larger Member States. On average, cross-border mail has been estimated to represent well under 10 % of the overall mail market⁽⁸⁾ in the Community.

- (5) The relevant market can be further divided into a market for cross-border mail on which PPOs and private companies collect mail from customers in the originating country for delivery in other countries, and a sub-market for incoming cross-border mail on which PPOs offer mail delivery services for cross-border mail to PPOs and private mail companies.
- (6) For historical reasons (including the existence of national monopolies), cross-border mail has traditionally been the domain of the PPOs. However, private companies have entered the market for cross-border mail via remail. This term describes the activities of companies which collect mail in country A and transport it to country B where it is put in the regular mailstream. It is customary to distinguish between three categories of remail services⁽⁹⁾: ‘ABC remail’ (where the final addressee of the mail resides in country C), ‘ABB remail’ (where the final addressee of the mail resides in country B) and ‘ABA remail’ (where the final addressee of the mail resides in country A). At least some of the PPOs are also providing remail services.

IV. BACKGROUND

1. Terminal dues

- (7) Nearly all the countries in the world are members of the Universal Postal Union (UPU) which was founded in 1874. The UPU holds a congress every five years at which the Universal Postal Convention (UPU Convention) which provides the framework for the operational relations between the postal administrations is reviewed. Under the UPU Convention the members of the UPU agree to provide domestic delivery services for incoming cross-border mail.
- (8) Prior to 1969 postal administrations did not directly compensate each other for the delivery of international mail since it was assumed that each mail item generated a reciprocal response, resulting in a broad balance of traffic. This assumption of an equilibrium became however invalid as imbalances developed.
- (9) The UPU reacted to these developments by introducing, in 1969, a system providing for remuneration for the costs of handling and delivering cross-border mail in the country of destination. The fees which have to be paid for these services are commonly referred to as ‘terminal

⁽⁴⁾ OJ L 15, 21.1.1998, p. 14.

⁽⁵⁾ Bags containing bulk mail for one addressee.

⁽⁶⁾ The definition also includes printed papers and items containing books and pamphlets weighing up to 5 kg and literature for the blind weighing up to 7 kg.

⁽⁷⁾ PriceWaterhouseCoopers, Liberalisation of incoming and outgoing intra-Community cross-border mail, December 1998.

⁽⁸⁾ The PriceWaterhouseCoopers study referred to above (footnote 7) gives a figure of 6,3 %. However, the study did not take into account the situation in all the Member States of the Community.

⁽⁹⁾ See the judgment of the Court of First Instance of the European Communities in Case T-110/95 IECC v Commission [1998] ECR II-3605, at paragraph 2.

dues'. The method used consisted in fixing a rate per kilogram which was the same for all postal operators concerned. This system was not satisfactory since it did not properly reflect the cost structures of the individual operators. Furthermore the method was inherently flawed since it ignored the real cost of delivery, given that it is normally cheaper to deliver one item of mail weighing 1 kg than 50 letters weighing 20 g each.

- (10) The inadequacies of this system led the postal administrations of several European countries to work out a different formula in the framework of the European Conference of Postal and Telecommunications Administrations (CEPT), a subgrouping within the UPU. The result of these discussions in 1987 was a method (the CEPT system) under which the remuneration to be paid consisted of two elements, a rate per item (ultimately SDR 0,147 ⁽¹⁰⁾) and a rate per kilogramme (ultimately SDR 1,491). For a standard letter ⁽¹¹⁾, this results in terminal dues of EUR 0,205. Compared to the previous remuneration level pursuant to the UPU system, the CEPT system resulted in considerable increases for most of the mail concerned. However, the CEPT system still did not reflect the real costs of delivery in the country of destination.

- (11) In 1993, following a complaint lodged by the International Express Carriers Conference (IECC), the Commission issued a statement of objections in which it expressed the view that the CEPT system was contrary to Article 81(1) of the EC Treaty since it fixed a uniform rate for the delivery of incoming international mail. The Commission also considered that Article 81(3) was not applicable since the terminal dues agreed on were not cost-based. In this context the Commission expressed the view that the method for calculating terminal dues should be fully cost-based or at least involve a more accurate approximation of costs, for example by calculating terminal dues as a percentage of domestic tariffs in the country of destination. However, in view of subsequent developments (which will be described in the following paragraphs) the Commission decided not to proceed to a prohibition decision in that case. That approach adopted by the Commission was endorsed by the Court of First Instance in its judgment of 16

September 1998 in Case T-110/95 (*IECC v Commission*) ⁽¹²⁾.

2. The first REIMS Agreement (REIMS I)

- (12) On 2 June 1995, 14 PPOs entered into an Agreement for the Remuneration of Mandatory Deliveries of Cross-Border Mails (the REIMS I Agreement) which was resigned in an amended form by 16 PPOs on 13 December 1995. The parties included the PPOs from all the Member States of the Community apart from Spain and the PPOs from Norway and Iceland. An application for a negative clearance/exemption was lodged with the Commission in December 1995 ⁽¹³⁾.
- (13) Under the REIMS I Agreement, terminal dues were for the first time to be linked to domestic tariffs on a Europe-wide basis ⁽¹⁴⁾. Terminal dues were to be increased to 80 % of the domestic tariffs in yearly steps, using as their starting point the remuneration paid under the CEPT system. The increase would have been 15 % in both 1997 and 1998 and 20 % in 1999 and 2000 ⁽¹⁵⁾. A final increase in 2001 would have brought terminal dues up to the final level (i.e., 80 % of domestic tariffs). These increases were strictly linked to specific improvements in quality of service. A postal operator which did not reach the targets set was not allowed to increase his terminal dues.
- (14) The validity of the REIMS I Agreement had been made dependent on the condition that the Spanish PPO acceded to it by 31 May 1997. Since this condition was not fulfilled, the REIMS I Agreement expired on 30 September 1997.

V. THE REIMS II AGREEMENT

1. Membership

- (15) Membership in the Agreement is open to public and private operators of a mandatory, universal postal service provided that they have or contract to have an obligation to provide this service to the other parties.

2. Contents of the Agreement

a) Purpose

- (16) According to the parties, the main aims of the REIMS II Agreement are (1) 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, and (2) to improve the quality of the cross-border mail service.

⁽¹²⁾ An appeal against this judgment is pending before the Court of Justice (C-449/98 P).

⁽¹³⁾ Case No IV/35.849. A notice on this Agreement was published in OJ C 42, 14.2.1996, p. 7.

⁽¹⁴⁾ The five member countries of the Nordic Postal Union (Denmark, Finland, Iceland, Norway and Sweden) have applied, since 1989, a system under which their postal operators pay each other a remuneration for mail exchanged between these countries which is a percentage (first 60 %, then 70 %) of the domestic postage in the country of delivery. The level of payment is linked to the quality of service provided with regard to both incoming and outbound mail. If the quality-of-service standards are not achieved, the payment is reduced.

⁽¹⁵⁾ For Greece, the increases were to be 7 %, 11 %, 15 % and 20 % respectively.

⁽¹⁰⁾ Special drawing right. In 1997, SDR 1 was the equivalent of ECU 0,824.

