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The Liberalization of Postal Services in the European Union

Edited by
Damien Geradin



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Foreword

The present volume represents the reports, often revised and updated, which were presented at the Conference “The Liberalisation of Postal Services in the European Union” held in Brussels in February 2001. In addition, it contains several contributions written in the wake and as a result of the conference. This conference was organized in the framework of the *Pôle d'Attraction Interuniversitaire* (PAI) No 36 (European Integration Law) granted by the Prime Minister's office to the University of Liège and the University of Ghent (1990–1996), later joined by the Free University of Brussels (1997–2001). Financial support was also provided by the “Regulation of Network Industries Project” at the University of Liège.

Special thanks to Lora Borissova and Anne Heinen, research assistants at the *Institut d'Etudes Juridiques Européennes* of the University of Liège, who played a central role in the organization of the above conference and in the production of the volume. Thanks to Julien Compère who helped with the editing of the papers and to Donald Slater who corrected the English of several papers.

Introduction

The last few years have seen a restructuring of the European postal market. For many years, this market was dominated by State monopolies often created or at least fostered by the Member States themselves. Monopoly privileges were traditionally granted to the incumbent as the *quid pro quo* to perform a range of universal service obligations (hereafter, “USOs”). As a result, public postal operators (hereafter, “PPOs”) did not compete with each other. They only faced competition from the private sector on some fringe markets.

Today, competition and liberalization are the buzzwords on the lips of all policy-makers and market players. In the early 1990s, some Member States, such as Sweden or Finland, initiated market opening reforms in their postal sector. For the remaining Member States, the liberalization process was triggered a few years later by the adoption of Directive 97/67 on common rules for the development of the internal market of Community postal services and the improvement of the quality of the service (hereafter, the “postal directive”).¹ The directive provides Member States could only maintain in the reserved sector the treatment of mail items “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 weight less than 350 grams”.² Interestingly, some Member States when transposing the directive into their national legislation went beyond the minimum market opening requirements set by the Council and the European Parliament. Furthermore, as this book was going to press the Telecommunications Council of Minister reached a common position according to which from 2003 onwards mail items weighing more than 100 grams or subject to a delivery charge higher than three times the tariff of ordinary mail are to be liberalised and that a further step in the liberalization process is to be effected from 2006 onwards when the weight and price limits are to be revised to 50 grams or two and a half times the tariff for ordinary mail delivery. Progress in the opening of the postal market is thus to be expected in the years to come.

The removal of monopoly rights enjoyed by the incumbent is, however, only a first step in the liberalization process. Another equally important step is to ensure that the incumbent does not abuse the dominant position that it will usually retain during the initial phase of the market opening process – because, for instance, it has a large market share or because it owns or controls essential

¹ O.J. 1998, L 15/14.

² Article 7.1 of the directive.

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facilities.³ Preventing abuses of market power can be realised through adoption of regulatory requirements (e.g., accounting separation and cost allocation rules) or through the application of competition rules and, in particular, Article 82 of the EC Treaty.

Besides creating competition, regulatory reforms in the postal sector must also guarantee the continuing performance of USOs which, as noted above, have traditionally been granted to the incumbents as a counterpart for their monopoly rights. Traditionally, these obligations have been funded through internal cross-subsidies (between profitable and loss-making market segments). Since cross-subsidization will no longer be a valid option in a competitive market, other forms of funding (e.g., the creation of a compensation fund) will need to be elaborated.

In light of the above developments, the objective of the book is to take a closer look at the complex challenges raised by the liberalization of the postal market in the European Union. The book is divided into three parts.

Part I comprises two papers examining the main aspects of the international regulation of postal services. Though the focus of this book is to examine the liberalization process taking place at the EU level, it is useful to first have a look at the international regulatory framework provided by the Universal Postal Union (hereafter, "UPU") and World Trade Organization (hereafter, "WTO") rules.

The first chapter (by J. Campbell) examines the evolution of two major issues of international postal law: terminal dues (i.e., what post offices charge each other for the delivery of inbound international mail) and remail (i.e., the practice of producing mail in one country and posting it in another).⁴ A discussion of the international rules applicable to these (intimately linked) issues is of great interest to European postal observers as these issues have raised major disputes in the EU context. As Campbell shows, the UPU rules regarding terminal dues have evolved over time and a major breakthrough was realised at the 1999 Beijing Congress where postal officials accepted the principle that terminal dues should be related to domestic postage. Current terminal dues arrangements still contain distortions, however, and should thus further evolve in the years to come.

The second paper (by D. Luff) analyses the compatibility of UPU rules with WTO law.⁵ It concludes that UPU rules are not adapted to the constraints of international trade law and should thus be adapted. The paper also argues that WTO rules, in particular those concerning schedules of commitments and the

³ See, generally, Damien Geradin, "The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process", in D. Geradin, Ed., *The Liberalization of State Monopolies in the European Union and Beyond*, Kluwer Law International, 2000, p. 181.

⁴ J. Campbell, "Evolution of Terminal Dues and Remail Provisions in European and International Postal Law".

⁵ D. Luff, "International Regulation of Postal Services: UPU vs. WTO Rules".

classification of postal services, are not well adapted to postal market evolutions. According to the author, the ongoing WTO negotiations should thus be used as an opportunity to introduce a greater coherence between international postal rules and WTO law.

Part II comprises six papers discussing the various aspects of the liberalization process taking place at the EU level.

The first paper (by D. Geradin and C. Humpe) provides a detailed analysis of the postal directive, the key provisions of which are critically reviewed.⁶ To throw some light on these provisions, references are made to relevant European Commission (hereafter, the "Commission") decisions and the case-law of the Court of First Instance and Court of Justice of the European Communities (hereafter, respectively "CFI" and "ECJ"). The paper shows that while the postal directive successfully addresses a range of key issues, several important questions remain unsettled and thus deserve further legislative attention.

The second paper (by S. Baker and J. Dodgson) discusses the issue of market definition of postal services.⁷ Properly defining markets is of central importance for the application of competition rules. As pointed out by the authors, the ECJ and CFI have stated on a number of occasions that the Commission must define the relevant market in cases involving Article 81 and 82 of the EC Treaty and the Merger Control Regulation. The first paper reviews the different techniques that can be used to define markets and then examines how the Commission has defined markets in the postal sector in its numerous merger and Article 82 decisions. The paper concludes that market definitions should not be seen in a static fashion. They may evolve as markets develop with the internationalisation of the postal business.

The third paper (by J. Derenne and C. Stockford) analyses the issue of market power in postal services.⁸ As pointed out by the authors, given the strong dominant position of many PPOs, there is a clear platform for the application of Article 82 of the EC Treaty in order to prevent abuse of this dominance. However, the paper shows through a review of Commission decisions that, until recently, this institution has proved quite passive in applying Article 82 to the postal sector. The paper further argues that the national courts, the national competition authorities, and the national postal regulators did not prove more effective in ensuring an even playing field between PPOs and new entrants and that the actions before the CFI and ECJ led to mixed results in terms of preventing abuses of market power. The paper, however, observes that the dawn of the new millennium seems to have brought a new approach to the Commission.

⁶ D. Geradin and C. Humpe, "The Liberalization of Postal Services in the European Union: An Analysis of Directive 97/67".

⁷ S. Baker and J. Dodgson, "Market Definition in Postal Services".

⁸ J. Derenne and C. Stockford, "Abuse of Market Power in Postal Services: Lessons from the Commission's Decisional Practice and Court of Justice Case-Law".

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Recent Commission decisions suggest that competition law is now being applied to the postal sector far more vigorously than in the previous decade.

In the next paper, L. Flynn discusses the issue of access to the postal network by reference to the “essential facilities” doctrine.⁹ The paper first reviews the content and implications of this doctrine, which were recently clarified by the Bronner judgement of the ECJ. Then, it analyses how this doctrine could be applied to the issue of access to the postal network. The paper argues that what matters in the postal sector is not the issue of access per se. Rather, questions relating to the terms of access, in particular pricing regimes, supervision of access and the possibility of reviewing the basis on which these decisions are made are more important. Finally, the paper reviews the access regimes put in place in other sectors (telecommunications, electricity and natural gas) to see what lessons can be drawn for the postal sector and to identify the potential for a European variation of the essential facilities doctrine.

The fifth paper of Part II (by J.Y. Art) reviews the merger decisions adopted by the Commission in the postal sector.¹⁰ The paper first reminds the reader that the compatibility of mergers with the common market depends on whether or not these transactions strengthen a dominant position. The dominance test used by the Commission to mergers involving PPOs revolves around three issues: (i) the broadening of the PPO’s portfolio and its impact on the assessment of the proposed concentration; (ii) the financing of the concentration; and (iii) the justification of the remaining exclusive rights. The last two issues are particularly sensitive. As pointed out by the author, third parties in merger review proceedings frequently argue that the acquisition was only made possible as a result of the operator’s revenues from the reserved services, thereby raising the question of whether such transactions should be also examined under the EC Treaty’s State aid rules. The fact that PPOs are able to expand to new markets by purchasing other companies also raise the question of whether, since they seem to have a lot of financial resources available, they still need to retain their exclusive rights.

Finally, the sixth paper (by V. Visco Comandini) deals with the highly controversial issue of the funding of USOs in the postal sector.¹¹ As pointed out by the author, since USOs are public goods which will not be provided by the market, strategies need to be developed to ensure their provision. Traditionally, USOs have been entrusted to the PPOs, which were allowed to fund them through the revenues of the reserved area. With the liberalization of the market, this approach will no longer be sustainable in particular in the Member States facing high USO costs. The alternative to the reserved area as a means to fund

⁹ L. Flynn, “Access to the Postal Network: The Situation after Bronner”.

¹⁰ J.Y. Art, “Merger Control in the Postal Sector”.

¹¹ V. Visco Comandini, “The Provision and Funding of Universal Service Obligations in a Liberalized Environment”.

USOs are the creation of a compensation fund, the imposition of a tax on new entrants, and bidding schemes for USOs. The paper shows that, while these strategies have theoretical merits, they will not necessarily be easy to implement in practice. They will also involve difficult policy trade-offs.

Part III of the book contains country reports analysing the current state of liberalization in five EU Member States (France, Germany, Italy, Portugal, and the United Kingdom) and Norway. This report shows that there is some diversity in the approaches chosen by the Member States to implement the postal directive. This is in part due to the fact that this directive only establishes a framework leaving some freedom to the Member States as to the means of liberalizing their market. It is open to question whether this approach inspired by the idea of subsidiarity is adequate to the task of creating an EU-wide postal market.

Damien Geradin

November 2001

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Part I: Postal Services Liberalization and International Law

V Abuse of Market Power in Postal Services: Lessons from the Commission's Decisional Practice and Court of Justice

Jacques Derenne and Claire Stockford

I. INTRODUCTION

It is notable that as liberalisation has been beating a path through the vast majority of the former state industries, introducing the demands of free market competition and forcing the heavy state-owned monopolies to compete with upstart new entrants with fresh ideas and innovative business models, the postal sector has largely resisted this change. It is one of the last industries in the Member States of the European Union that is still fiercely protected by both national and European legislation, and dominated by public authority influence. The postal service industry is one that Member State governments fight tooth and nail to cushion from market influences, often citing the provision of universal service as the reason for this protective attitude. It is interesting to note therefore, that in the other network industries in which universal service is important, such as electricity and telecommunications, the effects of liberalisation have been largely positive and there has been no evidence that universal service, protected by limited regulation, has suffered in any way. Moreover, in these industries, the Community institutions have not shied away from pushing the Member States and their former monopolies into the competitive sphere through both regulatory action and the application of competition law, in the way that they seem to have in the postal sector, at least until recently, as described hereafter. Finally, there is one specific feature of the postal sector which should not be omitted: this sector now features a series of new services invented and developed by private industry which have been copied by the postal monopolies acting in the liberalised sector, supported by the use of monopoly resources, thereby raising the legal issue of undistorted competition, in particular with respect to cross-subsidies.

