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NOTICE FROM THE COMMISSION

on the application of the competition rules to the postal sector and
in particular on the assessment of certain State measures relating
to postal services

PREFACE

As recognized by the Court of Justice of the European Communities, Community law, and in particular the competition rules of the Treaty, apply to the postal sector⁽¹⁾.

Subsequent to the submission by the Commission of a Green Paper on the development of the single market for postal services⁽²⁾ 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⁽³⁾, a substantial discussion has taken place on the future regulatory environment for the postal sector in the Community.

This draft Notice, which complements harmonization measures proposed by the Commission, builds on the results of this discussions in accordance with the principles established in Council Resolution (94/C48/02) of 7 February 1994 on the development of Community postal services. It sets out the guiding principles according to which the Commission intends to apply the competition rules of the Treaty to the postal sector, in order to further the gradual, controlled liberalization of the postal market while maintaining the necessary safeguards for the provision of a universal service.

It sets out the approach it intends to take when addressing the compatibility of State measures restricting the freedom to provide service and/or to compete in the postal markets with the competition rules of the Treaty. It confirms the Member States' right to maintain, at this stage, a defined area of reserved services.

In addition, it addresses the issue of non-discriminatory access to the postal network and the regulatory safeguards required to ensure fair competition in the sector.

(1) In particular in Joined cases C-48/90 and C-66/90, The Netherlands and Koninklijke PTT Nederland NV and PTT Post BV v Commission, [1992] ECR I-0565 and Case C-320/91, Procureur du Roi v Paul Corbeau [1993] ECR I-2533.

(2) COM(91) 476 final.

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

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Introduction

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. The Court of Justice of the European Communities has acknowledged that the EC Treaty and in particular the competition rules apply to the postal sector⁽⁴⁾.

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 State measures relating to public undertakings and undertakings to which the Member States grant special or exclusive rights in the postal sector.

Especially on account of the development of new postal services by private operators, certain Member States have revised, or are revising, their postal legislation in order to restrict the monopoly of their postal organizations to that considered necessary for the realization of the public interest objective. Finally, the Council invited the Commission to propose measures i.e. defining a harmonized universal service and the postal services which could be reserved⁽⁵⁾.

A comprehensive approach is therefore necessary encompassing, on the one hand, proposals for European Parliament and Council Directives to define a harmonized set of postal services and, on the other, to specify the obligations of the Member States under the Treaty, thereby giving them clear guidelines so as to avoid infringements of the Treaty.

The Council requested in this regard that the measures should be transparent, simple and easy to manage, to ensure the best possible conditions of monitoring and enforcement.

At this stage, a Notice is therefore the appropriate instrument to provide guidance to Member States and postal operators enjoying special or exclusive rights to ensure a correct implementation of the competition rules. This notice, though it cannot be exhaustive, aims to specify in general terms concrete obligations of the Member States under the Treaty in the postal sector and thus to provide the necessary guidance for the correct interpretation, in particular, of Article 90(1) of the EC Treaty in conjunction with Articles 59 and 86.

By issuing the present Notice, the Commission is moreover taking a step towards defining the scope of the exception under Article 90(2), in order 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.

⁽⁴⁾ See footnote 1.

⁽⁵⁾ Resolution of 7 February 1994 on the development of Community postal services, OJ No C 48, 16.2.1994, p. 3.

1. Definitions

In the context of this Notice:

"postal services" means services which consist of the collection (including public collection), carriage, and delivery of postal items;

"public postal network" means a system of human resources and tangible assets necessary to ensure:

- the public collection of postal items covered by the universal service obligation from mail boxes or other access points throughout the territory;
- the routing and handling of such items between points of access to the postal network and the distribution centre;
- the delivery of such items to the addressees shown, on the basis of regular delivery rounds;

"collection" means the process of gathering, transporting and relaying postal items from the place of packaging and from mail boxes where they have been deposited for that purpose to a point giving access to the postal network;

"distribution" means the operations ranging from sorting in the distribution centres to the delivery of postal items to the addresses shown on the items;

"postal item" means any addressed item whose technical specifications allow it to be carried in the postal network. Such items include books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value;