⁽¹¹⁾ Weighing (on the basis of the figures used in the REIMS II Agreement) 14,63 g.

b) **Terminal dues**aa) *Principle*

- (17) The REIMS II Agreement links terminal dues to domestic mail tariffs in the country of destination and to the quality of service provided by the postal operator that delivers the mail. According to the Agreement, terminal dues are to increase over a transitional period until they reach (subject to penalties which will accrue if the requisite quality-of-service target is not met) a maximum of 80 % of domestic tariffs in 2001.
- (18) The parties acknowledge that at present they are not able to prove that 80 % of domestic rates correspond to the costs of delivering incoming cross-border mail. They argue that this is due to the differences between the costs incurred by the individual parties and the lack of a cost accounting system enabling them to calculate precisely the cost of a particular service. The parties maintain, however, that the figure chosen is a sufficiently reliable proxy for the costs actually incurred by the operators. In this context data for several operators was submitted in order to support the conclusion drawn by the parties.

bb) *Domestic tariffs serving as reference*

- (19) Domestic tariffs usually distinguish between different weight steps (such as 20, 50 and 100 g for letters). According to the Agreement, these different tariffs are converted, on the basis of a standard structure, into linear tariffs for the purpose of calculating terminal dues. In doing so, the Agreement distinguishes between three categories:

Letters up to C5 size and a maximum weight of 100 g;

Flats up to C4 size and a maximum weight of 500 g;

Packets of all shapes up to limits of weight and size set by the UPU.

- (20) An example will suffice to illustrate this approach. According to the standard structure used in the Agreement, 1 t (or, more precisely, 999,9 kg) of letter mail comprises 68 336 items of which 83,01 % are letters weighing up to 20 g, 15,71 % letters weighing between 20 and 50 g and 1,28 % letters weighing between 50 and 100 g. An average letter thus weighs 14,63 g. Similar figures and calculations are provided for flats and packets. Linear tariffs are calculated on the basis of this standard structure.
- (21) Changes in domestic tariffs will only be taken into account for the purpose of calculating terminal dues if they are notified by 1 September of the year preceding the year concerned.

cc) *Levels of terminal dues*

- (22) The Agreement distinguishes between four different levels of terminal dues:
- Level 1: priority mail items presented in mixed bags (which may contain letters, flats and packets).

Terminal dues for such items will ultimately be 80 % of domestic tariffs excluding VAT ⁽¹⁶⁾,

- Level 2: the receiving PPO may offer rebates on the Level 1 remuneration on the basis of work sharing/preparation of mail (for example, by presorting mail according to format or destination). The same discounts must be offered to all sending PPOs when equal conditions are met. The parties will have to inform IPC ⁽¹⁷⁾ by 31 December 1998 about the rates and conditions for such rebates,
 - Level 3: all the parties are obliged to grant each other access to the 'generally available domestic rates' (such as bulk rates for direct mail, printed matter or periodicals) in the country of delivery. This remuneration level (which will normally be lower than the other levels) is of particular importance for the significant volume of cross-border business mail,
 - Non-priority mail: to mail designated as 'non-priority', terminal dues will be applied that are 10 % less than the terminal dues for Level 1 mail ⁽¹⁸⁾.
- (23) The terminal dues to which a party is entitled must in any event (and after deduction of penalties) never be lower than terminal dues under the CEPT system, except in countries where 80 % of domestic rates of the receiving PPO is lower than the CEPT rate. In those countries, terminal dues must never be lower than 80 % of the domestic rate.

dd) *Transitional period*

- (24) Terminal dues were to be increased (subject to penalties which will accrue if the requisite quality-of-service target is not met) over a transitional period as follows:

1997: CEPT level + 15 % ⁽¹⁹⁾

1998: 55 % of domestic tariffs

1999: 65 % of domestic tariffs

⁽¹⁶⁾ In countries where postal services have been fully liberalised, where a uniform tariff is applied throughout the country and where VAT is applied to domestic postal services, the domestic tariff to be used for the calculation of terminal dues is to be increased by a percentage equivalent to half the rate of VAT, subject to a maximum of 12,5 %.

⁽¹⁷⁾ International Post Corporation, a Brussels-based entity used by the parties, *inter alia*, for the purpose of assisting them in implementing the REIMS II Agreement.

⁽¹⁸⁾ As an exception, terminal dues for non-priority mail delivered by The Post Office, of the United Kingdom, will, in view of the low domestic rates for priority mail in the United Kingdom, be only 5 % less than the terminal dues payable for priority mail until the end of 2000. The Post Office will however have to submit, before 31 October 2000, a new offer for terminal dues payable as of 1 January 2001. As a further exception, the PPOs of Iceland, Luxembourg, Greece (until the end of 2003) and Spain (until the end of 2005) are authorised to treat all incoming mail as priority mail and thus to receive priority-mail terminal dues.

⁽¹⁹⁾ This increase would only have occurred if the PPO concerned had met the quality-of-service target. On the other hand, no penalties would have applied.

2000: 70 % of domestic tariffs

2001: 80 % of domestic tariffs.

(25) The purpose of the transitional period is to allow postal operators and their customers to adapt to the new system and to avoid market disturbance by sudden, sharp tariff increases for outward cross-border mail.

(26) For the period until the end of 1999, terminal dues will be calculated on the basis of the domestic tariffs applied by 1 September 1997 at the latest. Increases which have since occurred (or may still occur) are therefore not taken into account ⁽²⁰⁾.

ee) *Quality of service*

(27) The REIMS II Agreement introduces a system of quality-of-service standards for Level 1 (and Level 2) mail in order to improve the quality of service. The standards are defined as the percentage of incoming cross-border mail (from a particular PPO) which has to be delivered within one working day after the day of its arrival ('J') in the office of exchange of the receiving PPO ⁽²¹⁾, provided that it arrives there by the Latest arrival time (LAT), the Critical entry time (CET) and/or the Critical tag time (CTT) ⁽²²⁾. A standard of 80 % J + 1, for example, means that 80 % of the incoming mail will have to be delivered to its final destination within one working day. The rules pursuant to which the LAT, the CET and the CTT are to be set, are to be determined by IPC after consultation with the parties. According to the information provided by the parties, only rules regarding the LAT were established ⁽²³⁾.

(28) The performance (as to the delivery of incoming cross-border mail) of the individual parties is measured by means of diagnostic systems set up by IPC. These measurements have already begun. The earliest available figures are those for 1997.

⁽²⁰⁾ An exception was made for the PPO from Luxembourg in case this operator should have decided to apply new tariffs before 1 October 1998. However, no use was made of this exception which has thus become devoid of purpose.

⁽²¹⁾ Saturdays are considered as working days for those PPOs who offer Saturday delivery for domestic mails.

⁽²²⁾ The LAT is defined as the latest acceptable time of touchdown, permitting delivery of airmail items the next working day. The CET is the latest acceptable time of delivery at the platform of an office of exchange or an airmail unit equipped with sensor gates. The CTT is defined as the latest time at which the transponders must go through the sensor gates.

⁽²³⁾ According to these rules, none of the parties can apply an earlier CTT than 4 p.m. from Monday to Saturday in their main office of exchange in the capital or in another main city. Earlier CTTs in other offices of exchange can be justified for operational reasons. Finally, the CTT in the airmail unit can be earlier than 4 p.m., but not earlier than 3 p.m.