Until around the year 2000, there was no frenetic activity within the Community institutions in regard to the postal sector, although given the strong dominant position of many of the postal operators within the EC, it could be said that there was a clear platform for the application of Article 82 EC in order to prevent abuse of this dominance. However, some progress has been made and the following description of the practices of the European Commission and

the Court of Justice should illustrate the evolution that has taken and is taking place.

This chapter is intended to be primarily descriptive, although analytical comment will be included at various points. The past behaviour of the Commission will first be described, including references to the regulatory moves made by the Commission (Section II). The activity before the national courts and competition authorities of the Member States over a similar period will then be briefly (and non-exhaustively) mentioned (Section III), before the judgements emanating from the Court of Justice in this sector are considered (Section IV). Then, returning to the Commission, its most recent and effective practice in regard to postal services will be analysed (Section V) and some of the main competition legal issues in the postal sector will be described in light of the cases mentioned in the preceding sections (Section VI).

II. THE PAST BEHAVIOUR OF THE COMMISSION

A. The early years: an informal approach

The first signs of a move towards postal deregulation appeared in the mid-1980s. At this time, national authorities were highly protective of their postal monopolies and the sector was heavily regulated. In some Member States, competition was even excluded from the express carrier sector and the provision of other "value-added" services, the Member States endeavouring, by this exclusion, to protect their monopolies from these new services by prohibiting them.

The Commission took an unfavourable view of this extensive protection of the postal monopolies, and took informal action against a number of Member States, based on the former Articles 90(1) and 86 of the EC Treaty (now Articles 86(1) EC and 82 EC). Due to the co-operation provided by the national authorities concerned, this informal action successfully drew these anti-competitive practices to a close.¹ In fact, the effect was widespread, resulting in changes to restrictive postal laws and practices in Member States including Belgium, France, Germany and Italy (1985–86) and also Ireland (1986), Italy (1989), Denmark (1991).

The swift and effective action of the Commission's informal approach is amply illustrated by the case of France. In 1983, a number of Members of the European Parliament asked Parliamentary Questions concerning the restrictions imposed by certain Member States on inter-Member State mail services. This prompted the Commission to make enquiries regarding international mail services in the Member States.

In regard to France, the Commission was particularly concerned by (i) the

¹ Commission's Fifteenth Report on Competition Policy, para. 259, and Sixteenth Report on Competition Policy, para. 298.

geographical restriction imposed on express carriers (limited to operating within the Paris area), (ii) a monthly fee levied on private international mail businesses, which it feared could act as a subsidy to PTT, funded by its private competitors and (iii) the need for the express carriers to receive a prior authorisation from the PTTs in order to operate. The Commission forced France to accept the following conditions, contained in a letter of 18th December 1985, the contents of which were subsequently published in a press release in the EC Bulletin:²

- express carrier activity is no longer subject to a contractual authorisation given by the PTTs;
- the fee is abolished (and the express industry reimbursed);
- the express carriers are free to operate throughout France with the possibility to sub-contract their transport activity to another company in whole or part of the territory (the tracking of the items of correspondence is sufficiently fulfilled by an "airway bill");
- the "Société de messagerie internationale" (SFMI), set up by the PTT/La Poste in order to generate competitive express mail services, will be obliged to operate under the same conditions as its private competitors;
- the French authorities will not impose further regulation on the activities of express carriers.

Less than three years after the original Parliamentary Questions, the combination of the interest of the Commission in taking up the matter and the willingness of the national authorities to co-operate assured that an effective and timely result was achieved.³

This "soft" and informal approach was relatively successful in remedying the problems involved, but of limited scope. It did not produce the change in mood and swift liberalisation that occurred in the telecommunications sector following the Commission's seminal British Telecom decision in 1982,⁴ which condemned BT's abuse of its dominant position in the telex forwarding market. The telecommunications market is now almost unrecognisable from that prevailing in most Member States 20 years ago, with new market players, innovative cost structures and more consumer choice. Of course, some of this development can be attributed

² E.C. Bulletin n° 12-1985, p. 53.

³ A similar result had already been achieved in 1984 by way of an exchange of letters when the Commission heard that Germany was considering amending its postal law in a way that could be used to prohibit international mail services (E.C. Bulletin n° 1/1985), a position that was also mimicked by the Belgian authorities in 1985.

⁴ Commission Decision 82/861/EEC of 10 December 1982 relating to a proceeding under Article 86 of the EEC Treaty (Case IV/29.877 – British Telecommunications), 1982 OJ L 360/36, which was later confirmed by the European Court of Justice in Case 41/83, Italy v. Commission, [1985] E.C.R. 873.

to technological progress (although equally it could be argued that the drive to innovate could have been increased by market liberalisation), but nonetheless, the contrast with the postal sector is marked. Despite some technological development and improved competition on the fringes of the monopolies, postal services strongly resemble those of two decades ago.

B. Early decisional practice

1. *Express carrier activity*

In the 1990s, the Commission started to take a more formal approach against anti-competitive conduct in the postal services market. The first competition decisions in the postal sector were taken against the Netherlands⁵ and Spain.⁶ These decisions covered similar ground to the earlier informal Commission action outlined above. The Member States concerned had extended their postal monopolies from basic postal services (over which the public postal operator already held a dominant position as a result of a legal monopoly) to cover express delivery services, which had not previously been reserved to the monopoly. This extension was regarded as not being objectively justified in order to protect the provision of basic postal services, thereby infringing Article 86 (1) EC in conjunction with Article 82 EC.

The main issue now concerns the exact definition of the reserved area and of the concept of express mail services. This will be mentioned hereafter when reviewing briefly the regulatory situation with the EC Postal Directive.

2. *Remail: the IECC cases and their effects*

The question of the free provision of express carrier services now appears to be resolved. However, another issue that was initially raised with the Commission in the same period has not yet been satisfactorily settled. The issue is that of the terminal dues charged by the incumbent postal operators on incoming cross-border mail. Terminal dues are the sums that must be paid to the delivering postal operator by the collecting postal operator. They arise in instances of international mailings, where, for example, a mail item is posted in Member State A to an address in Member State B. Postage will be paid in Member State A, to the postal operator in that Member State, but part of the service will be

⁵ Commission Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services, 1990 OJ L 10/47 (later annulled on procedural grounds, see Joined Cases C-48/90 and C-66/90, Netherlands and PTT v Commission, [1992] E.C.R. I-565).

⁶ Commission Decision 90/456/ECC of 1 August 1990 concerning the provision in Spain of international express courier services, 1990 OJ L 233/19.

carried out by the postal operator in Member State B. Therefore, a payment (or terminal due, in postal parlance) is paid on each mail item handed over to Member State B. Terminal dues raise competition issues when private operators carrying out remail activities carry out the first part of the service (it should be noted that remail is therefore an activity relying upon cooperation between express carrier operators and post offices, the latter being all deeply involved in remail activities: remail brings all post offices into competition for international mailings).

Terminal dues (“TDs”) are currently regulated by agreements between post offices. Although the system has met with regulatory approval, many industry operators are still dissatisfied with the system, which in conjunction with the Universal Postal Convention (“UPC”)⁷ allows remail to be intercepted under certain circumstances. Reference is made here to Chapter III entitled “*Evolution of Terminal Dues and Remail Provisions in International Postal Law*” in which James I. Campbell Jr. gives a detailed explanation of remail and the terminal dues system.

Interceptions of remail and the terminal dues system, as it then operated, were the subject of a complaint to the Commission in 1988 by an organisation known as the *International Express Carriers Conference* (“IECC”), which brings together a number of private international express carriers. The complaint alleged that there was an anti-remail conspiracy between the post offices, acting to exclude private operators (remailers) from the market by means of the price-fixing of terminal dues and the use of interceptions carried out under Article 23 (now 43) of the Universal Postal Convention.⁸

Following this complaint lodged in 1988, in 1993, the Commission addressed to La Poste, Deutsche Bundespost Postdienst, Royal Mail, Régie belge des postes, Finnish Post, Sweden Post and Swiss PTT a Statement of Objections recognising substantial infringements of the EC competition rules.⁹ However, in 1995, seven years after the initial complaint was made, the Commission went on to reject the complaint on the basis that the anticipated draft REIMS agreement on terminal dues and promises regarding future behaviour given by the post offices concerned would resolve the problems at the source of the complaint.

⁷ The Universal Postal Convention is a text produced by the Universal Postal Union, a body representing the post offices of 189 nation states and operating under aegis of the United Nations.

⁸ As explained in the Chapter III of this volume, “*Evolution of Terminal Dues and Remail Provisions in International Postal Law*”, by James I. Campbell Jr., the numbering of the UPC has changed a number of times. In the earliest cases discussed, reference is made to Article 23 UPC. This became Article 25 UPC in 1994 and then Article 43 UPC in 1999. Throughout this chapter reference is made to the Article in force at the time of the case concerned.

⁹ Case IV/32.791 – Remail.

However, the planned REIMS agreement in fact failed, as its validity was conditional upon the accession of the Spanish Post Office, an event which never occurred. It has now been replaced by an agreement known as REIMS II, which has entered into force. However, the final version of this latter agreement is dated 1998, a full 10 years after the initial complaint made by the IECC.¹⁰ As shown by James I. Campbell Jr. in Chapter III, the absence of a prohibition decision from the Commission at that time allowed the former terminal dues system to continue unchanged, at least until January 1998, three years after the Commission's decision.¹¹

The Commission responded to the complaint in three steps: (i) a decision rejecting the part of the complaint concerning interceptions of ABA remail (essentially stating that this was not an abuse of dominant position since it was made with a view to protecting the national postal monopoly), (ii) a decision rejecting the part of the complaint concerning interceptions of ABC remail (essentially stating that the post offices promised not to continue their interceptions, that there was no new evidence of interceptions and that there was no Community interest to adopt a formal prohibition decision on this aspect) and (iii) a decision rejecting the part of the complaint concerning the price-fixing of terminal dues (essentially stating that there was no Community interest in adopting a formal prohibition decision on this aspect since the post offices concerned assured the Commission that they were working on the implementation of a new cost-oriented terminal dues system, the draft REIMS agreement).

The Commission Decision rejecting the IECC's complaint has been annulled by the Court of First Instance, insofar as it concerned commercial physical ABA remail, and this judgement was confirmed by the Court of Justice's rejection of an appeal made by Deutsche Post.¹² However, the Court of First Instance did not examine the substance of the rest of the Complaint, limiting itself to a finding that the other decisions of the Commission, refusing to adopt a prohibition decision, were lawful. Appeals against the Court of First Instance's judgements were ultimately unsuccessful.¹³ Therefore, the majority of the Commission's Decision rejecting the IECC's complaint (thereby refusing to confirm the

¹⁰ This agreement was finally exempted by the Commission under Article 81(3) of the EC Treaty: Commission Decision 1999/695/EC of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/36.748 – REIMS II), 1999 OJ L 275/17. Since the exemption was only valid until 31st December 2001, the agreement, slightly amended, was re-notified for further exemption, 2001 OJ C 195/11).

¹¹ See footnote 47 of Chapter III.