"item of correspondence" means 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 its wrapping. Books, catalogues, newspapers and periodicals shall not be regarded as items of correspondence;

"document exchange" means the delivery of mail by the senders to ad hoc exchange centres in which correspondents have designated boxes where they can come to retrieve their mail. Users of an exchange centre must belong to a group of subscribers to this service;

"direct mail" means items of correspondence consisting of the same message and sent to a large number of addresses for advertising or marketing purposes;

"express mail service" means a service featuring, apart from greater speed and reliability in the collection and distribution, all or some of the following supplementary facilities: guarantee of delivery by a fixed date; collection from domicile; personal delivery to addressee; option of changing the destination and addressee in the course of transportation; confirmation to sender of reception of the item dispatched; monitoring and tracking and tracing of items dispatched; personalized service for customers and provision of an à la carte service, as and when required;

"universal service providers" means a public or private entity designated by a Member State to ensure the provision of the universal service, or parts thereof;

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

"special rights" means the rights that are 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, which are authorized to provide a service or undertake an activity,
- designates, otherwise than according to objective, proportional and non-discriminatory criteria, several competing undertakings, as undertakings which are authorized 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" means the remuneration applied between universal service providers for the delivery of incoming cross-border mail;

"intermediary" means any economic operator who acts between the sender and the universal service provider, by collecting, routing and/or pre-sorting postal items, before channelling them into the public postal network of the same or of another country;

"points of access" means physical locations where postal items may be delivered by customers or intermediaries at the various stages of handling of postal items prior to distribution. This includes the counters of the post offices, postal boxes as well as the entry points of distribution centres for pre-sorted postal items;

"national regulatory authority" means 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 Notice;

"essential requirements" means the non-economic reasons in the general interest which may cause a Member State to subject the provision of postal services to specific mandatory conditions. These reasons are public decency, the surveillance of possible criminal activities as well as, in justified cases, data protection.

2. Article 90(1)

- 2.1 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 Treaty rules. The expression "undertaking" includes every person exercising an economic activity, irrespective of the legal status of this person and the way in which it is financed. The provision of the collection, transportation, sorting and distribution of postal items, constitute economic activities, these services being 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. A dominant influence on the part of the public authorities is 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 attaching 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 exploit in an organized manner postal services for third parties against remuneration are also to be considered as being such undertakings.

2.2 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.

2.3 In all Member States except Sweden and Finland, special and exclusive rights apply to services such as the collection, 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.

3. Articles 90(1) and 59

(a) Basic principles

3.1 The granting of special or exclusive rights to one or more operators as referred to under 2.2 to carry out the collection, 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 States concerned when the addressees or the consignors 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⁽⁶⁾, comprise prohibiting the conveyance of certain categories of postal items to other Member States in particular by intermediaries, as well as the prohibition on distributing inward cross-border mail.

3.2 Article 66, read in conjunction with Articles 55 and 56 of the Treaty, sets out derogations from Article 59. Since they are exceptions they must be interpreted restrictively. As regards postal services, the derogation under Article 55 only applies to the conveyance and distribution of mail effected 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 (cf. *infra* 3.5) in order to protect the public interest. The other derogations from the Treaty listed in these provisions do not apply to postal services. Such services cannot, in themselves, threaten public policy and cannot affect public health.

⁽⁶⁾ For a general explanation of the principles deriving from Article 59, see Commission interpretative communication 93/C334/03 concerning the free movement of services across frontiers, OJ No C 334, 9.12.1993, p. 3.

- 3.3 The case-law of the Court of Justice allows, in principle, for further derogations on the basis of mandatory requirements, if they fulfil non-economic essential requirements in the general interest and are applied without discriminatory effect and in proportion to the objective to be achieved. As regards postal services, the only essential requirements justifying restrictions on the freedom to provide postal services are public decency and the surveillance of possible criminal activity, such as the conveyance of illegal weapons and drugs, as well as, in justified cases, data protection. In this context, data protection means the confidentiality of mail. Conversely, consumer protection does not make it necessary to restrict freedom to provide postal services, since this objective can also be attained through free competition in the framework of the general legislation on fair trade practices and consumer protection.
- 3.4 The Commission therefore considers that the maintenance of any special or exclusive right which limits cross-border provision of postal services would in principle be incompatible with Articles 90 and 59 of the Treaty, without prejudice to the considerations set out under point 5.4.