(29) For the purpose of setting quality-of-service standards, the parties have been divided into three groups. According to the parties, this division is based on geographic and demographic factors. The Spanish and Greek ⁽²⁴⁾ PPOs are in Group C. Group B comprises the PPOs from Germany, France, Italy, Portugal and the United Kingdom. All the other parties are in Group A. In 1998, Group A had to attain 90 %, Group B 85 % and Group C 80 % J + 1. The respective targets for 1999 and 2000 are 95 %, 90 % and 85 %.

(30) The quality of service standards and grouping are to be reviewed and renegotiated before 31 December 2000.

(31) A penalty system (penalty-curve) is applied when the agreed standards are not met ⁽²⁵⁾. The level of terminal dues which would otherwise be payable is reduced by 1,5 % (where the actual result amounts to between 90 % and 100 % of the target to be reached) and 3,5 % (where the actual result amounts to between 80 % and 90 % of the target to be reached) respectively for each percentage point by which the PPO concerned fails to reach the requisite quality-of-service standard ⁽²⁶⁾. In the worst case (that is to say, if the result actually achieved by the PPO concerned amounts to no more than 80 % of the target), these penalties will thus reduce the terminal dues to which a PPO is entitled by 50 %.

ff) *Special transitional rules for the PPOs from Greece, Italy, Spain and Portugal*

(32) Special arrangements have been made for some parties in order to ease the transition towards the new terminal dues system. These provisions apply to mail sent to and from Greece, Spain and Italy. The PPOs concerned may however terminate the transitional arrangements and join the normal terminal dues regime. There is also a special provision for postcards sent from Portugal.

⁽²⁴⁾ Notwithstanding this classification, special rules apply to Spain and Greece (see recital 33 and following).

⁽²⁵⁾ For the time being, the penalties will be calculated on the basis of the quality of service globally (that is to say, with regard to all the mail it receives from the other parties) achieved by each PPO. After the transitional period these penalties will be based on the quality of service achieved by a receiving PPO with regard to each individual sending PPO.

⁽²⁶⁾ Suppose that the quality-of-service target says that 90 % of incoming cross-border mail must be delivered next day, and that the actual result is that only 87 % of this mail is delivered within this time. This means that 97 % of the target is reached (87 is 97 % of 90). Thus, the loss of quality is 3 %. Since this figure is within the 90 % to 100 % range, a penalty of 1,5 % for each percentage point accrues. The penalty is thus $3 \times 1,5 \% = 4,5 \%$ of terminal dues payable. This means that the PPO concerned is allowed to charge only 95,5 % (100 % to 4,5 %) of the terminal dues to which it would otherwise be entitled. In 1998 (where terminal dues for Level 1 amount to 55 % of domestic rates), the PPO would thus receive terminal dues amounting to 52,5 % of domestic rates (i.e. 95,5 % of 55 %).

1) Greece

1.1. Outbound mail

- (33) Terminal dues for priority mail were to amount to 40 % of domestic tariff in 1998. The level was to be raised to 45 % in 1999, to 50 % in 2000, to 60 % in 2001, to 70 % in 2002 and finally to 80 % in 2003. If pursuant to these rules the Greek PPO would have to pay higher terminal dues than parties not subject to the transitional arrangements, then the Greek PPO will only have to pay the terminal dues payable by these parties.

1.2. Inbound mail

- (34) For inbound mail, progressively increased quality-of-service targets are set, which, if achieved, will trigger increases of the terminal dues payable to the Greek PPO by other parties. The quality-of-service target for 1998 was 50 % which, if achieved, would have resulted in an increase in terminal dues of 7 %. The corresponding figures for the quality-of-service targets (and increases in terminal dues) are 60 % (10 %) for 1999, 70 % (15 %) for 2000, 80 % (15 %) for 2001 and 85 % (20 %) for 2002. In 2003 terminal dues would be increased to 80 % of domestic rates if the Greek PPO manages to maintain the quality-of-service standard of the preceding year (85 %).

2) Spain

2.1. Outbound mail

- (35) Terminal dues for priority mail and postcards will increase at specified rates each year, starting from the current CEPT rate in 1998 ⁽²⁷⁾. If the quality-of-service targets of the receiving PPOs are reached, the terminal dues which they are entitled to receive from the Spanish PPO will increase by 10 % in both 1999 and 2000 and by 15 % in 2001, 2002 and 2003 respectively. These increases may not lead to terminal dues which are higher than the terminal dues payable to the PPO concerned by other parties not subject to the transitional arrangements. From 2004 onwards these terminal dues

will be increased by one third of the remaining difference between the level reached in 2003 and the final level of terminal dues under the REIMS II Agreement (i.e. 80 % of domestic tariffs). Consequently, the normal terminal dues level will be reached in 2006.

2.2. Inbound mail

- (36) For incoming priority mail, the Spanish PPO will be paid the current CEPT rate as long as this rate is higher than 80 % of the Spanish interurban domestic tariff.

3) Italy

3.1. Outbound mail

- (37) The terminal dues with regard to priority mail and postcards to be paid by the Italian PPO to the other parties will be increased annually, provided that the receiving operators meet the relevant quality-of-service targets. The annual increase rates were to be 15 % in 1998 and 20 % in both 1999 and 2000. If the receiving PPOs do not meet their targets but improve their quality of service to a certain extent ⁽²⁸⁾, the increase was to be limited to 5 % in 1998 and 7 % in both 1999 and 2000. These increases may not lead to terminal dues which are higher than the terminal dues payable to the PPO concerned by other parties not subject to the transitional arrangements. A final increase on 1 January 2001 will bring the terminal dues payable by the Italian PPO up to the final level of terminal dues under the REIMS II Agreement (i.e. 80 % of domestic tariffs).

3.2. Inbound mail

- (38) The rules set out above for outbound mail will also apply to inbound mail from the other parties.

4) Cap system

- (39) A 'cap' system has been designed to ensure that the PPOs of Greece, Spain and Italy do not abuse the advantages granted to them under the transitional arrangements described above. Under the system, outbound mail-flows towards other REIMS II parties are divided into three categories; postcards, stock and new flows. 'Postcards' are not subject to the cap system. They may thus benefit from the lower terminal dues set for these PPOs in the transitional arrangements. The 'stock' comprises the current volume of all mail other than postcards. It also comprises a yearly addition of 5 % ('the organic growth rate') ⁽²⁹⁾. The 'stock' also benefits from

⁽²⁸⁾ The increase in quality-of-service required is by 10 percentage points or more if the performance was under or equal to 55 % (for example, going from 31 % to 41 % or more), by 5 percentage points or more if the performance was between 55 % and 80 % (for example, going from 62 % to 67 % or more) and by 3 percentage points or more if the performance was equal to or above 80 % (for example, going from 81 % to 84 % or more).

⁽²⁹⁾ The Spanish PPO may increase its 'organic growth rate' by another 5 % in one of the years 1999, 2000 or 2001.