¹² Case T-133/95, IECC v. Commission, [1998] E.C.R. II-3645 and Case C-428/98 P, Deutsche Post v. Commission, [2000] E.C.R. I-3061.

¹³ Case C-449/98 P, IECC v. Commission, [2001] E.C.R. I-3875 and Case C-450/98 P, IECC v. Commission, [2001] E.C.R. I-3947. See Section IV below for a fuller description of these cases.

Statement of Objections in a prohibition decision) stands, yet the fact that there are pending complaints before the Commission based on similar matters suggests that the REIMS agreements may not have resolved as many of the IECC's competition concerns as the Commission seems to have expected it would. The decision which the Commission adopted in July 2001 against Deutsche Post following a complaint of the British Post Office¹⁴ seems to confirm that the Commission has more actively applied competition law in the postal sector after 2000, as is demonstrated by a comparison of the cases described in Sections II and V.

It is interesting to consider that remail could be viewed as the postal equivalent of telex forwarding, over which BT was condemned for impeding competition in 1982. As mentioned above, that case triggered a snowballing effect in telecoms liberalisation. The Commission could be considered to have missed an opportunity to use the IECC case to induce a similar effect in the postal sector.

3. *Cross-subsidies in the postal sector: the Commission's initial approach*

Another longstanding case in the postal sector was triggered by a complaint made by the *Syndicat français de l'Express international* ("SFEI", now known as the *Union française de l'express international*, "UFEX", an organisation bringing together nearly all of the international and national private express carriers operating in France). This case involved the French international mail sector. The complaint claimed that, despite the assurances of the French Government in 1985, private mail operators were still being disadvantaged on the French international mail market in comparison to SFMI-Chronopost. As long ago as 1990, the SFEI filed a complaint with the Commission alleging that the commercial and logistical assistance granted by La Poste, the French public postal operator benefiting from a legal monopoly, to its subsidiary, SFMI-Chronopost, constituted cross-subsidisation of SFMI-Chronopost's activities. The complaint considered therefore that, in breach of Article 82 EC, La Poste was abusing the dominant position it held as a result of its legally protected monopoly and that the French State, the owner of La Poste, was providing an illegal (non-notified) and incompatible (unlikely to be exempted under Article 87 EC) State aid to SFMI-Chronopost.

In 1992, the Commission divided the complaint into a State aid case and an abuse of dominance case, rejecting the SFEI's complaint on both grounds.¹⁵ A challenge was brought against the two decisions. In reference to the State aid Decision, the Commission indicated in a letter of 14th July 1992 addressed to the Court that it would withdraw the Decision, rendering it unnecessary for the

¹⁴ See Section VI and press release IP/01/1068 of the Commission.

¹⁵ Commission Decisions of 10 March 1992, not published.

Court to rule on the action for annulment.¹⁶ On 1st October 1997, the Commission rendered a new Decision,¹⁷ concluding that there was no State aid to SFMI-Chronopost. The Court of First Instance¹⁸ annulled the Commission's Decision finding that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost did not constitute a State aid, stating that the Commission had wrongly assessed the case by failing to compare the prices charged by La Poste to its subsidiary to those that would have been charged by a private undertaking operating outside the reserved sector.¹⁹ The Commission had merely ascertained that the costs of La Poste had been covered in the sums charged to its subsidiary and this analysis was considered inadequate by the Court of First Instance. This judgement is now under appeal to the European Court of Justice,²⁰ although the Commission itself declined to appeal the judgement of the Court of First Instance.

In regard to the part of the complaint based on an abuse of dominant position under Article 82 EC, a similar procedure unfurled. Initially, in March 1992, the Commission rejected the Complaint. Once again, the Commission withdrew its decision, on this occasion in August 1994. This withdrawal followed a challenge brought by UFEX after the annulment by the Court of Justice of an Order of the Court of First Instance which considered that an action lodged in 1992 by UFEX was inadmissible.²¹ A second rejection Decision was taken on 30th December 1994, based, again, not on an analysis of the substance of the case but on a view that the matters complained of had been resolved in a merger decision, involving several PTTs including La Poste and TNT, of 2nd December 1991, allegedly justifying that there was no Community interest in investigating the matter further. The Court of First Instance agreed with the Commission's view.²² However, the Court of Justice disagreed with the Court of First Instance and stated that the Commission should have ensured that the matters complained of no longer produced anti-competitive effects before concluding that there was no Community interest in investigating the complaint.²³ The Court of Justice annulled the judgement of the Court of First Instance and the case was then sent back to the latter, this lengthy procedure finally resulting in the annulment

¹⁶ Case C-222/92, SFEI v. Commission, Order of 18 November 1992, not published.

¹⁷ Decision 98/365/EC of 1st October 1997 concerning alleged State aid granted by France to SFMI-Chronopost, 1998 OJ L 164/37.

¹⁸ Case T-613/97, UFEX v. Commission, [2000] E.C.R. II-4055.

¹⁹ Paras 74 and 75 of the judgement.

²⁰ Case C-83/01 P, Chronopost, 2001 OJ C 150/9, Case C-93/01 P, French Republic, 2001 OJ C 150/11 and Case C-94/01 P, La Poste, 2001 OJ C 134/7, pending.

²¹ Case T-36/92, SFEI v. Commission, [1992] E.C.R. II-2479 and Case C-39/93P, SFEI v. Commission, [1994] E.C.R. I-2681.

²² Case T-77/95, SFEI v. Commission, [1997] E.C.R. II-1.

²³ Case C-119/97 P, UFEX v. Commission, [1999] E.C.R. I-1341.

of the Commission decision rejecting the complaint.²⁴ Section IV below contains a further discussion of the Court's role in this affair.

The Commission was condemned in this case not only for its flawed analysis, but also for its inertia. At paragraph 79 of his Opinion before the Court of Justice in the second appeal lodged by UFEX, Advocate-General Colomer stated that he found the Commission's passive approach to the case difficult to understand in relation to the importance of the market concerned and the evident Community dimension in the case.²⁵

The UFEX case now finds itself back at the Commission, almost a decade after the original complaint, still awaiting a decision on the substance. It is hoped that with the Commission's new proactive approach (see Section V, below), a swift and effective resolution can be achieved in this complex saga.

The SFEI/UFEX case is not the only complaint that has been made to the Commission alleging that La Poste has been involved in breaches of EC competition rules. The other cases mainly concern the State aid rules, as indeed did part of the UFEX case. The "Sytraval" case was initiated by a 1989 complaint made by the *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs* ("Sytraval") and Brink's France, alleging that Sécuripost, a subsidiary of La Poste, benefited from assistance provided by La Poste in terms of use of La Poste's staff, premises and fuel vouchers, and an advantageous loan granted by Sofipost, the financial arm of La Poste. The Commission originally issued and then withdrew a Decision on this State aid issue. In 1993, a new Decision was issued, which was annulled by the Court of First Instance.²⁶ However, this annulment was grounded in procedural matters; the Court decided that the Commission had failed to adequately state the reasons for its decision to reject the complaint and the Court of Justice agreed with this assessment, although it did criticise the judgment on certain points.²⁷ This judgement prompted the Commission to re-examine the issues complained of nine years earlier. The result of this was a decision confirming that the use of certain La Poste facilities, plus an allegedly advantageous loan to Sécuripost did not constitute State aid.²⁸

Furthermore, the *Fédération Française des Sociétés d'Assurances* (FFSA) made a complaint that accused La Poste of being on the receiving end of State aid, rather than providing it, as alleged in the two previously mentioned complaints. The FFSA claimed that certain tax exemptions conferred on La Poste constituted

²⁴ Case T-77/95 RV, UFEX v. Commission, [2000] E.C.R. II-2167.

²⁵ See the Opinion of Advocate-General Colomer in Case C-119/97 P, UFEX v. Commission, [1999] E.C.R. I-1341, para. 79. This question is developed in section IV D herein.

²⁶ Case T-95/94, *Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs and Brink's France v. Commission*, [1995] E.C.R. II-2651.

²⁷ C-367/95 P, *Commission v. Sytraval*, [1998] E.C.R. I-1719.

²⁸ Commission Decision 1999/676/EC of 20 July 1999 concerning presumed aid allegedly granted by France to Sécuripost, 1999 OJ L 274/37.

State aid. The Commission issued a decision in 1995²⁹ (five years after the original complaint) finding that there was no State aid. The Court of First Instance found to the contrary that the tax exemptions conferred on La Poste by the French State did constitute State aid as they “place[...] *La Poste* in a more favourable financial situation than other taxpayers” (paragraph 167 of the judgement), but that the Commission’s conclusion that the State measures could be justified under Article 86(2) EC, had no impact on its assessment of the aid and as a result the Decision should not be annulled.³⁰ The Court of First Instance notably ruled that “Community law requires that the State aid in question should not benefit the public operator’s competitive activities”.³¹ In the absence of separate accounts for reserved services and non-reserved services, the Court considered that the method of comparison used by the Commission (calculation of the amount of the aid and of the additional costs generated by the particular task assigned to La Poste) “was appropriate for making sure that the grant of State aid in question involved no cross-subsidy contrary to Community law”.³²

Although La Poste seems to have been one of the focal points of unwelcome regulatory attention throughout the 1990s, it was by no means the only incumbent postal operator subject to complaints of this kind. Deutsche Post was also the subject of a number of complaints, including one made by UPS, alleging that like La Poste, it had been cross-subsidising its parcel service and providing it with illegal State aid. This case has been the subject of a recent Commission Decision and will be discussed in Section V.

The long-running postal sagas described above obviously prompted more Commission action in the postal sector in the 1990s than in the previous decade. Despite this higher level of activity, it is debatable whether much more was achieved in this period than in the early years in which an informal approach was adopted. During the period from 1990 to 1999, the Commission was obviously not demonstrating the type of decisiveness that the postal sector needed in order to promote good practice and encourage fair competition. The undertakings that are trying to establish themselves in the non-reserved sector of the postal market are obliged to face not just the might of the incumbent, often supported financially or politically by the Member State government, but also the lack of political will of the Commission to fully apply competition law to the post offices, at least before the new trend described in Section V below. The Commission’s involvement is particularly important in this sector given the

²⁹ State aid NN 135/92, France, 1995 OJ C 262/1.

³⁰ Case T-106/95, FFSA v. Commission, [1997] E.C.R. II-229, the appeal brought against this judgement was dismissed by Order of the Court: Case C-174/97 P, FFSA v. Commission, [1998] E.C.R. I-1303.

³¹ Case T-106/95, supra note 30, para. 183.

³² Id., para. 189.

political influence of governments on national regulators and the continued lack of independence of certain national regulators.

4. Regulatory progress initiated by the European Commission

Whilst the Commission's application of competition law principles during this period before 2000 might diplomatically be described as cautious, more decisive moves were made on the regulatory front.

The Commission, with the support of those Member State governments in favour of swift liberalisation in the sector, pushed through a partial liberalisation of the postal sector, allowing the limited introduction of competition and paving the way for more radical future measures.

The Commission's regulatory progress in the postal sector started with the arrival of the 1992 Green Paper. This highlighted the need to prevent the differences between the divergent definitions of the reserved service used in the Member States from harming the internal market. The Commission also made several references to the IECC complaint showing how it considered the issues raised by that case to be important, whilst it paradoxically chose not to apply the same views later in order to ensure an effective application of competition law in that very case.