(b) Consequences

- 3.5 Where Member States deem it necessary to regulate postal services to ensure the achievement of the applicable essential requirements or public service tasks, the content of such regulation must correspond to the objectives 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 and where it is demonstrated that less restrictive procedures cannot safeguard the relevant public interests. Member States are in any case invited to notify the measures taken to the Commission to enable it to assess their proportionality.

4. Articles 90(1) and 86

(a) The relevant market

- 4.1 Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves 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 international mail, owing to the exclusive rights of the operators referred to under 2.2 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.
- 4.2 As regards the product markets, one must distinguish between several distinct markets.
- 4.3 The general letter service encompasses the delivery of items of correspondence in the course of daily delivery rounds.

This does not include self-provision, i.e. the performance of postal services by the legal or natural person from whom the item of correspondence originates, nor the collection, transport and delivery of items of correspondence by a third party acting only on its own behalf.

Also excluded are such postal items as are not considered items of correspondence, since they consist in 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 its address. This concerns magazines, newspapers, printed periodicals, including catalogues, or other printed matter as well as goods or documents accompanying and relating to such items.

- 4.4 Other distinct markets include, for example, the express courier market, the document exchange market, as well as the market for new services combining the new telecommunications technologies and some elements of the postal services.

A document exchange differs from the market as referred to under 4.3 as it does not encompass the collection and the delivery to the addressee of the postal items transported. It involves only the conveyance of mail from boxes of exchange users into the boxes of other exchange users, these boxes being provided in one or more locations not being the premises of an exchange user.

The express mail service also differs from the market as referred to under 4.3 owing to the value added by comparison with the basic postal service⁽⁷⁾. In addition to faster and more reliable collection, transportation and distribution of the postal items, an express mail service is characterized 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 during transportation; confirmation to the sender of delivery, tracking and tracing; personalized treatment for customers and the offer of a range of service according to requirements.

- 4.5 The activities referred to under 4.3 cover different markets: the markets for the collection and for the sorting of mail, the market for the transport of mail and, finally, the distribution of mail (domestic or international). The four activities provide the components of the final service to the user, but are in various cases provided by different operators which shows that they constitute different markets. This is the case for international mail, where the collection 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, many postal operators allow downstream access to their postal network, sometimes at the delivery office. This permits in many cases a higher reliability (quality of service) by bypassing any sources of failure in the postal network upstream. Collection, sorting, transport and distribution should therefore be considered distinct markets, as they meet distinct needs.

⁽⁷⁾ Commission Decisions 90/16/EEC (OJ No L 10, 12.1.1990, p. 47) and 90/456/EEC (OJ No L 233, 28.8.1990, p. 19).

(b) Dominant position

- 4.6 Because the operator as referred to under 2.2 is in most of the Member States the only one to control 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 its national market for the delivery of items of correspondence. Since delivery is the final stage of the service to the user, this operator is in most cases also dominant on the markets for the collection and processing of mail. 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) Potential abuses

- 4.7 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 its operators referred to under 2.2 for services which it does not offer, or offers in conditions not satisfying the needs of customers in the same way as the service of competitive economic operators could do, such 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 activities referred to under 4.3 restrict the provision of other distinct services. On the basis of the relevant evidence, the Commission requested several Member States to abolish restrictions under the exclusive rights regarding the provision of express mail services by international couriers⁽⁸⁾.

A recent report prepared for the Commission⁽⁹⁾ demonstrated 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 standardization of dimensions and weights. The failure to standardize dimensions and weights is an additional obstacle to increased competition as well as a restraint on quality and efficiency improvements rendered possible by new technology. These postal operators also maintained opacity in the cross-subsidies, which explain, according to that study, most of the price disparities; these are especially penalizing residential users, who do not qualify for any discounts schemes. This shows that postal operators, where they are granted special or exclusive rights, let the quality of the service decline⁽¹⁰⁾ in many instances and that they omitted to take necessary steps to improve service quality.