⁽²⁷⁾ The same terminal dues will apply to postcards from Portugal.

the lower terminal dues. 'New flows' are defined as the mail volume (excluding postcards) that exceeds the 'Stock' volume (after addition of the organic growth rate). This volume of mail will be subject to the normal terminal dues to which receiving PPOs are entitled pursuant to the REIMS II Agreement.

- (40) The cap system will not be applied to mail exchanged between the countries with transitional arrangements, i.e. Greece, Spain and Italy.

c) Articles 25 and 49(4) of the UPU Convention

- (41) Article 25 of the UPU Convention contains provisions on the treatment of domestic mail posted abroad (re-mail). Article 49(4) concerns terminal dues for incoming bulk mail. After the end of the transitional period, Articles 25 and 49(4) of the UPU Convention will no longer be applied between the Parties.

d) Term

- (42) The Agreement is entered into for an indefinite period of time. Any party may however withdraw from the Agreement at any time. Such withdrawal becomes effective at the end of the first full calendar year after notice has been given. In particular circumstances, a party may also withdraw from the Agreement by giving six months' notice.

e) Relationship to other agreements

- (43) The REIMS II Agreement as amended by the supplementary agreement provides that the parties are free to conclude between themselves bilateral or multilateral agreements on terminal dues in which different conditions, in particular other levels of terminal dues, may be fixed. Where a party concludes with another party (or other parties) an agreement on lower terminal dues, it is however obliged (subject to the rules on penalties and the special transitional rules described at paragraphs 32 to 40) to apply the same terminal dues to all the parties provided the transactions are equivalent.

VI. CHANGES AND CLARIFICATIONS AFTER NOTIFICATION

- (44) After a preliminary examination of the Agreement, the Commission indicated to the parties several aspects which in its view had to be changed, adapted or clarified before it could consider adopting a positive attitude with regard to the Agreement.
- (45) The parties thereupon prepared a first supplementary agreement to the REIMS II Agreement (supplementary agreement). This supplementary agreement was entered into on 22 September 1998 by 11 of the 16 REIMS II parties. The remaining five REIMS II parties signed the

Agreement at a later stage⁽³⁰⁾. This supplementary agreement contains the following changes and clarifications.

1. Link between terminal dues and quality of service

- (46) Under the REIMS II Agreement as originally notified, it was possible that terminal dues would rise even if the quality of service provided by the PPO concerned actually deteriorated. The Agreement as amended now establishes the principle that no increase in terminal dues will take place during the transitional period if the quality of service of the party concerned goes down. In order to determine whether this is the case, the quality-of-service performance in a given year is compared to the average quality-of-service performance achieved by that party in preceding years, beginning with 1997. There will be no margin of interpretation. This rule does not apply to those PPOs for which special transitional arrangements exist. It will naturally also not be applicable if the quality-of-service of a PPO deteriorates but still matches the relevant standard set by the Agreement. Terminal dues may also be increased if (and to the extent that) it can be shown that a deterioration of a party's quality of service is caused by special efforts undertaken by this party to improve its delivery system and is only temporary in nature. The decision as to whether these conditions are met ultimately rests with the Commission, which may entrust this task to an expert.

- (47) Finally, as a special rule, those parties which did not meet their quality-of-service targets for 1998 were exceptionally to be allowed to increase their terminal dues in 1998 by 15 % over the CEPT level (but to no more than 55 % of domestic tariffs) if they had reached their quality-of-service target in 1997.

2. Level 3

- (48) The parties have clarified that they are legally bound under the REIMS II Agreement to grant Level 3 access to each other. In order to facilitate such access, the parties will, to the extent that this is within their power, relax domestic regulations for other parties where these regulations are not justified and could in practice bar the other parties from access to domestic rates. Where the domestic regulations concerned have been set by the state, the parties will use their best efforts to remove them in cooperation with the competent national authorities.

⁽³⁰⁾ The Spanish PPO (which was the last one to join) signed the Supplementary Agreement on 28 January 1999.

- (49) All the tariffs and conditions relevant for Level 3 access will be available to all the parties through a database managed by IPC. The parties have undertaken to update this database without delay when their tariffs and conditions change.

3. Late, lost and damaged mail

- (50) The parties have introduced provisions on late, lost and damaged mail according to which a proper system for dealing with and analysing complaints will be introduced, including an acknowledgment of receipt for each complaint and standard time limits for the reply to such complaints. Customer services and access to such services will thus be improved, for example by introducing a 'freephone line' for complaints and by cooperating with consumer organisations.

4. Transparent cost accounting and annual reports

- (51) The parties undertake to comply with obligations to be imposed on them by the Commission according to which they will have to introduce a transparent cost accounting system as required by Article 14 of the Postal Directive by the end of 1999 and to provide annual reports on the development of international and domestic tariffs and costs and on the development of cross-border flows, including information on Level 3 access.

5. Further issues

- (52) The parties have furthermore agreed to use their best efforts to negotiate quality-of-service standards and a penalty system for non-priority mail. For 1998 and 1999 the reference standards were to be J + 3 or the standard already established by a party (but in any event no more than J + 4). Finally, the parties agree to use their best efforts to afford outgoing cross-border mail a service which conforms to certain standards set out in the supplementary agreement.

VII. COMMENTS FROM THIRD PARTIES AND THE COMMISSION'S SECTION

- (53) On 1 December 1998, the Commission published a notice ⁽³¹⁾ in the *Official Journal of the European Communities* pursuant to Article 19(3) of Regulation No 17 in which it set out the details of the notified Agreement and indicated that it proposed to adopt a positive view of that Agreement.
- (54) In total 35 replies were received by the Commission. Only two of the third parties submitting comments recommended that the REIMS II Agreement be authorised. All the others were, to some extent or other, critical of the Agreement. Among the latter was The Post Office of the United Kingdom, one of the parties to the REIMS II Agreement. That PPO has, however, clarified in the mean-time that in view of the compromise reached by the parties with regard to the duration of the transitional period (see recital 61), it continues to support the Agreement. The most important comments are summarised in the following paragraphs.

- (55) The most important objection concerned the temporal consequences of an exemption of the Agreement. Pursuant to the timetable envisaged by the REIMS II Agreement, terminal dues were to be increased to up to 65 % of domestic tariffs in 1999 and to reach the final amount of 80 % on 1 January 2001. A considerable number of third parties expressed the view that such a retroactive effect (as it is called by some of them) would have serious negative effects for customers. In particular, it is argued that the present timetable would shorten the transitional period to well under two years and result in significant price increases over a short period of time. Most of those who made submissions in this regard argued that the transitional period of four years originally envisaged by the REIMS II Agreement should be maintained and that this period should only start to run once the Commission had authorised the Agreement.

- (56) Several comments alleged that the terminal dues were not cost-based, but tariff oriented and queried whether the figure of 80 % of domestic tariffs did indeed represent a reliable proxy for costs.

- (57) Several third parties argued that the conditions to be fulfilled for Level 3 access to be granted were still not clear enough. There was concern that, in the absence of quality-of-service standards (and penalties) for such mail, there would be little incentive to provide a good service.