4.1. The failed 1994 draft Commission directive

Despite the reluctant attitude of the Member States, in order to implement the principles of the Postal Green Paper, the Commission prepared a draft Directive, based on the former Article 90(3) of the EC Treaty (now Article 86(3) EC). This draft Commission Directive, which would have followed the efficient example in the telecommunications sector of the so-called Terminals and Services Directives adopted in 1988 and 1990, was ultimately unsuccessful and never succeeded in making it onto the statute books. The Commission tried to echo the successful liberalisation measures used in the telecommunications sector in the postal sector, without the same level of success. This attempted legislative reform failed largely due to the lobbying power of the incumbent operators and the protective tendencies of Member States governments towards their own postal monopolies.

4.2. The 1997 postal directive

After the setback of the rejection of the 1994 draft Postal Commission Directive, the Commission directed its efforts into a new proposal, resulting in Directive 97/67/EC of the European Parliament and the Council on common rules for the development of the internal market of Community postal services and the improvement of quality of service.³³

Article 7 of the Directive defines the scope of the services which may fall

³³ 1998 OJ L 15/14.

within the reserved area "to the extent necessary to ensure the maintenance of universal service" and it also provides that these reserved services can be "accelerated delivery services", provided that they fall under the two limits of weight and price referred to in this provision (five times the public tariff and less than 350g). These two points call for the following comments.

Firstly, it is interesting to note that, whilst the Court effectively stated that the grant of exclusive rights has to be justified by the preservation of the "economic equilibrium of the service of general economic interest performed by the holder of the exclusive right",³⁴ and that any derogation to the rules of the EC Treaty under Article 86(2) EC should be restrictively construed and adequately justified by the Member States (or the undertakings) claiming the benefit of it, nonetheless a number of Member States have adopted the maximum thresholds permitted by the Directive, without offering any economic justification as to how this was necessary for the preservation of the services in the general economic interest. Regarding this departure from EC Treaty principles, it is surprising to note that the Commission in its Postal Notice (see subsection C below) states that "*The point of departure will be a presumption that, to the extent that they fall within the limits of the reserved area as defined in the Postal Directive, the special or exclusive rights will be prima facie justified under Article 90(2). That presumption can, however, be rebutted if the facts in a case show that a restriction does not fulfil the conditions of Article 90(2)*".³⁵

We consider that this position is both contrary to the text of the Postal Directive (which requires that postal services be reserved "to the extent necessary to ensure the maintenance of universal service") and to the long-standing case law of the Community courts which places the burden of proof of demonstrating that the conditions of the derogation provided by Article 86(2) EC are fulfilled, on the Member State and/or the company claiming the benefit thereof.³⁶

Secondly, it may also be questionable whether the Directive itself is in full compliance with EC competition rules. Indeed, the reserved sector thresholds

³⁴ Case C-320/91, Corbeau, [1993] E.C.R. I-2533.

³⁵ Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, 1998 OJ C 39/2, para.8.3.

³⁶ "It is for an operator who seeks to invoke the exception contained in Article 90(2) to justify the application of that exception" (Case C-393/92, Gemeente Almelo v. Energiebedrijf Ijsselmij [1994] E.C.R. I-1477, Opinion of Advocate-General Darmon, para. 169); See also Case 155/73, Giuseppe Sacchi, [1974] E.C.R. 409, para. 15; Case T-260/94, Air Inter S.A. v. Commission, [1997] E.C.R. II-1000, paras. 138-141; Case C-179/90, Mercati convenzionali porto di Genova v. Siderurgica Gabrielli [1991] E.C.R. I-5889, Opinion of Advocate-General Van Gerven, para. 28; Case C-157/94, Commission v. Netherlands, [1997] E.C.R. I-5768, paras. 51-52 and 58-64, Case C-158/94, Commission v. Italy, [1997] E.C.R. I-5793, paras. 54-60 and Case C-159/94, Commission v. France, [1997] E.C.R. I-5819, paras 94-95 and para. 101.

could be considered to conflict with the interpretation of the Treaty of the Court of Justice in its *Corbeau* judgement (see below), since Article 7 of the Directive excludes from the competitive sector all items of correspondence, “*whether by accelerated delivery or not*”, provided that they fall within the two limits mentioned above. This is not in compliance with the *Corbeau* case which stated that “ (...) *the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, such as collection from the senders’ address, greater speed or reliability of distribution or the possibility of changing the destination in the course of transit, in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right*” (point 19). It seems that this anomaly of the Directive was recognised by the Commission, which proposed to delete these terms “*whether by accelerated delivery or not*” and to insert an explicit definition of special services and of special services which cannot be reserved.³⁷ Despite the fact that MEPs should be well aware of the contents of EC case law, the European Parliament apparently did not understand this point since it rejected this amendment by deleting the proposed new article and by reinserting the terms “*whether by accelerated delivery or not*” into Article 7(1) of the Directive.³⁸ However, the Council of Ministers understood this point since, following the global compromise reached in December 2001, Article 7(1) no longer refers to this rather odd³⁹ concept (see the postscript to this article).

4.3. *The Commission postal notice*

Recital 41 of Directive 97/67/EC provides that the Directive does not affect the application of EC competition rules or those relating to the freedom to provide services. As described below, this Directive does not prevent the Commission from adopting decisions under competition rules, which it did only after 1999.

³⁷ See Article 1(1) of the amended proposal for a European Parliament and Council Directive amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, 2001 OJ C 180/291 E. In Recital 10 of the amended proposed text, the Commission explained that “Experience has shown the referring only to the price limit as a means of determining the added value of express services is no longer a practical proposition due to the development of added value express services below the price limit”.

³⁸ European Parliament Report A5-0361/2000, text of the EP amendments published in 2001 OJ C 232/287.

³⁹ Indeed, the word “accelerated” was never defined in EC postal law. It appeared to mean the reserved mail service of post offices which could benefit from some “priority” with the payment of a surcharge rather than the express mail service which offers obvious different characteristics.

The idea that the Directive is without prejudice to the application of competition rules is confirmed by the 1998 Notice on the application of EC competition law to the sector, referred to above, which states that “[t]he autonomous behaviour of the postal operators also remains subject to the competition rules in the Treaty”. The Commission itself acknowledged this in its *FAG* Decision, rendered in relation to a Directive containing an analogous recital, in which it stated: “Directive 96/67/EC [on access to the groundhandling markets at Community airports] is without prejudice to the application of the rules laid down in the Treaty, as is stated in the twenty-eighth recital of the Directive itself, which stipulates that the Directive ‘does not affect the application of the rules of the Treaty’ and that ‘the Commission will continue to ensure compliance with these rules by exercising, when necessary, all the powers granted to it by Article 90 of the Treaty’”.⁴⁰

The existence of that Directive did not hinder the Commission’s ability to issue a Decision (or a Directive under Article 86(3) EC) on competition grounds. This was recently confirmed by the Court of Justice, in the *Portuguese Airports* case, in which the Court confirmed the Commission’s freedom to take Decisions under Article 86(3) EC, where it sees fit to do so.⁴¹

4.4. Some issues concerning the implementation of the postal directive

Concerns have also been raised in relation to certain aspects of the Directive’s implementation. In particular it appears that certain Member States have been rather lax in implementing the provisions of the Directive relating to analytical accounting (Article 14) and the independence of regulators (Article 22). These gaps in implementation of the Directive have serious effects on the practical application of the central principles of the Directive to the postal sector.

The Directive provided a generously long deadline for the implementation of analytical accounting: Article 14(1) provides for a period of two years from the entry into force of the Directive. That deadline expired in February 2000. However, in 2001, it appears that the requirements of Article 14 have not been satisfied in a number of Member States (and in other cases the deadline was missed; in Belgium, for instance, experts to verify the analytical nature of La Poste’s accounts and the cost of the universal service were only appointed at the end of 2000). This is a problem because the lack of transparency makes regulation more difficult, both at national and Community level. For example, it is not easy to examine whether there is cross-subsidisation between services without full separation of the accounts for reserved and non-reserved services.

Article 22 obliges Member States to establish a “legally separate” and “operationally independent” postal regulator at national level. Certain Member States

⁴⁰ Commission Decision 1998/190/EC of 14 January 1998, *FAG – Flughafen Frankfurt/Main AG*, 1998 OJ L 72/30, para. 105.

⁴¹ Case C-163/99, *Portugal v. Commission*, [2001] E.C.R. I-2613, paras 19–20.

have still not complied with this provision. For example, in France, there is an ART (telecoms) but no "ARP" (postal). The only "regulator" is the relevant Ministry, which also has an interest in La Poste (the director of the division of the Ministry in charge of the postal regulation is also the *commissaire du gouvernement* within the Board of Directors of La Poste). A 1998 complaint against France before the Commission (lodged under Article 86(3) EC and thus under competition rules and not relying upon the subsequent Postal Directive) was finally decided in October 2001 (see postscript of this article). It may be no coincidence that postal sector problems that arise in France have proved particularly difficult to resolve.

A similarly unsatisfactory situation exists in Belgium. The regulator, the IBPT, exists, but it is not fully independent as it is still dependant to a certain extent on the relevant Minister, and the Belgian State is still the sole "shareholder" of La Poste. There is scope for obvious conflicts of interest in these situations and a fully independent regulator should be established as soon as possible in order to ensure an effective application of competition law and sector specific regulatory principles to the postal industry.

The Commission has acknowledged that this situation is unacceptable. On 30th July 2001, the Commission issued a press release⁴² announcing that it had sent a reasoned opinion under Article 226 EC to Belgium, formally requesting it to amend its implementation of the Postal Directive, in particular, to correct its failure to ensure the independence of the regulator. In its press release, the Commission underlined the importance of "*regulatory independence as a fundamental instrument to ensure the proper functioning of the universal postal service and ensure undistorted competition in the liberalised area*" (a new legal framework will be submitted to the Belgian Parliament in order to remedy this issue). As confirmed by the press release, the Commission is also currently examining the issue of regulatory independence not only in France, as mentioned above, but also in Greece, Italy and Spain.

Regulatory changes are starting to take hold in the sector and are bringing about some improvements. Further progress was attempted by the Commission's proposal for amendments to Directive 97/67/EC, designed to increase the level of competition on the postal market. The most significant change in the proposal was a suggestion to reduce the reserved limit from 350g to 50g by 2003. Despite the apparent magnitude of this move, due to postage patterns it would only have led to an increase of about 16% in the part of the market open to competition and the post offices would have kept a monopoly over the vast majority of the letter mail market. Nonetheless, this would have been a welcome move towards liberalisation of the sector. However, both the European

⁴² "Postal services: Commission pursues infringement proceedings against Belgium", IP/01/139.

Parliament and the Council opposed the changes, with the Parliament's suggestion of a more limited reduction of the reserved sector, to 150g rather than 50g, supported by a number of Member States in the Council, including some of those traditionally in favour of swift liberalisation, such as the UK. Most of the opponents of liberalisation adopt their conservative stance on the basis of their support for the maintenance of the universal service. However, the experience of countries such as Sweden has shown that even when complete liberalisation takes place, universal service can still be maintained. In fact, in the Swedish case, a full eight years after liberalisation of the postal sector, and despite the licensing of 45 operators, the previous postal monopoly still handles 95% of all letter mail and universal service obligations imposed as licence conditions to ensure that the universality of the service is not threatened.⁴³

It is hoped that the European Parliament and the Member States can be persuaded to see the benefits of the new proposals. As mentioned above, the proposed new definition of the reserved service is more in line with the case law of the Court (in particular, the judgement in *Corbeau*, as discussed herein), since, under the proposal, the words "*whether by accelerated delivery or not*" would be removed from Article 7(1) of the Directive. In combination with the new proposed Article 20(2), which provides a definition of express mail and explicitly states that, subject to certain conditions, it is a special service, this should provide useful clarification and legal certainty for mail operators. As also mentioned above, the European Parliament and some Member States continue to oppose these amendments (see, on this issue the postscript of this article).