⁽⁸⁾ See footnote 7.

⁽⁹⁾ UFC-Que Choisir, "Postal services in the European Union", April 1994.

⁽¹⁰⁾ 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 Union). The exclusive rights of the postal organizations favoured this fall in quality, since they prevented other companies from entering the market. As a consequence the postal organizations failed to compensate for wage increases and reduction of the working hours by introducing modern technology, as enterprises in industries open to competition did.

As regards cross-border postal services, the study showed that quality still needs to be improved significantly in order to meet the needs of customers, and in particular the residential customers who cannot afford the services of the courier companies or use facsimile transmission instead. By excluding other economic operators from the market, Member States induce the postal operators to offer insufficient cross-border services, thereby limiting the provision of services, contrary to Article 90 read in conjunction with Article 86.

- 4.8 Member States need not necessarily set up new bodies specifically for the monitoring of access conditions applied or of the compliance with special and exclusive rights. However, they should not give to their operator as referred to under 2.2 or to any body which is not an autonomous department of the Ministry in question, the power of supervision of the application of the exclusive rights granted and the supervision of the activities of postal operators generally. Such power would induce an operator under 2.2 having a dominant position to place its competitors at a disadvantage, thereby violating Article 86. The system of undistorted competition as provided for in the Treaty can only be ensured if equal opportunities for the different economic operators are guaranteed. To allow an operator under 2.2 to check the declarations of its competitors, to assign to an undertaking the power to supervise the activities of its competitors or to associate an undertaking in the granting of licences means that such undertaking is given commercial information about its competitors and thus has the opportunity to distort at will the activity of those competitors.
- 4.9 Refusal to supply is also an abuse prohibited by Article 86 of the Treaty. This behaviour would lead to a limitation of services within the meaning of Article 86(b) and, if applied only to some users, result in discrimination contrary to Article 86(c). In most of the Member States, the operators under 2.2 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 therefore likely to lead to discrimination. Member States should in this regard ensure that their postal legislation does not encourage postal operators to differentiate unduly as regards the conditions applied or to exclude certain companies.
- 4.10 The operation of a universal collection and delivery network confers significant advantages on the operator under 2.2 to offer liberalized services. The prohibition under Article 90(1), read in conjunction with Article 86(b), applies to the extension, without objective reason, of the dominant position of the operator on the market as referred to in 4.3, to markets which are distinct and dissociable from the former and respond to the needs of specific economic operators, at the risk of eliminating all competition by other than economic means. In countries where local delivery of items of correspondence is liberalized and the monopoly is limited to inter-city transport and delivery, an extension of the monopoly from the latter market to the first would therefore be incompatible with the abovementioned Treaty provisions, in the absence of additional reasons justifying such extensions, since the functioning of services in the general economic interest did not seem to be endangered under the previous situation. The relevant Member States should inform the Commission of such envisaged extension of the special or exclusive rights and of its justifications in view of the realization of the general economic interest objective mentioned.
- 4.11 There is a potential effect on the trade between Member States, since the postal services offered by operators other than the operators under 2.2 can cover mailings to or from other Member States, and restrictions may impede cross-border activities of operators in other Member States.

5. Article 90(2)

(a) Service of general economic interest and the reserved area

- 5.1 Article 90(2) of the Treaty allows an exception from the application of the Treaty rules where their application obstructs, in law or in fact, the performance of the particular task assigned to the operators under 2.2 for the provision of a service of a general economic interest. This task consists in the provision and the maintenance of a basic public postal service guaranteeing, at affordable, cost-effective and transparent tariffs, nation-wide access to the public postal network within a reasonable distance and during adequate opening hours, including the collection of postal items from accessible postal boxes or collection points throughout the territory and the delivery of such items to the address indicated in the course of regular scheduled delivery rounds, as well as associated services entrusted by measures of a regulatory nature to those operators for universal delivery at a specified quality.

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. Any definition of the reserved area has to take into account the financial resources necessary for the provision of the service of general economic interest.