- (58) Several third parties claimed that there should be quality-of-service standards for end-to-end transport (and penalties with regard to outgoing mail), and not just standards for the PPO receiving and delivering the cross-border mail. Some of the commentators argued that the standards should apply to non-priority mail and Level 3 mail as well. The exception granted to the parties (according to which terminal dues can be increased in certain, specific circumstances even if the quality of the service deteriorates) was considered to be dangerous and open to abuse. A considerable number of third parties claimed that the system for the measurement of the quality of service achieved needed to be monitored carefully. In particular, it was pointed out that 'optical' improvements in quality of service could easily be brought about by bringing forward the latest arrival time by which mail has to reach the receiving PPO. The relevant rules should therefore be uniform for all the parties concerned and applied throughout the term of the Agreement. The actual measurement had to be carried out in an independent, accurate and representative way.

- (59) It was argued that the system concerning late, lost and damaged mail provided in the Agreement so far was not an adequate or practical solution. A harmonised system (with a standardised system of monitoring) would be preferable.

- (60) Several third parties expressed concern at the fact that the Dutch PPO would remain outside the Agreement. It was claimed that this would lead to discrimination (since the Dutch PPO would pay different terminal dues). There was also concern that the REIMS parties would in the future treat mail coming from each other first, something which could result in a poorer quality for mail from third parties.

⁽³¹⁾ See footnote 3.

- (61) After having examined these comments, the Commission came to the conclusion that the transitional period had to be lengthened in order to avoid the negative effects feared by third parties. It also concluded that the final increase to 80 % of domestic tariffs should not be accepted before sufficient information was available which would allow the Commission to ascertain whether this increase was necessary in order to bring terminal dues in line with costs. The parties were informed accordingly. At a meeting on 4 March 1999, the parties informed the Commission that they accepted the concerns underlying the approach of the Commission. They announced that they would begin to implement the Agreement on 1 April 1999 and that terminal dues for 1999 would be increased to a maximum of 55 % of domestic tariffs. They also accepted that the duration of a possible exemption should be limited to the period expiring on 31 December 2001, i.e. before the final increase to 80 % of domestic tariffs would occur.

B. LEGAL ASSESSMENT

I. ARTICLE 81(1) OF THE EC TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

1. Agreement between undertakings

- (62) Regardless of their specific legal form, all the parties to the REIMS II Agreement carry on an economic activity and are therefore to be considered as undertakings within the meaning of the competition rules of the EC Treaty⁽³²⁾. The REIMS II Agreement is thus an agreement within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.

2. Restrictions of competition

a) Price fixing

- (63) The Agreement fixes the terminal dues which the parties have to pay each other on the market for inbound cross-border mail. These terminal dues are the price the PPO in the country of origin pays to the PPO in the country of destination for the service of delivering cross-border mail. Therefore, this Agreement fails to be considered as an agreement fixing selling prices within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement.
- (64) It is true that the REIMS II Agreement does not fix the actual amounts to be paid but only establishes a percentage. However, since this percentage is linked to domestic tariffs, the Agreement has the result of fixing prices. It is true that the parties remain free to set their own domestic tariffs. In theory, they could thus modify

the terminal dues payable under the REIMS II Agreement by altering these domestic tariffs. However, for most PPOs, cross-border mail is of limited importance compared to the volume of domestic mail. Furthermore, in many Member States any amendment to domestic tariffs is subject to approval by the national regulatory body. The level of domestic tariffs is therefore highly likely to be governed primarily by domestic considerations. By fixing, in an agreement entered into between themselves, terminal dues as a percentage of domestic tariffs the parties thus eliminate or reduce their freedom to determine the level of remuneration for the delivery of inward cross-border mail.

- (65) It has to be acknowledged that the REIMS II Agreement is a price-fixing agreement with unusual characteristics. It concerns the price of a service (delivery in the country of destination) which the PPO in the country of origin needs in order to ensure that the mail reaches its addressee and which this PPO is not (or not yet) capable of providing itself⁽³³⁾. Since it is obvious that a postal operator is entitled to receive remuneration for delivering mail coming in from another country, it is clear that some sort of arrangement is necessary in order to determine the level of this remuneration. However, this could be achieved by concluding a bilateral agreement with the PPO from whose country the mail is sent in which the two parties agree on the terminal dues to be paid. This approach would result in a network of bilateral agreements the contents of which would not necessarily be identical⁽³⁴⁾. The REIMS II Agreement sets terminal dues for all the parties in a uniform way at a certain percentage of domestic tariffs. It is true that the Agreement (as amended by the supplementary agreement) expressly allows the parties to enter into bilateral or multilateral agreements on terminal dues between themselves. However, it is very unlikely that the parties will make use of this possibility as the conclusion of the REIMS II Agreement eliminates any incentive to conclude separate agreements between the parties. This would appear to be confirmed by the fact that, to the knowledge of the Commission, there is only one such bilateral or multilateral agreement between some of the REIMS II parties, i.e. the Nordic Agreement which was concluded long before the REIMS II Agreement saw the light of day. It is worth noting that no other REIMS II party appears to have joined the Agreement. The Commission concludes therefore that, notwithstanding the specific clause in the Agreement allowing bilateral or multilateral agreements between the parties, in practice, the REIMS II Agreement to a very large extent, reduces the incentive to conclude such agreements which could lead to different tariffs which might be more favourable from a customer point of view.

- (66) In view of the fact that the REIMS II parties account for the major part of cross-border mail between their respective countries, the restriction of competition identified above must also be considered as being appreciable.

⁽³²⁾ See for example the judgment of the Court of Justice in Case C-41/90 *Höfnér and Elser v Macrotron* [1991] ECR I-1979, at paragraph 21.

⁽³³⁾ A certain parallel may be drawn with the agreements in the telecommunications sector by which the telecommunications operators from different countries traditionally agreed on the price (the 'accounting rate') to be charged for the termination of international calls.

⁽³⁴⁾ This is indeed what has happened in the telecommunications sector. The accounting rates (see footnote 33) applied by a given operator varied from country to country.

b) *Restricted membership*

- (67) Membership in the REIMS II Agreement is limited to postal operators (private or public) which operate a mandatory universal service. This could be interpreted as precluding other operators from benefiting from the same rates as the parties to the REIMS II Agreement. However, nothing in the Agreement prevents the parties from entering into identical or similar agreements on terminal dues with third parties. The condition for membership in the REIMS II Agreement thus does not appear to represent a restriction of competition.

3. Effect on trade

- (68) The REIMS Agreement concerns the remuneration for inbound cross-border mail services between PPOs and has thus by definition an effect on trade between Member States and on trade between the contracting parties within the meaning of the EEA Agreement. In view of the importance of the REIMS II parties on the markets for inbound cross-border mail between their respective countries, this effect must be regarded as appreciable. In this context one should also bear in mind that business customers produce the most part of cross-border mail and that this mail is in general connected to trade between Member States. Although the increase in terminal dues does not necessarily imply a similar increase in overall tariffs, these tariffs are likely to be raised, at least for some kinds of mail. An increase of the tariffs for international mail clearly has a negative effect on trade between Member States.