C. Conclusion on the Commission's past activities

In the 1980s and 1990s, whilst competition in the telecommunications sector gained ground through a combination of technological development and sector specific regulation, combined with the application of competition law principles, the Commission bringing infringement actions against Member States reluctant to open their telecommunications markets, the postal sector changed little. Some regulatory progress was made, but due to the perceived "sanctity" of the universal service and the reluctance of certain Member State governments to open their postal markets, little changed in practice.

The fact that in practice (before 2000) the Commission has not appeared to apply the Directive "without prejudice" to the competition law provisions of the Treaty, has led to uncertainty in the sector. The scanty application of Articles 81 and 82 EC to the postal sector in formal decisions has led to confusion and legal uncertainty. For example, in relation to activities such as remail, which appear to be in the interest of consumers and the common market and which

⁴³ Report of Post and Telestyrelsen "The Liberalised Swedish Postal Market and the Situation Eight Years after Liberalisation", May 2001, available in at: <<http://www.pts.se>>).

promote an internal market in cross-border postal services, the Commission declined, until recently, to condemn delays to and interception of such mail by the post offices of the Member States under the UPC. Additionally, the Commission is still receiving complaints about the same problems in the postal sector as it did a decade ago, as is evidenced by the complaint made, *inter alia*, by the British Post Office (now rebranded as "Consignia"), discussed below.⁴⁴ In this case, the Commission did not hesitate to adopt its recent prohibition decision following a complaint, as described below in Section V. There may not have been a need for these ongoing investigations if the Commission had acted more decisively in response to earlier postal complaints, such as the 1988 IECC complaint concerning the same type of behaviour of the post offices. The lack of clear decisional action leaves mail operators or would-be entrants into the postal market frustrated, and confused about the market available to them. This is just as capable of deterring those wishing to carry out postal activities as if a full legal monopoly over the whole sector still existed.

However, there are indications that there may be more cause for optimism in the new millennium. As well as moving towards further regulatory liberalisation of the market, the Commission appears to be taking a more proactive approach towards the policing of the sector. This is explored further in Section V, below. However, only time will tell whether this is a sustained change in attitude or a mere blip of activity in an otherwise fairly stagnant arena.

III. THE (IN)ACTIVITY OF NATIONAL COURTS, NATIONAL COMPETITION AUTHORITIES AND NATIONAL POSTAL REGULATORS

It is important to remember that the European Commission is not the only regulator capable of ensuring an even playing field between the former public postal operators and the new entrants and alternative operators active in the postal services market. Institutions in the Member States also have the capability to apply national and European competition law principles to the postal sector. In fact, as these institutions are closer to the national market, they are well placed to observe the market and ensure that operators are acting fairly, and outside the legal monopoly, in the areas where competition is permitted, to ensure that alternative operators are encouraged to challenge the incumbent. By examining the activities of the Member State courts, national competition authorities and national postal regulators it is possible to see whether the Member States have seized the opportunity available to them. The results are

⁴⁴ "Commission opens formal proceedings against Deutsche Post for disturbing international mail traffic", IP/00/562 announcing the Statement of Objections issued against Deutsche Post following a complaint made by the British Post Office and supported by five subsequent complaints. See *infra*, Section V.A which discusses the decision taken by the Commission in July 2001 (Commission press release IP/01/1068).

decidedly mixed, as the description below illustrates, although it does not claim to be an extensive examination of national practices; certain cases and Member States have been excluded in order to avoid too lengthy a discussion.

A. National courts

Some of the disputes between the former incumbent post offices and their competitors have been brought before national judges, but with relatively limited success so far. Indeed, actions before national courts meet numerous obstacles, including the difficulty of producing evidence of abuses, the technical nature of the issues involved that national judges are not (yet) used to dealing with, and the conflicts of jurisdiction between national courts, competition authorities and the European Commission.

A few cases are well known as a result of coming before the European Court of Justice by means of a reference by the national court for a preliminary ruling on a matter of EC law involved in the case – a procedure invariably resulting in further delay and costs for the parties.

An important national case is obviously the *Corbeau* case before the Court of First Instance of Liège, in Belgium, which came before the Court of Justice for a preliminary ruling. This case was brought before the Court in the course of criminal proceedings for an alleged infringement of the postal monopoly. A fuller account of the facts can be found at section 4.B, herein.

More recently, a German Court was requested to rule on a dispute between the German Post Office and two companies alleged to be the real senders of mail posted from abroad (ABA remail). The German Post Office's action was an attempt to recover the full internal postage rate from these companies.⁴⁵

Even more recently, TNT brought an action before an Italian Court against the Italian Post Office and three of its employees. Following an inspection by the Post Office, heavy fines had been imposed on TNT for not having paid to the Post Office a tax equivalent of the postage rate for each of the items that it carried itself.⁴⁶ In each case, the national court referred questions to the Court of Justice for a preliminary ruling.

An Italian administrative court, the Tribunale Amministrativo Regionale per la Lombardia also referred interesting questions to the Court of Justice for preliminary ruling in a dispute between the Italian Post Office and the Agenzia R di Recapito. The Italian Court wished to know whether express services could be reserved, and the link between value-added services and the price limit of reserved services. It also asked the Court of Justice how exclusive concessions for the provision of postal services should be awarded by public authorities.

⁴⁵ See Joined Cases C-147/97 and C-148/97, *Deutsche Post AG v. GZS Gesellschaft für Zahlungssysteme mbH Citicorp Kartenservice GmbH*, [2000] E.C.R. I-825.

⁴⁶ Case C-340/99, *TNT Traco SpA v. Poste Italiane*, [2001] E.C.R. I-4109.

Unfortunately, this case was removed from the register of the Court of Justice before a ruling on these issues could be given.⁴⁷

Obviously, not all cases are referred to the Court of Justice, even if they necessitate the application of EC competition rules. Hence, in spite of the result in the *Corbeau* case, the Belgian Post office tried to prohibit the entry of various competitors such as Delta Express, BAP or Hays DX onto the markets for certain value-added services. The Belgian Post Office brought proceedings before the Commercial Court of Brussels, in order to request an injunction against its competitors forcing them to stop their activities, and to claim damages for the losses allegedly caused by the supposed infringements of the postal monopoly. The Commercial Court, in a judgement of 22nd May 1995 (not published), relying on the reasoning developed by the Court of Justice in the *Corbeau* judgement, dismissed the Post Office's action. The Court considered that the services provided by Delta Express, BAP and Hays (DX service) in Belgium met the criteria laid down in the *Corbeau* judgement and thus did not violate the Belgian postal monopoly. Indeed, the Court accepted that the services provided by the private companies sued by La Poste incorporated value-added elements such as the more expeditious treatment of items, and that these activities were not likely to endanger the financial equilibrium of La Poste.

The clarification brought by cases such as the *Corbeau* and the *Delta Express* cases should not be permitted to obscure the obstacles met by actions before national courts against postal operators believed to be abusing their market power. It is significant that the two actions mentioned above were brought by the Post Office against new entrants, and not the contrary.

The SFEI/UFEX case before French national courts is a very good illustration of the obstacles that may be encountered. In parallel to the complaints to the European Commission and to the actions against the Commission's Decision to reject the complaint, mentioned herein, the SFEI and some of its members brought an action before the Commercial Court of Paris, in order to obtain damages and an injunction against the French Post Office to prevent cross-subsidies to Chronopost, its express service. The action was based on French law on unfair competition and Articles 86, 92 and 93 of the EC Treaty (now Articles 82, 87 and 88 EC). Although the action was lodged in June 1993, a final ruling has not yet been rendered. Firstly, the Commercial Court referred the case to the Court of Justice for a preliminary ruling concerning the notion of State aid.⁴⁸ Secondly, the French authorities, intervening in the civil case, challenged the competence of the Commercial Court to rule on the dispute, on the grounds that the dispute related to the organisation of a public service, and

⁴⁷ Case C-336/98, *Agenzia R di Recapito Srl v. Poste Italiane*, 1998 OJ C 340/8, and subsequent notice of its removal from the register: 1999 OJ C 352/29.

⁴⁸ See Case C-39/94, *Syndicat français de l'Express international (SFEI) v. La Poste* [1996] E.C.R. I-3577. See section IV F herein for a further examination of this case.

therefore fell within the competence of the administrative courts. The issue was referred to a specific court, the *Tribunal des conflits*, which considered, in a judgement of 19th January 1998, that the Commercial Court was competent, except in so far as an assessment of the legality of administrative acts would be required; such issues should if necessary be referred to administrative courts for preliminary ruling.⁴⁹ Thirdly, the Commercial Court decided then to stay the proceedings to wait for a decision from the Commission on the State aid aspect of the case. Fourthly, following the decision of the Commission of 1st October 1997 considering that the French Post Office had not granted State aid to Chronopost, the Commercial Court rejected the applicant's action in that respect; at the time of writing this decision was under appeal before the Paris Court of Appeal. In respect to the Article 86 (now Article 82) issues, the Commercial Court decided to stay the proceedings, first for a few months in the hope that the Competition Council, which is also dealing with the case under French competition law, would render a decision (having been asked to consider the issue in 1990), and then until the European Commission has taken a new decision on the 1990 complaint.

Conflicts of competence between national courts or authorities may thus constitute serious barriers to actions before national courts against abuses of market power by post offices, in a field where precedents are scarce because of recent legislative changes and the relative novelty of liberalisation. The applicants, who chose to act before French administrative court in order to challenge State aid allegedly granted by La Poste found their action dismissed as inadmissible, precisely because the civil courts were held to be competent to deal with the disputes. This was also the fate of Sytraval's action for damages against La Poste before French national courts. The *Conseil d'Etat* (the highest French administrative court) rejected the action as inadmissible by a judgement of 29 July 1998, on the grounds that disputes between La Poste and third parties normally fall within the competence of the civil courts.⁵⁰ In a separate case, the *Conseil d'Etat* rejected an action brought by La Poste against a judgement of a lower administrative court, which had annulled a decision by La Poste to address an injunction to a company which was delivering mail within a 24 hour time-limit in the Region of Rouen. The *commissaire du gouvernement* of the *Conseil d'Etat* considered that the criteria of definition of additional services of the *Corbeau* case law were fulfilled, and that La Poste's action should be rejected on the substance. Moreover, the *Conseil d'Etat* considered that since an Act of 1990, La Poste services had not been competent to address injunctions to persons or companies infringing its monopoly; since 1990 this competence has rested with the Minister competent for postal services. Therefore, La Poste, instead of

⁴⁹ *Revue Française de Droit Administratif*, 1999, p. 189 and 1998 p. 329, including the opinion of the *commissaire du gouvernement*.

⁵⁰ *Conseil d'Etat*, 29 July 1998, req. 156019, not reported.

addressing an injunction to its competitor, should have brought an action before the civil or criminal courts. Consequently, La Poste's action was dismissed.⁵¹

B. National competition authorities

Likewise, notwithstanding the current trend towards the so-called "modernisation" of EC competition law,⁵² in general, national competition authorities do not appear to be a very efficient forum for the supervision of post offices behaviour on the market and the settlement of disputes between new entrants and the incumbent operators.