The financial resources for the maintenance and improvement of this public network still derive mainly from the activities as referred to under 4.3. An analysis of the revenues obtained from mail flows in the Member States establishes that the maintenance of special or exclusive rights with regard to this market is, in the absence of exceptional circumstances, sufficient to guarantee the improvement and maintenance of the public postal network. Items of correspondence falling within the first weight step of the standard postal service constitute the core of this market.

In most Member States the limits of the monopoly are fixed 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.

- 5.2 On average the items of correspondence weighing less than 350 grammes and having a tariff which is less than five times the public tariff for a standard mail item falling within the first weight-step account for about 98% of the letter mail of the postal operators. Given that the revenue impact would be insignificant, operators under 2.2 could therefore not claim that the service concerning mail exceeding the limits as defined above should be reserved to them.

As long as such activities are not otherwise harmonized by Community law in a way compatible with the provisions of the Treaty, the scope of the area that Member States may reserve for the universal service provider and are not obliged to open to competition should therefore extend only to the service as referred to above. 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 light of the experience gained, the Commission will review the scope of this area, in particular with regard to the weight and price limit, at the latest during the first semester of the year 2000.

- 5.3 As regards direct mail, it has been included in the definition of items of correspondence. However, the direct mail market is still developing at a different pace from one Member State to the other, which makes it difficult for the Commission, at this stage, to specify in a general way the obligations of the Member States regarding this service. Direct mail items do not contain genuinely personalized messages. It addresses the needs of specific operators, as a substitute for advertising in the media. Moreover, the senders of direct mail do not require the same short delivery times asked for by customers requesting services on the market, as referred to under 5.2. The fact that both services are not always directly interchangeable shows the existence of distinct markets.

The two principal issues surrounding direct mail are tariffication and potential abuse of its liberalization so as to circumvent the reserved services referred to under 5.2. Evidence from the Member States who do not restrict direct mail services is still inconclusive and does not yet allow a definitive general assessment. Taking these uncertainties into account, it is considered appropriate to proceed temporarily on a case-by-case basis. Member States may deem it necessary to maintain in particular circumstances certain existing restrictions on direct mail services or to introduce licensing in order to avoid artificial traffic distortions and substantial destabilization of revenues. Such restrictions may only concern direct mail items falling under the combined weight/price criterion for reservable services set out under 5.2.

Depending on the experience gained the Commission will decide before 30 June 1998, on the basis of all economic data peculiar to the development of the postal markets in the relevant Member States until that date, and on the basis of the financial equilibrium of the universal service provider, whether or not the possibility to extend the reservation of direct mail after 31 December 2000. Such a decision should imply, in particular, discussions with the regulator, the operator under 2.2 and the potential posters of direct mail to see whether the outstanding problems can be overcome and which solutions could be envisaged.

- 5.4 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 international mail from the Member State of origin is currently under revision to adjust terminal dues to match actual costs of delivery.

Member States may therefore deem it necessary to maintain in particular circumstances certain existing restrictions on the distribution of inward cross-border mail⁽¹¹⁾, so as to avoid artificial traffic diversion, which would inflate the share of cross-border mail in the Community traffic. Such restrictions may only concern items falling under the reservable area of services.

Depending on the experience gained the Commission will decide before 30 June 1998, on the basis of all economic data peculiar to the development of the postal markets in the relevant Member States until that date, and on the basis of the financial equilibrium of the universal service provider, whether or not to extend the reservation of inward cross-border mail after 31 December 2000.

In assessing the situation the Commission will take into account the relevant, specific circumstances in the Member States.

⁽¹¹⁾ 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.

5.5 The collection, sorting and transport of postal items has been or is currently being liberalized in a number of Member States. Given that the revenue effects of such liberalization may vary according to the situation in the different Member States, certain Member States may deem it necessary to maintain in particular circumstances certain existing restrictions on the collection, sorting and transport of postal items by intermediaries, so as to allow for the necessary restructuring of the operator under 2.2. However, such restrictions should in any event be applied only to postal items covered by the market as referred to under 5.2, not go beyond what is already de facto accepted in the Member State concerned, and be compatible with the principle of non-discriminatory access to the postal network as set forth under point 5(b)(vii). The necessary restructuring of the operator under 2.2 should be completed by 1 January 2000 at the latest. In the light of the experience gained, the Commission will review the situation with regard to the restrictions at the latest during the first half of the year 2000.