II. ARTICLE 81(3) OF THE EC TREATY AND ARTICLE 53(3) OF THE EEA AGREEMENT

1. Improvement in the distribution of goods/promotion of technical or economic progress

- (69) It is clear that the CEPT levels of terminal dues often resulted in a remuneration for the delivery of cross-border mail which did not cover costs. The consequence of this was that the resulting deficit on incoming cross-border mail had to be covered by the PPOs by profits obtained from the provision of domestic mail services or outward cross-border mail services. Such cross-subsidisation would be unsustainable in the long run, particularly in view of the increasing liberalisation of the postal sector. There is no doubt that postal operators are entitled to receive a remuneration for the delivery of cross-border mail which covers the costs caused by this activity. A move towards a more cost-based system leads to a more secure financial position and therefore allows the postal operators to maintain and improve this service. This is an advantage which may be considered as representing an improvement in the provision of the

services concerned as required by Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

- (70) The most substantial advantage which the Agreement is expected to produce consists in a substantial increase in the quality of cross-border mail services. This is most obvious with regard to the receiving operator, i.e. the PPO delivering the mail. By linking increases in terminal dues to improvements in the quality of service, the REIMS II Agreement produces a strong incentive for the parties to improve their performance. The receiving operator will only be able to claim higher terminal dues from the other parties if he manages to meet the ambitious quality-of-service targets set out in the Agreement. If the targets are not met, penalties will be applicable which can considerably reduce the terminal dues to which a party is entitled. The incentive thus created for the receiving operator to improve his quality is not affected by the fact that the quality of service achieved by the parties is measured on a yearly basis. Far from delaying the incentive to improve the quality of mail services, this would appear to be the most logical method to ensure that the terminal dues payable with respect to a particular year are in line with the quality of service achieved during that year.
- (71) For the purpose of setting quality-of-service targets, the parties have created different groups to which different thresholds apply⁽³⁵⁾. Since the Agreement provides for special transitional measures with regard to all the PPOs in group C, there are in effect only two groups, A and B. The quality of service to be achieved by the PPOs classed in group A is somewhat higher than the respective target for the parties in group B. However, the parties have explained that this distinction is based on demographic and geographic criteria in the sense that group A consists of parties from countries that are either comparatively small or have a large part of their population concentrated in a comparatively small area. Although this division (which according to the Agreement is to be reviewed in the near future) ultimately appears to have been the result of a compromise between the parties, it does not seem to have been carried out in an arbitrary way. In any event it has to be recalled that even the target set for the PPOs in group B (90 % J + 1 in 1999) is high. This distinction therefore does not affect the incentive to increase the quality of the service.
- (72) The specific transitional rules for some of the parties are also based on the principle that increases in terminal dues are linked to an improvement in the quality of service. In view of the particular problems facing the PPOs concerned the Commission considers that the fact that these transitional rules provide for a slower increase in terminal dues (and thus, indirectly, of quality of service) does not appear to be objectionable.
- (73) It is true that the linkage between increases in terminal dues and an improvement in quality of service established by the REIMS II Agreement depends heavily on the system for the measurement of the quality of service. As some of the third parties have pointed out in their comments, it is important to ascertain that this system is functioning properly. The Commission was alerted to the risk that an 'improvement' in the quality of service might be produced by simply bringing forward the time

⁽³⁵⁾ See recital 29.

by which the mail to be delivered has to reach the receiving operator. The Commission has therefore examined whether this risk could materialise in practice. It found that the parties have established rules only with regard to the LAT ⁽³⁶⁾, which cannot be earlier than 4 p.m. and 3 p.m. for the main offices of exchange and the airmail units respectively. The parties have confirmed, in reply to a question of the Commission, that any mail which complies with the LAT thus set will be regarded as having arrived on time for the purposes of the REIMS II Agreement, irrespective of whether this mail has also complied with the CET and/or CTT which some of the parties may apply.

- (74) It is true that no specific quality-of-service targets have been agreed in respect of mail for which Level 3 access is used. However, the very essence of Level 3 access is that such mail is treated, to all intents and purposes, like domestic mail. Where there are quality-of-service targets for domestic mail, they will thus equally be applicable to the relevant incoming cross-border mail.
- (75) The Agreement will also contribute towards improving the overall quality of cross-border mail. Article 3(8) of the REIMS II Agreement (introduced by the supplementary agreement) obliges the sending operators to use their best efforts to afford outgoing priority mail a quality of service which conforms to the standards set out in Annex 7 thereto. According to those provisions, the parties are aiming at achieving a standard of 85 % J + 1 by 2002, that is to say, 85 % of outgoing priority cross-border mail should arrive at the receiving operator's office of exchange within one day of having been posted ⁽³⁷⁾.
- (76) The conclusion that the REIMS II Agreement may be expected to result in considerable improvements with regard to cross-border mail is not affected by the fact that not all the PPOs from the Community and the EEA (or from other countries) participate in the Agreement. As the Netherlands Post Office has decided not to join the other parties, the Agreement will of course not be applicable to cross-border mail exchanged between the Netherlands and the REIMS II parties. However, this does not alter the fact that the Agreement is likely to produce benefits in respect of the cross-border mail exchanged between the parties to the REIMS II Agreement.

2. Benefits to consumers

- (77) The improvements described above (and in particular the better quality of service for cross-border mail) would also be beneficial towards consumers. For the reasons set out in the following paragraphs, the Commission considers that the Agreement will allow consumers a fair share of the benefits resulting from it.
- (78) It appears likely that as a consequence of the REIMS II Agreement at least some of the operators will be paying substantially increased terminal dues. It is to be expected that, as a result, prices for cross-border mail will be increased in at least some of the countries concerned.

However, on the basis of the information collected by the Commission in the course of its examination, it can be concluded that these possible increases will not prevent consumers from receiving a fair share of the benefits which the Agreement is expected to produce, and this for a number of reasons.

- (79) First, to the extent that the increases in terminal dues result in a level of terminal dues which is closer to real costs of delivering the mail, the Agreement will merely entail a reduction of the cross-subsidisation which must take place under the current arrangements. Since the users of domestic mail or outgoing cross-border mail would thus no longer (or at least to a lesser extent) have to contribute towards the cost of incoming cross-border mail, the PPOs would be able to adjust the tariffs for domestic mail and outgoing cross-border mail where appropriate.
- (80) Second, since the Commission has insisted that terminal dues can only be increased if the quality of service improves, any increases in tariffs for cross-border mail would be accompanied by improvements in the service rendered. It can be expected that consumers get a fair share of the benefits if the quality of the service improves, provided that the increase in tariffs is not excessive. As mentioned above, there is only one exception where terminal dues can be increased in a case where the quality of service deteriorates. This is where such deterioration: (a) can be proved to be due to special efforts undertaken in order to speed up delivery, (b) is only temporary in nature, and (c) has only been caused by the said efforts. An example for such a situation could be the installation of a new sorting centre, which could temporarily affect the quality of the service. It is clear that the relevant criteria will in any event have to be strictly interpreted. Furthermore, as the parties have agreed in the supplementary agreement, the final decision as to whether these conditions are fulfilled will remain with the Commission (or an independent expert to be appointed by it). In these circumstances the Commission considers that this exception does not jeopardise the principle that increases in terminal dues presuppose an improvement of the quality of service.