However, some national competition authorities have been quite active. Since the entry into force of the Swedish Competition Act in 1993 which fully liberalised that country's postal services, the Swedish Competition Authority has had to deal with more than a hundred cases involving the Swedish Post Office, which in spite of liberalisation still controls more than 95% of certain markets. Those cases originated either in complaints by third parties, or in applications for negative clearance introduced by the Swedish Post Office.⁵³

The Italian competition authority has also taken a number of decisions relating to the postal sector. Many of these decisions were adopted in the context of the notification of merger transactions. On 17th December 1998, the Italian competition authority took a decision finding that the Italian Post Office had abused its dominant position by delivering items for its own hybrid mail service (*Postel*) at more advantageous prices than those applied to its competitor on the market for hybrid mail. A procedure is also pending with respect to a complaint by IMX International Mail Express, an express mail company, relating to interception of alleged remail by the Italian Post Office.⁵⁴

However, not all national competition authorities have actively intervened in the postal sector. It may be noted for instance that the French Competition Council has only issued a single opinion concerning the activities of the French Post Office, and this related to the market for financial services.⁵⁵ This is obviously not due to an absence of disputes relating to alleged abuses of market power by dominant postal operators on the market for mail services. Indeed,

⁵¹ Conseil d'Etat, 15 March 1999, req. 170414, opinion of M. Hubert.

⁵² Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty – COM(2000) 582, 2000 OJ C 365/284.

⁵³ Post & Teleskytrelsen (the Swedish National Post and Telecom Agency), "The liberalised Swedish Postal Market and the situation eight years after the abolition of the monopoly", May 2001.

⁵⁴ Autorità garante della concorrenza e del mercato, Bollettino settimanale, n. 14 del 23 aprile 2001, p. 5.

⁵⁵ Opinion n° 96-A-10 of 25 June 1996 relatif à une demande d'avis de l'Association française des banques concernant le fonctionnement des services financiers de La Poste au regard du droit de la concurrence, BOCCRF, Report of the Competition Council for 1996.

two complaints lodged against La Poste with the Competition Council in December 1990 and in 1996 still await decisions on the substance of the case.

C. National postal regulators

Dedicated postal regulators are to be welcomed. They should be able to provide effective monitoring of the market and develop sector-specific expertise in order to improve the application of legal principles to the postal market. However, the advantages that should flow from the creation of dedicated national postal regulators in the Member States may be lost, unless certain precautions are taken in the establishment of these bodies.

Firstly, it must be ensured that if the postal regulator is combined with the telecommunications regulatory body, as is the case in a number of Member States, the postal sector is not neglected, in favour of the more newsworthy telecommunications sector. It is possible that the postal sector will be sidelined, leaving the regulator to make more visible progress in relation to the telecommunications industry. A visit to some of the websites of these joint regulators illustrates this point. Often homepages and headlines will trumpet recent developments in the telecommunications sector, without mentioning the postal sector, which will often be confined to a small part of the site that visitors must actively seek out.

In principle, joint regulation is not a bad idea, particularly given the increased convergence between certain electronic mail and conventional mail services (for example, "non-physical" remail and so-called hybrid mail⁵⁶). However, Member States must ensure that the telecommunications sector is not prioritised at the expense of postal matters. Although a legal monopoly still exists to some extent in most Member States, there is a great deal for postal regulators to oversee outside the boundaries of the reserved services, and even within the scope of those reserved services, in order to ensure that they are being run in conformity with principles of both national and Community law.

Secondly, it must be ensured that national postal regulators are not just legally independent from the State and the incumbent, but are also independent in fact. When sector-specific regulators were established for the telecommunications industry, many of the initial personnel of the regulator were formerly employed by or associated with the incumbent operator. Although the integrity of these personnel is not in question, it is possible that these people bring a certain mindset with them. This may lead to a conservative approach to regulation, on the basis that these people believe that a particular system has worked well in the past and consequently do not see the need to change it. It is acknowledged that most of the pool of postal knowledge in any Member State will be held by

⁵⁶ For an explanation of the latter, see the Poste Italiane Commission Decision described herein.

the employees of the incumbent, as in the early stage of liberalisation of any industry, and the regulator must use some of this knowledge of the industry. However, the incumbent mindset must not be allowed to dominate the regulator, and it must be ensured that a balance is achieved between including the knowledge required for effective regulation of the sector, and keeping a certain distance between the regulator and the regulated.

Progress cannot be made unless independent and effective regulation is assured. Countries such as France and Belgium, in which there are still question marks over the independence of regulators (see above Section II B.4.4) do not provide the industry the confidence necessary for competition to thrive. There must be a clear dividing line between the postal regulator, on the one hand, and the state and the incumbent, on the other hand. In a number of Member States, the dividing line is not clear and in certain Member States, it has never been drawn.

By contrast, the Swedish National Post and Telecoms Agency, Post & Telestyrelsen, is to be commended. Rather than trying to restrain the Commission's push to liberalise the postal sector, like a number of Member States, Sweden apparently took the view that competition in postal services is something to be embraced rather than shied away from. It took the bold step of liberalising its postal sector in 1993, without waiting for the European Commission to find consensus between the Member State governments. Since legal liberalisation, the regulator has been active in ensuring that postal competition is encouraged. Whilst the incumbent operator, Posten AB, still handles the vast majority of letter mail, there are now 45 authorised postal operators.⁵⁷ Many of these alternative operators conduct their business in either niche or local markets. Therefore, whilst the letter mail dominance of Posten AB has not been seriously challenged, this is perhaps more attributable to the natural barriers to entry in the market, rather than to any regulatory laxity. Moreover, despite the geography of the country, Sweden has achieved admirable rates of delivery efficiency.⁵⁸ Universal service, the usual reason cited for opposing liberalisation, has been assured without the need to create a special compensation fund. The Swedish authorities have found that the Universal Service Obligation brings a number of benefits, and although a universal service compensation mechanism has been considered on several occasions, the Swedish Government has decided that it is not required. The provision of universal service, often seen as a burden, may actually bring considerable economic benefits to the undertaking obliged to provide it.⁵⁹

⁵⁷ Report of Post & Telestyrelsen "The Liberalised Swedish postal Market and the situation eight years after liberalisation", supra note 52.

⁵⁸ Delivery of 95% of all items deposited for overnight delivery on the next working day, *ibid.*

⁵⁹ Report of Post & Telestyrelsen, supra note 52 at 5. For a further examination of these issues see Chapter IV by Professor Visco-Comandini.

IV. THE PRACTICE OF THE EUROPEAN COURT OF JUSTICE

A handful of postal matters have come before the Court of First Instance and the Court of Justice, either by way of judicial review proceeding against the Commission or a Member State, or by way of a preliminary reference from one of the Member State courts.

A. The Dutch PTT case

It is unfortunate that the early decision of the Court in *Netherlands and PTT v. Commission*⁶⁰ resulted in a setback for both alternative postal operators and the Commission itself.

The Commission had issued a decision against the Netherlands, condemning it for its new postal law, which reserved mail items weighing up to 500g to PTT-Nederland NV (and its subsidiary PTT-Post BV), unless certain conditions were met regarding the service offered and the applicable tariffs. The Commission considered that the new law extended the dominant position of PTT-Post BV. The effect of the Commission's action was somewhat marred by the fact that the Court of Justice annulled the Decision, albeit on procedural grounds.

B. The Corbeau case

The Court next had an opportunity to examine the application of competition law principles to postal matters in the interesting case of *Corbeau*.⁶¹ This case arrived at the European Court by way of a preliminary reference from a Belgian court hearing criminal proceedings against an individual accused of illegally infringing the postal monopoly. Mr Corbeau operated a business involved in the collection and delivery of mail around the town of Liege, which was claimed to infringe the exclusive rights of the "Régie des Postes" in respect to the collection, carriage and distribution of mail. The Court ruled that it is not contrary to Article 90 of the Treaty (now Article 86 EC) for a Member State to establish a legal monopoly to collect, carry and distribute mail and to protect that monopoly with criminal sanctions. However, it is contrary to Article 90 to penalise the supply of services dissociable from the services operated in the general economic interest and which do not threaten the stability of the latter. As the case arrived at the Court by way of a preliminary reference, these statements of principle were sent back to the national referring court for application to the facts of the case.

⁶⁰ Joined cases C-48/90 and C-66/90, *Netherlands, Koninklijke PTT Nederland NV & PTT Post BV v. Commission* [1992] E.C.R. I-565.

⁶¹ Case C-320/91, *Corbeau*, [1993] E.C.R. I-2533.

C. The GZS and Citicorp cases

Another two postal preliminary references came to the Court in the form of the *GZS* and *Citicorp* cases (subsequently joined by the Court of Justice⁶²), relating to matters pending before German courts. The *Citibank* case concerned so-called “non-physical” remail. The account details of customers of a number of credit card companies were forwarded electronically to a central data processing facility, situated in the Netherlands. Statements were prepared at this site and subsequently dispatched to customers in various locations, including Germany. Deutsche Post objected to this activity as the Dutch Post Office was only paying it terminal dues (equal to a percentage of the internal tariff). Deutsche Post therefore demanded the full (and substantially higher) internal postal tariff that it claimed was its right under Article 25(4) UPC.⁶³ A substantially similar activity was carried out by the Danish partner of GZS, and again Deutsche Post claimed the full internal tariff on the electronically generated postal items from the Danish Post Office. Although these items were not physically transported out of Germany, they fell within the UPC remail rules, as Article 25 covers correspondence “made up” in another country.

In a disappointing judgement, the Court ruled against Deutsche Post’s position, but only insofar as it had not deducted the terminal dues already paid by the Post Office of origin from the full domestic tariff which it was claiming on these mail items. It is not only the answer to the preliminary reference question itself that is disappointing, but also the reasoning of the Court. At paragraph 50 of the judgement, the Court stated: *“If a body such as Deutsche Post were obliged to forward and deliver to addressees resident in Germany mail posted in large quantities by senders resident in Germany using postal services of other Member States, without any provision allowing it to be financially compensated for all the costs occasioned by that obligation, the performance, in economically balanced conditions, of that task of general interest would be jeopardised”*.

The Court did not support this statement by reference to any of the evidence. Its judgement in this case in fact formed a preliminary ruling, meaning that whilst the Court is not required to rule on the substance of the case before it, it could have required the national forum to conduct its own economic analysis; it did not. This is regrettable. The statement cited in the previous paragraph may withstand economic analysis, but until such an analysis is carried out this unevidenced statement lays behind a judgement which prevents companies from taking advantage of the savings that could result from the use of modern technology and the centralisation of some of their services. GZS and Citicorp were trying to take a pan-European approach to their businesses, making savings from the economies

⁶² Joined cases C-147/97 and C-148/97, *Deutsche Post v. GZS and Citicorp*, [2000] E.C.R. I-825.

⁶³ Previously numbered as Article 23(4) and now Article 43(4). See *Supra* note 8 for details.

of scale that should result from the European Union's internal market. Such savings may have helped to increase efficiency in their businesses and may also have been passed onto consumers. As a result of this judgement, undertakings taking such a broad-minded approach to their commercial operations may take a pace backwards and start thinking once more along national dividing lines.

* * *

In section II, above, the apparent reluctance of the Commission to take prompt and decisive action was examined. It is hardly surprising therefore that the question of the Commission's obligation to investigate complaints made in relation to the postal sector has reached the Court on more than one occasion, as a result of mail operators being driven to pursue a judicial remedy for their grievances, having failed to achieve an administrative one from the Commission.