5.6 The operators under 2.2 should not use the income from the reserved area to cross-subsidize activities in areas open to competition, except where the share of the cost of universal service obligations borne by the universal service providers justifies such cross-subsidization or in other justified cases, such as cultural mail or services to the disabled. In any event the price of competitive services offered by the operator under 2.2 should be above the average incremental costs of provision⁽¹²⁾. If services were offered at a price below such cost, the Commission would investigate the matter under Article 86.

(b) Conditions

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

(i) liberalization of other postal services

Member States should therefore withdraw all special or exclusive rights for the supply of postal services other than the market as referred to under 5.2 and mail connected with the exercise of official authority, and should take all necessary measures to guarantee the right of all economic operators to supply the said services.

This does not prevent Member States from making, where necessary, the supply of such services subject to declaration procedures or class licenses and, in justified cases, to individual licensing procedures aimed at the enforcement of essential requirements. Member States 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 for appealing against any refusal.

⁽¹²⁾ The average of all additional costs, including capital costs, incurred by the universal service provider in providing the relevant service. A company operating in normal market conditions would under normal circumstances not offer services at a price below such cost, as, if it were below this value, the cessation of the service would raise the net profitability of the company.

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

Exclusive rights may be extended only where they are indispensable for ensuring the functioning of the tasks of general economic interests entrusted to the relevant operator under 2.2. In many areas the entry of new companies into the market could, on the basis of their specific skills and expertise, contribute to the realization of the services of general economic interest.

Where the relevant operator under 2.2 does not ensure the fulfilment of these universal service objectives in accordance with Community law (such as the ability of every citizen in the Member State concerned to have access to newspapers, magazines and books), via its universal postal network, financed through the exploitation of services covered by special or exclusive rights, and where the universal service obligations could otherwise not be met, instead of extending these rights, Member States should rather draw up a set of public-service specifications, in addition to essential requirements, relating to conditions of permanence and, in justified cases, availability and quality of service, in the framework of the licensing or declaration procedures applied to competing operators.

All of these conditions should form a set of public-service specifications and be objective, non-discriminatory and transparent. Before they are implemented, the Commission will verify the compatibility of such conditions with the Treaty.

- (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 these rights. Prohibiting self-delivery, i.e. the performance of postal services by the legal or natural person who originates the item of correspondence or the collection or transport of items of correspondence by a third party acting only on its behalf, would for 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 under 2.2.

- (iv) monitoring by an independent regulatory body

The monitoring of the performance of the public service tasks of the operators under 2.2 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 under 2.2 shall be ensured by a body or bodies independent of the latter.

This body should in particular ensure that contracts for the provision of reserved services are made fully transparent, are separately invoiced and are distinguished from non-reserved services such as printing, labelling, enveloping; that terms and conditions for services which are part-reserved, part-liberalized are separate; and that the reserved element is open to all posters, 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 a regular reporting on their performance.

(vi) transparency of accounting

Operators under 2.2 use common components of infrastructure to compete in a variety of markets. Price and service discrimination between classes of customers can easily be practised by operators running a universal postal network, given the important overheads which cannot be meaningfully assigned to any one service in particular. It is therefore extremely difficult to determine the cross-subsidies within them, both between the different stages of the handling of postal items in the public postal network and between the reserved activities and the services provided under conditions of competition. Moreover, a number of operators offer preferential tariffs for cultural items in which it is clear that the long-run incremental costs are not being covered. It is thus necessary that operators under 2.2 should 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 that they should allow the assessment of the conditions applied at the various access points to 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.

(vii) non-discriminatory access to the postal network

Access must be afforded to customers or intermediaries at defined public points of access. Access conditions including contracts (when offered) should be transparent, published in an appropriate manner and offered on a non-discriminatory basis.

Member States should abolish all existing restrictions on the processing of mail before its access to the public postal network, unless the necessity of these restrictions for financing the universal service or for compliance with public policy or essential requirements is demonstrated.