- (81) Third, the Commission has required the parties to specify in writing any increases in their tariffs for cross-border mail, which they intend or envisage introducing until the end of 2001. It can be concluded from the reply of the parties that any such increases will on average be modest. Furthermore the Commission will of course closely monitor the developments in this area. In order to allow it to do so, an obligation to report will be imposed on the parties in this Decision ⁽³⁸⁾. Where appropriate, the Commission will use its powers under Article 82 of the EC Treaty if a party to the REIMS II Agreement introduces price increases which appear to be excessive and which do not appear to be justified by costs.

⁽³⁶⁾ See recital 27.

⁽³⁷⁾ The target is slightly lower (80 %) for Greece, Iceland, Portugal and Spain.

⁽³⁸⁾ See recital 98.

(82) Fourth, the Agreement itself provides a possibility, which should considerably reduce the negative financial impact, which may arise for customers, that is to say the Level 3 access. Whereas the level of terminal dues established pursuant to the Agreement is based on the domestic tariffs for priority mail, Level 3 access affords the possibility of benefiting from reduced domestic tariffs. Cross-border mail for which the sending PPOs claim such access is thus to be treated just like domestic mail. This possibility is of particular significance for bulk mail but also for items such as newspapers. It is obvious that such access could easily be impeded or even prevented by imposing inappropriate conditions. For example, making the possibility of using Level 3 access for newspapers dependent on the relevant item being printed in the Member State of destination would render such access illusory for publications from other states. At the Commission's express request, the parties have therefore agreed to remove such obstacles to the extent that this is within their power. It appears necessary, in view of the importance of Level 3 access to customers, to make the granting of the present exemption depend on satisfactory Level 3 access being granted⁽³⁹⁾.

(83) Fifth, the Commission agrees with the view expressed by a great number of third parties according to which, in view of the delay which has occurred, the original timetable envisaged by the REIMS II Agreement could have resulted in considerable increases of terminal dues within a very short period of time. This could have had serious negative effects on the interests of consumers. The Commission therefore insisted that the transitional period be postponed by one year. The present exemption is subject to a condition, which ensures this⁽⁴⁰⁾. The ultimate level of terminal dues envisaged by the parties would therefore not be reached before 1 January 2002. Furthermore, the Commission insisted that the period of exemption should end before this final level of terminal dues was reached. In the Commission's view this represents a reasonable compromise which should ensure that the interests of consumers are safeguarded.

(84) The provisions on late, lost and damaged mail introduced by the supplementary agreement shall also contribute towards reserving a fair share of the benefits to consumers. Although it is true that the measures introduced are capable of being improved, at least for some of the countries concerned, they mark an important step towards protecting the rights of consumers.

(85) The fact that the Agreement only applies to cross-border mail between the parties does not affect the above conclusion. Nothing in the Agreement prevents the parties from treating cross-border mail forwarded to them by third parties in the same expeditious way as cross-border mail received from the REIMS II parties.

3. Indispensability

(86) In order to qualify for an exemption under Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the restriction of competition must be indispensable to the attainment of the relevant objectives. This presupposes that the levels of terminal dues agreed on by the parties do indeed reflect the costs, which the delivery of cross-border mail causes to the delivering operator. The REIMS II Agreement does not establish a direct link between terminal dues and the actual costs but expresses terminal dues as a percentage of domestic tariffs. This is mainly due to the fact that even today there is not enough reliable information on the costs incurred by the parties concerned. Most of the parties are still in the process of setting up proper cost-accounting systems. In the absence of reliable information as to costs, the principle of linking terminal dues to domestic rates appears to be acceptable (and has in fact been suggested by the Commission). Although the tariffs charged for domestic services have inevitably in the past been influenced to some extent by political considerations, they represent the most logical yardstick for assessing the costs of delivery.

(87) The Commission is of the opinion that under present circumstances the conclusion of an agreement setting terminal dues at the same percentage of domestic tariffs and (if one disregards the special transitional measures agreed for some of the parties) on the same conditions for all the parties is indispensable in order to attain the benefits aimed at by the parties. As the summary of the historical background under Part A⁽⁴¹⁾ has shown, the process of elaborating the REIMS II Agreement has been protracted and laborious. Since the CEPT arrangement adopted more than a decade ago, only one other terminal dues agreement appears to have been concluded between some of the parties to the present Agreement. It appears significant that this other agreement (the Nordic Agreement) is also a multilateral arrangement. Unlike the operators in the telecommunications sector, the PPOs in the postal sector appear rarely to have made use of bilateral agreements on terminal dues. The Commission considers that although the parties could have concluded bilateral or multilateral agreements on terminal dues, it appears unlikely that such negotiations would have made it possible to attain the benefits which the present Agreement may be expected to produce as quickly and as efficiently.

(88) However, although the Commission accepts that the conclusion of the REIMS II Agreement may be considered indispensable for attaining the objectives pursued, it needs to be verified whether the actual level agreed is appropriate. The parties have not adduced convincing evidence, which would allow the conclusion that terminal dues have to be set at 80 % of domestic rates. On the contrary, the parties have admitted that the figure of 80 % is an approximation only. It has however not been established that this figure is a sufficiently accurate approximation of costs. On the other hand, the Commission accepts that the level of terminal dues has

⁽³⁹⁾ See recital 96.

⁽⁴⁰⁾ See recital 95.

⁽⁴¹⁾ See recital 7 and following.

so far generally been too low and has not allowed operators to cover the costs of delivery. In view of these circumstances the Commission considers that the most reasonable solution is to allow increases in terminal dues while ensuring that the final increase to 80 % of domestic tariffs can only take place once the Commission has had a possibility to re-examine the question on the basis of proper cost accounting data. Limiting the exemption to the period expiring on 31 December 2001 will enable the Commission to ascertain the appropriateness of the proposed final increase before it is implemented. The maximum level of terminal dues allowed pursuant to this Decision will therefore **not exceed 70 %** of domestic tariffs, a level which does not appear to be unreasonable ⁽⁴²⁾.

- (89) Article 14 of the Postal Directive obliges Member States to ensure that appropriate accounting systems will be introduced within two years of the date of entry into force of that Directive, i.e. by 10 February 2000 at the latest. However, there is no guarantee that sufficiently reliable figures which should cover at least one full calendar year would thus be available in the second half of 2001 when the Commission is likely to be asked to extend the present exemption and authorise the increase to 80 % of domestic tariffs. The Postal Directive is in any event only binding on the Member States of the Community but not Iceland and Norway. It therefore appears necessary to make this exemption Decision dependent on the condition that the parties introduce a proper cost-accounting system by the end of 1999 ⁽⁴³⁾.

4. Elimination of competition

- (90) By relating terminal dues to domestic tariffs and setting their final level at up to 80 % thereof, **the REIMS II Agreement may be expected to reduce to a very large extent arbitrage-based remail**. It would, however, be inappropriate to regard this as an elimination of competition since the establishment of a cost-based remuneration system **would only restore normal competitive conditions**.