E. The IECC cases

In fact, the two long-running postal sagas discussed in section II, the UFX and IECC cases, eventually ended up at the Court, with mixed results. The IECC case was finally fully resolved by an Order of 11th May 2000 and the judgements of 17th May 2001, the latter delivered 13 years after the initial complaint was lodged at the Commission. The Order⁶⁴ brought to a close Case C-428/98P by the rejection of an appeal brought by Deutsche Post against a judgement of the Court of First Instance.⁶⁵ Deutsche Post unsuccessfully tried to claim that the Court of First Instance's annulment of the Commission's Decision, insofar as it concerned commercial physical ABA remail, was erroneous. The two judgements of May 2001,⁶⁶ resulting from appeals brought against the verdict of the Court of First Instance concerning interception of ABC remail and the issue of terminal dues,⁶⁷ were unsuccessful and upheld the Commission's right to reject the remainder of the IECC's complaint without examining the substance thereof. The reasoning of the Court depended largely on the Community interest doctrine, and confirmed the Commission's right to refuse to continue an investigation even at a very late stage, when the vast majority of resources required to form a Commission decision had already been expended. This result was obviously a great disappointment to alternative postal service operators in Europe, particularly after a chink in the armour of the normally infallible Community interest doctrine appeared in the judgement issued by the

⁶⁴ Case C-428/98 P, *Deutsche Post v. IECC*, [2000] E.C.R. I-3061.

⁶⁵ Joined cases T-133/95 and T-204/95, *IECC v Commission*, [1998] E.C.R. II-3645.

⁶⁶ Case C-449/98 P, *IECC v. Commission*, [2001] E.C.R. I-3875, at para. 10, and Case C-450/98 P, *IECC v. Commission*, [2001] E.C.R. I-3947, at para. 10.

⁶⁷ Case T-110/95, *IECC v. Commission*, [1998] E.C.R. II-3605 and Joined cases T-133/95 and T-204/95, *IECC v. Commission*, [1998] E.C.R. II-3645.

Court of Justice in the UFEX case.⁶⁸ In this context, the following statement of the Court in the IECC terminal dues case may be considered somewhat puzzling.

The Court referred to the single criterion chosen to examine the Community interest of the complaint i.e., that “*the Commission may decide that it is not appropriate to investigate a complaint alleging practices contrary to Article 85(1) of the Treaty where the facts under examination give it proper cause to assume that the conduct of the undertakings concerned will be amended in a manner conducive to the general interest*” (paragraph 48). In this context, it ruled that “*the chosen criterion required that the facts under examination allowed the Commission to found a legitimate belief that the conduct of the undertakings concerned would be amended. It was not therefore necessary for the amendment of that conduct to be fully completed by the time of the contested decision*” (paragraph 51, emphasis added). It thus appears that mere “beliefs” are sufficient for the Commission to drop cases for which it recognised in a detailed Statement of Objections the seriousness of the alleged infringements.

Nonetheless, some *dicta* of the Court demonstrated that the Court recognised the economic value of remail, thereby dismissing the idea that remail is solely an arbitrage activity.

In its judgement in Case C-450/98P the Court stated, “*Remail allows large-scale senders of cross border mail to select the national postal administration or administrations which offer the best service at the best price for the distribution of cross border mail. It follows that, by using private operators, remail causes the public postal operators to compete for the distribution of international mail*” (paragraph 3). The Court went on to say that “*By its complaint of 13 July 1988, the IECC essentially sought to have the Commission adopt a decision prohibiting the actions of the public postal operators, which would have allowed the latter, and in reality would have required them, to eliminate the cost advantages that remailing derives from the fact that the terminal dues overcompensate or under compensate the postal administrations for the actual costs of distributing cross border mail but which, at the same time, would have prohibited the public postal operators from restricting or distorting the competition created by remailing, which offers other advantages in terms of costs or services*” (paragraph 10).

These *dicta* indicate that remail can play a useful role in globalising national postal services. In general, post offices are not obliged to compete on tariffs as they hold a legal monopoly to supply a number of reserved services on their territory. It is a well-known fact that there are vast imbalances between the standard postal tariffs of the Member States. For example, according to a 1998 study carried out for the Commission, in September 1998, the standard domestic tariff ranged from a mere 0.210 ECU in Spain and 0.243 ECU in Portugal to

⁶⁸ Case C-119/97 P, UFEX v. Commission, [1999] E.C.R. I-1341.

0.560 ECU in Germany and 0.542 in Sweden.⁶⁹ Remail uses these differences by using additional services to the advantage of consumers, which should force postal operators to offer competitive tariffs. However, these effects are undermined when remail is intercepted or delayed by postal operators who do not want to be forced to make their tariffs compete with those of other postal operators. Therefore, the usefulness of remail is undermined by the rights granted to public postal operators under the UPC. This is a clear case of using dominance (legal monopoly being an extreme form of legally protected dominance) to prevent cross-border price competition. In almost any other industry, one would imagine that such protectionism would be heavily condemned by the Commission.

F. The UFEX case concerning the complaint of an abuse of dominant position

The competition aspect of the *UFEX* case preceded the judgement of the Court of Justice in the *IECC* cases by more than a year. Although in the same sector and also based on Community interest reasoning, this appeal was accepted by the Court of Justice and the case was sent back to the Court of First Instance, following a significant judgement by the highest EC court.

In addition to reiterating the obligation of the Commission to state reasons for its decisions, the Court also imposed some restrictions on the Commission's application of the Community interest doctrine, which should oblige it to make its rejection of complaints more logical and consistent. The Court stated that "[...] *when deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty. In this context, the Commission is required to assess in each case how serious the alleged interferences with competition are and how persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community. If anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and 86 of the Treaty to act with a view to eliminating or neutralising them (see, to that effect, Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraphs 24 and 25). In deciding to discontinue consideration of a complaint against those practices on the ground of lack of Community interest, the Commission therefore cannot rely solely on the fact that*

⁶⁹ "Study on the impacts of liberalisation in the postal sector: Liberalisation of incoming and outgoing intra-Community cross-border mail", December 1998 (PricewaterhouseCoopers); Table 2.11, available on the website of DG Internal Market at:

<http://www.europa.eu.int/comm/internal_market/en/postal/evolframe/studies/pwc2.pdf>.

practices alleged to be contrary to the Treaty have ceased, without having ascertained that anti-competitive effects no longer continue and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest" (paragraphs 92–95 of the judgment).

By this judgement the Court endorsed the views of Advocate-General Colomer, who had commented that *"The Commission's attitude in the matter shows a passivity which is difficult to understand, given the importance of the market in question and its obvious Community dimension. The same reasons which existed for the adoption in 1991 of a decision relating to the concentration of postal undertakings in the express mail sector still existed after that decision and they ought to have prompted the Commission to monitor developments in the sector, even on its own initiative"*.⁷⁰

Following this striking condemnation of the Commission's inaction, the case was sent back to the Court of First Instance, which annulled the Commission Decision.⁷¹

G. The UFEX case concerning the State aid complaint

As mentioned in Section II, this matter also arrived at the EC courts after spending a number of years at the Commission, and is still not fully resolved. Although concerning State aid rules, it is interesting to briefly describe the principles deriving from the judgements since they concern the question of cross-subsidies (see also the article of Leigh Hancher in Chapter VIII).

As described in Section II, above, this multi-faceted case originated in complaints submitted to the Commission in 1990, alleging *inter alia* that the French State was providing an illegal State aid to La Poste. As set out above, the complaint was rejected and then the rejection decision was withdrawn. Dissatisfied with the Commission's reaction, the complainant pursued the matter before the Commercial Court of Paris, accusing the beneficiary of the State aid (SFMI-Chronopost) of unfair practices resulting from its receipt of non-notified State aid.

The Commercial Court made a preliminary reference to the Court of Justice.⁷² The judgement of the latter Court first recalled that the notion of State aid includes not only positive benefits but also extends to State measures which mitigate the charges normally borne by an undertaking and therefore have an equivalent effect to a subsidy. The Court concluded that *"the supply of goods or services on preferential terms is capable of constituting State aid"* (paragraph 59).

⁷⁰ Case C-119/97 P, UFEX v. Commission, [1999] E.C.R. I-1341, at para. 79.

⁷¹ Case 77/95 RV, UFEX v. Commission, [2000] E.C.R. II-2167.

⁷² Case C-39/94, Syndicat français de l'Express international (SFEI) v. La Poste, [1996] E.C.R. I-3547.

Of particular interest to subsequent proceedings is the following statement, “it is for the national court to determine what is normal remuneration for the services in question. Such a determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided” (paragraph 61, emphasis added).

Subsequently, the Commission took a decision finding that there was no State aid in this case.⁷³ It came to this conclusion on the basis that it was not obliged to take account of the fact that La Poste held legal monopoly in its assessment. The Commission considered that there was no State aid if the price paid by the subsidiary was the “full-cost price” (defined as total costs plus a mark-up to remunerate equity capital investment). As set out above, the Court of First Instance annulled this Decision. At the time of writing, the Judgement of the Court of First Instance was under appeal. Therefore, the following should be read in that context.

The judgement of the Court of First Instance⁷⁴ referred to the preliminary ruling of the Court of Justice by stating that, “*Even supposing that SFMI-Chronopost paid La Poste’s full costs for the provision of logistical and commercial assistance, that would not be sufficient in itself to show that no aid within the meaning of Article 92 of the EC Treaty was granted. Given that La Poste might, by virtue of its position as the sole public undertaking in a reserved sector, have been able to provide some of the logistical and commercial assistance at lower cost than a private undertaking not enjoying the same rights, an analysis taking account solely of that public undertaking’s costs cannot, in the absence of other evidence, preclude classification of the measures in question as State aid. On the contrary, it is precisely a relationship in which the parent company operates in a reserved market and its subsidiary carries out its activities in a market open to competition that creates a situation in which State aid is likely to exist*”. It went on to say that, “*The Commission should thus have examined whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided. Hence, the Commission should at least have checked that the payment received in return by La Poste was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector, pursuing a structural policy – whether general or sectorial – and guided by long-term prospects (see to this effect Case C-305/89 Italy v Commission [1991] ECR I-1603, paragraph 20)*” (paragraphs 74–75 of the Judgement).

This ruling is interesting as it states that the test to be applied to the pricing of the supply of services by an undertaking operating in the reserved sector is a comparison with the market price. In its decision, the Commission had merely

⁷³ See Supra note 17.

⁷⁴ Case T-613/97, UFEX a.o. v. Commission [2000] E.C.R. II-4055.

verified the costs incurred by La Poste in the supply of logistical and commercial assistance to La Poste and made a comparison with the remuneration received in return, from SFMI-Chronopost. This ruling recognises that if an undertaking related to a parent holding a legal monopoly is carrying on its business in an unreserved sector against commercial competitors, it should pay for services received from the public postal operator holding the legal monopoly as if it were unrelated to it; there is no commercial reason for doing otherwise. This sets a level playing field for the market.

In contrast to the Commission, the analysis of the Court of First Instance treats a non-reserved postal service on a commercial market basis and does not set it apart merely because it is a postal service. As a result of its analysis, the Court of First Instance ruled that the Commission had failed to correctly examine the State aid aspect of the complaint and it therefore annulled the Commission's decision. Again, it should be emphasised that this case is now under appeal to the Court of Justice. It is however interesting to note that the Commission did not challenge the judgement of the Court of First Instance.⁷⁵

V. CURRENT COMMISSION PRACTICE

A. The remail saga continues

Despite the Commission's rejection, for lack of Community interest, of the IECC complaint regarding the anti-competitive anti-remail activities of a number of public postal operators, remailers face similar difficulties today. In fact a number of complaints regarding anti-competitive behaviour in respect of remail items are currently pending before the Commission. This is demonstrated most prominently in the British Post Office complaint that was made against Deutsche Post.