Preferential tariffs appear to be offered by some operators to particular customers or groups in a non-transparent fashion. Member States should monitor the access conditions to this network with a view to ensuring that there is no discrimination either in the conditions of use or in the charges payable between intermediaries, by comparison with the operators under 2.2 themselves. It should in particular be ensured that intermediaries, including operators under 2.2 from other Member States, can choose from amongst available arrival points to the public postal network and obtain access within a reasonable period at price conditions based on costs.

This obligation does not mean that Member States are required to ensure access to the public postal network for items of correspondence from its territory, which were conveyed by commercial companies to another State to be introduced in the public postal network via a postal operator of that other State, for the sole reason 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 subjected to penalties by the independent regulatory body.

Member States should, according to the first paragraph of Article 5 of the Treaty, inform the Commission, at its request, of the conditions of access applied and, of the information required to assess their justifications. The Commission shall not disclose information acquired as a result of such requests to the extent that it is covered by the obligation of professional secrecy, and shall not use it for other purposes.

6. Application of Article 92 on State aid to postal operators as referred to under 2.2

(a) Principles

While a few operators as referred to under 2.2 are highly profitable, the majority appear to be 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, it is clear that direct financial support in the form of subventions or indirect support such as from 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⁽¹³⁾.

Member States are required to notify the Commission for approval all plans to grant aid or to alter existing aid arrangements. Moreover, the Commission is required to monitor aid it has previously authorized or which date 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⁽¹⁴⁾, as last amended by Directive 93/84/EEC⁽¹⁵⁾. In addition to the general transparency requirement for the accounts of operators under 2.2 as discussed under 5(b)(vi), Member States have therefore to ensure that financial relations between them and those operators are transparent as required in the Directive, so that the following emerge clearly:

⁽¹³⁾ Case C-387/92, Banco de Credito Industrial SA v Ayuntamiento Valencia, [1994] ECR I-877.

⁽¹⁴⁾ OJ No L 195, 29.7.1980, p. 35.

⁽¹⁵⁾ OJ No L 254, 12.10.1993, p. 16.

- (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 these public funds are actually put.

The Commission regards the following as making available public funds:

- (a) the setting-off of operating losses;
- (b) the provision of capital;
- (c) non-refundable grants, on loans to 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 assess various tax reductions granted to a postal operator under Article 92 of the Treaty. It examined whether this aid benefited the services provided by the relevant postal operator in the competitive area. Owing to the fact that a cost accounting system was not yet fully in place to perform this examination, the Commission relied on studies to evaluate the additional costs due to universal service obligations borne by the postal operator under 2.2 relating to its reserved activities and compared these costs with the amount of aid from the State to assess whether the aid satisfied the conditions of Article 92(1) of the Treaty.

The Commission, however, invited the Member State concerned to ensure that the cost accounting applied by the postal administration would ensure that public funds could not be used to cross-subsidize activities provided in the competitive area and requested an annual report which would allow the monitoring of compliance with Community law.

7. Review

This Notice is adopted at Community level to facilitate the assessment of certain State measures relating to postal services and in particular to explain the scope of the area which may be reserved by Member States to the operators under 2.2, and associated conditions. It is appropriate that after a certain period in which measures adopted have been in force within the Member States 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. In the course of the first half of the year 2000, the Commission will carry out a global evaluation of the situation in the postal sector in the light of the aims of this Notice.

The Commission will further monitor the sector in order to determine whether the adoption of binding measures according to the provisions of Article 90 of the Treaty is required, in particular taking account of the development of trade between Member States and of the investment certainty necessary to keep up with the pace of technological change in the sector.

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CONSULTATION

The Commission invites interested parties to transmit their observations on this draft Notice. These observations should reach the Commission at the latest two months after the publication of this draft Notice. They may be sent by fax (fax number 32 - 2 - 296 98 19) or by post to the following address:

Commission of the European Communities
Directorate-General for Competition (DG IV)
Directorate C
200 rue de la Loi/Wetstraat
B - 1049 Brussels

Subsequent to a public consultation, the Commission intends to adopt the Notice in order properly to enlighten the actors in the sector as to the application of the competition rules.