III. ARTICLE 86(2) OF THE EC TREATY AND ARTICLE 59(2) OF THE EEA AGREEMENT

- (91) According to Article 86(2) of the EC Treaty and Article 59(2) of the EEA Agreement 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.
- (92) **The parties argue that the REIMS II Agreement is necessary in order to achieve a cost-oriented remuneration for the delivery of international mail financing the universal service obligation, which the parties have to perform. In the parties' view, a strict application of the competition rules could endanger their economic equilibrium and obstruct the performance of the service of general economic interest assigned to them. However, the parties have not provided any evidence which would**

allow the conclusion that the application of Article 81 of the EC Treaty or Article 53 of the EEA Agreement to the REIMS II Agreement on cross-border mail services (which on average account for a small portion of the mail handled by the parties) would jeopardise their economic equilibrium. Neither have they established that the application of those provisions (including paragraph 3 thereof) would obstruct the performance of the particular tasks assigned to them. In any event, it has to be borne in mind that Article 86(2) of the EC Treaty represents an exception and has therefore to be interpreted strictly ⁽⁴⁴⁾. The same holds true for Article 59(2) of the EEA Agreement.

IV. DURATION OF THE EXEMPTION; CONDITIONS AND OBLIGATIONS

- (93) According to Article 8 of Regulation No 17, a decision pursuant to Article 81(3) of the EC Treaty is to be issued for a specified period of time and conditions and obligations may be attached thereto.

1. Duration of the exemption

- (94) Normally the exemption period covers at least the time which is necessary for the Agreement to take full effect. In the present case the Commission has come to the conclusion that exceptionally, the exemption period should come to an end before the final increase in terminal dues (from 70 to 80 % domestic tariffs) is implemented. The reason for this is that while the Commission generally agrees that terminal dues have to be increased to a level which covers the costs of the service rendered, there is not enough evidence at present to support the claim that this means that terminal dues have to be increased to a level of 80 % of domestic tariffs. Since this lack of supporting evidence is mainly due to the fact that most of the parties do not yet dispose of a sufficiently reliable and precise cost-accounting system, it does not seem unreasonable to postpone the final increase until such data becomes available and until the Commission has had the opportunity to assess this data. The exemption will thus be limited to the period starting with the implementation date, i.e. 1 April 1999, and expiring on 31 December 2001.

2. Conditions

a) Implementation of the Agreement

- (95) As explained above ⁽⁴⁵⁾, the Commission considered that it was necessary to change the timetable originally envisaged by the parties and delay the transitional period by one year in order to avoid as much as possible any immediate, negative repercussions on tariffs. The parties have agreed ⁽⁴⁶⁾ and proposed 1 April 1999 as the date for implementing their agreement. Since this is not reflected in the Agreement as it stands, it is necessary to make this Decision subject to a condition to this effect.

⁽⁴²⁾ It will be remembered that this is also the percentage used in the Nordic Agreement.

⁽⁴³⁾ See recital 97.

⁽⁴⁴⁾ See for example the judgment of the Court of Justice in Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, at paragraph 37.

⁽⁴⁵⁾ At recital 83.

⁽⁴⁶⁾ See letter of the parties of 4 June 1999.

Terminal dues will thus reach a maximum of 55 % of domestic dues for the rest of 1999. This maximum will be 65 % in 2000 and 70 % in 2001. The parties will have to amend their agreement accordingly as soon as possible and at the latest by the time the final account settlement for the terminal dues for 1999 is due.

b) **Level 3 access**

- (96) Level 3 access will be of considerable importance to the consumer. It may safely be assumed that bulk mail and other types of commercial mail account for the most important part of cross-border mail. Enabling sending PPOs to benefit from the delivering operator's domestic tariffs for such mail will therefore be an essential step to balance the negative effects of the Agreement. Article 2(6) of the Agreement obliges all the parties to grant such Level 3 access ⁽⁴⁷⁾. In order to facilitate this access, the parties are under an obligation to relax domestic conditions for other parties where those regulations are not justified and could in practice bar other parties from access to the domestic rates or (where it is not in their power to do so) to use their best efforts to remove these regulations with the relevant national authorities. In order to ensure that the parties comply with this requirement and grant each other effective Level 3 access, it is necessary to subject this exemption Decision to a condition to that effect.

3. **Obligations**

a) **Cost accounting systems**

- (97) In order to be able to ascertain whether the levels of terminal dues agreed on by the parties do indeed reflect the actual costs of the delivery of cross-border mail, the Commission needs to be able to dispose of reliable and accurate cost data. It is therefore appropriate to oblige the parties to introduce, by the end of 1999, a transparent cost accounting system ensuring that all significant cost elements can be identified, quantified, compared and controlled. This obligation should ensure that the parties introduce already in 1999 an appropriate cost accounting system as defined by Article 14 of the Postal Directive.

b) **Annual reports**

- (98) In order to enable the Commission to assess whether the Agreement works satisfactorily and particularly whether the abovementioned conditions are complied with, the parties should provide annual reports on the development of domestic tariffs, tariffs for cross-border mail and costs and on the development of cross-border traffic

flows by 31 March of each year at the latest. Those reports should include information on the implementation of Level 3 access (including, for example, examples of contracts under Level 3 conditions concluded with operators from other countries and of comparable contracts concluded with domestic customers). For the same reasons, the parties should inform the Commission of the amendment made to comply with the condition set out in recital 95 as soon as that amendment is signed,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement are hereby declared inapplicable to the REIMS II Agreement on terminal dues, as amended by the supplementary agreement, for the period between 1 April 1999 and 31 December 2001.

Article 2

The following conditions and obligations are attached to the exemption provided for in Article 1:

1. **Conditions**

- (a) The Agreement must not be implemented before 1 April 1999. The transitional period provided for in the Agreement must be postponed in order to ensure that terminal dues for the rest of 1999 are not increased beyond 55 % of domestic tariffs, and that the maximum increase of terminal dues is to 65 % of domestic tariffs in 2000 and to 70 % of domestic tariffs in 2001. The parties must amend their agreement accordingly as soon as possible and at the latest by the time the final account settlement for the terminal dues for 1999 is due.
- (b) The parties must take all the necessary steps in order to grant each other effective Level 3 access. In order to facilitate this access, the parties must relax domestic conditions for other parties where those rules are not justified and could in practice bar other parties from access to the domestic rates or (where it is not in their power to do so) they must use their best efforts vis-à-vis the relevant national authorities to remove those rules.

2. **Obligations**

- (a) The parties shall introduce, by the end of 1999, a transparent cost-accounting system as provided for in Directive 97/67/EC ensuring that all significant cost elements can be identified, quantified, compared and controlled.

⁽⁴⁷⁾ Article 2(6) of the Agreement obliges the parties to grant such access to the other parties. In so far as access for third parties is concerned, see point 2(8) of the postal notice of the Commission (OJ C 39, 6.2.1998, p. 2).

- (b) The parties shall provide annual reports on the development of domestic tariffs, tariffs for cross-border mail and costs and on the development of cross-border traffic flows by 31 March of each year at the latest. Those reports shall include information on the implementation of Level 3 access (including, for example, examples of contracts under Level 3 conditions concluded with operators from other countries and of comparable contracts concluded with domestic customers). The parties shall inform the Commission of the amendment made to comply with the condition set out in point 1(a) as soon as that amendment is signed.

Article 3

This Decision is addressed to:

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Done at Brussels, 15 September 1999.

For the Commission

Karel VAN MIERT

Member of the Commission