In February 1998 the British Post Office ("BPO") (now renamed Consignia) made a complaint to the Commission that Deutsche Post was infringing EC competition rules by intercepting, surcharging and delaying items of cross-border mail. Deutsche Post considers that any cross-border mail containing a reference to Germany, such as bearing a German reply address, is not "genuine" cross-border mail.⁷⁶ Therefore, it availed itself of the infamous Article 43(4) UPC (ex Article 23(4) and 25(4)), featured in a number of the cases above, in order to intercept the mail items and to apply the full domestic tariff to them. The BPO's

⁷⁵ Pending cases C-83/01 P, C-93/01 P and C-94/01 P, *Supra* note 20. On this aspect, one may recall that the Commission fully applied the market price test in the similar Sytraval case, when it issued a new State aid decision, following the judgments of the Community courts (See Commission Decision 1999/676/EC of 20 July 1999 concerning presumed aid allegedly granted by France to Sécuropost, 1999 OJ L 274/37).

⁷⁶ On the concepts of "*résidents*" and "*domiciliés*" in the Universal Postal Convention, see James I. Campbell, Chapter I of the book, Section VII.

initial complaint was followed by five subsequent complaints, based on the same type of allegations.

The Commission's investigation found that the mail items in question were in fact normal cross-border mail and thus should have been treated as such. It opened formal proceedings against Deutsche Post in May 2000, when it sent a Statement of Objections stating that it considered Deutsche Post to have abused its dominant position on the German market for the delivery of cross-border mail. The Commission also considered that Deutsche Post discriminated between customers by intercepting and surcharging items that it considered to be of German origin and therefore non-genuine cross-border mail. In its Statement of Objections, the Commission also commented that the tariffs of Deutsche Post bear no reasonable relation to either the real cost or value of the service it provides.

In July 2001, a press release was issued announcing that the Commission had adopted a formal decision condemning Deutsche Post for abusing its dominant position on the German letter market by "*intercepting, surcharging and delaying incoming international mail which it erroneously classified as circumvented domestic mail (so-called A-B-A remail)*".⁷⁷

The full text of the decision had not been published at the time of writing. However, it is known that the Commission chose to impose only a "symbolic" fine of €1000, as it considered that there had been uncertainty over the legality of Deutsche Post's activities during the period concerned; Deutsche Post's behaviour had been condoned over many years by the German courts and, when the interceptions took place, EC jurisprudence on remail had not been developed (due, to a significant degree, to the Commission's own actions).

The full decision should make interesting reading for both remailers and post offices. The press release states,

"The Commission's investigations revealed that the disputed mailings did not have German senders. The mailings were produced and posted in the UK, or alternatively produced in Sweden or in the Netherlands and posted to Germany via the UK" (emphasis added).

The underlined section appears to describe a typical ABC remail activity, of the type of which the Commission and the Court declined to condemn interception by, *inter alia*, Deutsche Post in the IECC case. A sea change in the Commission's view would be very welcome and the publication of the full decision is eagerly awaited, particularly by those that have been for many years condemning the anti-competitive practices of the post-offices in respect to remail.

⁷⁷ IP/01/1068, "Commission condemns Deutsche Post AG for intercepting, surcharging and delaying incoming international mail".

B. Cross-subsidisation

Decisive action was taken by the Commission in March 2001. Following a complaint made by United Parcel Service (UPS) that alleged that Deutsche Post was subsidising its parcel service with profits from its legally protected monopoly on letter mail, the Commission conducted an investigation which resulted in a Decision presenting interesting economic and legal analysis.⁷⁸

The Decision turns on two axes, both of which produce an anti-competitive effect. The first is Deutsche Post's pricing policy. The Commission found that Deutsche Post was pricing at a level that meant that between 1990 and 1995 every sale of its mail order parcel service represented a loss. This pricing policy does not offer any economic interest for a commercial entity in the medium term, but for a five-year period, it had restricted the market for competing parcel services from normal commercial undertakings, obliged to cover their costs.

The second axis central to the Commission's reasoning was based on Deutsche Post's fidelity rebates to customers of its commercial parcel service. The Commission applied the traditional jurisprudence of *Hoffman La Roche*⁷⁹ to demonstrate that the rebates offered by Deutsche Post were not quantity rebates, which are acceptable to the Commission and form a normal part of commercial strategy by reflecting the savings that can be made by selling large quantities of a good or service to one customer. Quantity rebates are based on the volume of purchases and are available to all purchasers on an equal basis. Instead the Commission found that the rebates applied by Deutsche Post were fidelity rebates, which are linked to a customer's requirements and are therefore capable of foreclosing the market, by providing a disincentive against a customer supplying some of its needs from an alternative operator. A fidelity rebate is typically made subject to the customer satisfying most or all of its demand from the supplier offering the rebate. The Commission examined a number of Deutsche Post contracts in the parcel mail sector and found that the rebates offered were fidelity rebates. Therefore, Deutsche Post was found to be abusing its dominant position in order to tie customers to it and to prevent or eliminate competition on the parcel service market in Germany.

The Commission fined Deutsche Post a total of €24 million. Moreover, as a result of this case, Deutsche Post agreed to structurally separate its commercial parcel service and to create a legally separate company to operate this business in financial isolation from its reserved sector activities. Any goods or services that this new entity procures from Deutsche Post must be paid for at market prices or, where a market price does not exist for the product or service in

⁷⁸ Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under Article 82 of the EC Treaty, 2001 OJ L 125/27.

⁷⁹ Case 85/76, *Hoffman La Roche v. Commission*, [1979] E.C.R. 461, in particular paras 94 to 96 of the judgement.

question, on the basis of attributable cost.⁸⁰ This development is likely to be considered by other postal operators as being more important than any fine or moral condemnation of past anti-competitive behaviour. It is helping to achieve the level playing field between incumbent and alternative operators that is so desperately needed in the postal sector in order to encourage market entry and to make the presence of alternative operators sustainable on the German postal market.

Nonetheless, the undertaking given by Deutsche Post to apply market prices (whenever possible and to set a price covering incremental cost in other cases) to the goods and services it supplies to its spun-off commercial parcels business raises some questions. The Commission Decision is founded in Article 82 EC. When previously applied in AKZO,⁸¹ the Court had interpreted that Article 82 EC means that dominant undertakings act abusively if they adopt pricing below average variable cost, or if they price below average total cost, with the object of driving competitors from the market. However, the Court did not oblige goods and services to be supplied at the market price.

In fact, the Commission appears to have treated the UPS complaint more like a State aid case. In the UFEX State aid case,⁸² the Court stated that where a public undertaking is concerned, it may not be sufficient to demonstrate that costs are covered in order to prove that there is no State aid element, as the fact that the supplier of the services operates in the reserved sector may mean that it is able to supply at a lower cost than undertakings without special rights. The UPS case was not based on a State aid investigation. Thus, this case raises new questions about the application of competition law principles to undertakings with special and exclusive rights. Perhaps such undertakings are subject to a more stringent test than those without such rights. If so, it is difficult to see how this is founded in Article 82 EC; the Decision does not explain this to us.

Other questions raised about the alleged subsidisation or cross-subsidisation of Deutsche Post's activities prompted a State aid investigation, which is still ongoing at the time of publication. However, Deutsche Post's activities do not only attract attention on this side of the Atlantic; the Department of Trade ("DOT") in the United States has also investigated complaints relating to state aid and abuses of dominant position in relation to Deutsche Post.

In 1999, the Commission published a notice in the Official Journal, inviting comments on the alleged aid in question.⁸³ This notice indicated that the Commission had received a number of complaints alleging that State aid was being supplied to the parcel service of Deutsche Post, *inter alia* from the mono-

⁸⁰ See, in particular, paras 20 et seq. of the Decision, *supra* note 77.

⁸¹ Case C-62/86, *AKZO Chemie v. Commission*, [1991] E.C.R. I-3359.

⁸² Case T-613/97, *supra* note 73, para. 74.

⁸³ 1999 OJ C 306/25.

poly revenues of Deutsche Post's letter mail business. The notice also made reference to the concerns raised in relation to a number of acquisitions made by Deutsche Post in regard to the financing of those acquisitions. Competitors had expressed concerns that these purchases could have been financed by Deutsche Post's monopoly operations.⁸⁴ The outcome of the Commission investigation of these issues, which are of widespread concern throughout the postal sector, will be interesting to examine.

It should be noted that the complainant, UPS, lodged an action for failure to act against the Commission on 11 October 2001 before the Court of First Instance (Case T-253/01; notice published in 2002 OJ C 31/31).

C. Hybrid mail: decisive action

The Commission also acted decisively against a creeping extension of the postal monopoly in Italy. Article 86(1) EC clearly states that Member States must not enact rules conflicting with the competition rules of the Treaty. Therefore, any legislation extending the postal monopoly of a public postal operator and thereby extending its dominance on the postal market of the Member State concerned would be contrary to EC law.

An Italian Decree of 1999 included within the reserved sector for the first time the delivery of "*items of correspondence [...] generated by telematic technologies*". This reserved to Poste Italiane all electronically generated hybrid mail, whether or not a value-added delivery service is provided. Therefore private operators are prevented from offering this type of service with a value-added element.

The Commission concluded that the Italian Decree in question contravened Article 86(1) EC, in conjunction with Article 82 EC insofar as it excludes competition in the value-added elements of hybrid electronic mail services, namely day- or time-certain deliveries.⁸⁵ This is an important decision as it demonstrates that the Commission will not tolerate protectionism from Member State governments towards their own post offices. The current state of postal legislation provides for the existence of a reserved service, if a Member State wishes to have one. Most Member States regard retaining a statutory monopoly over a reserved sector as politically important and in the general interest. However, the current trend is towards liberalisation and the Commission rightly will not accept any extension of the postal monopoly.

Both Poste Italiane and the Italian State have brought actions for annulment against this decision, based on both procedural and substantive grounds but

⁸⁴ "Commission starts proceedings concerning possible State aid for Deutsche Post", IP/99/530.

⁸⁵ Commission Decision 2001/176/EC, 2001 OJ L 63/59.

have later on withdrawn their actions.⁸⁶ The Commission has since announced that Italy has implemented the prohibition decision.⁸⁷

D. Tying practices

In another recent development, on 6th June 2001, the Commission announced that it had initiated formal proceedings against La Poste in Belgium, for an alleged abuse of its dominant position.⁸⁸ The investigation originated in a complaint by Hays, an undertaking providing a document exchange (“DX”) service in Belgium and in a number of other Member States, in particular in the UK where the DX service is popular in the legal sector.

Hays alleged that La Poste tied discounts on its ordinary letter mail service to acceptance of its business-to-business mail service, which competed with Hays’ DX service. A substantial number of Hays’ customers in Belgium come from the insurance sector. This sector was allegedly targeted by La Poste. According to the Commission’s preliminary investigation, a few days after the insurance sector rejected La Poste’s business-to-business offer, the preferential tariffs for business-to-consumer mail from which it benefited were terminated. It was claimed that in order to regain this preferential tariff, the insurance companies were obliged to sign up for the business-to-business mail service. Likewise, in order to gain the preferential business-to-customer tariff, it is alleged that insurance brokers would have been obliged to sign up to La Poste’s business-to-business service. Moreover, while it is usual for post offices to offer discounts to large mailers, for example, large companies or public institutions where savings can be derived from economies of scale and the pre-sorting of mail, in the present case, a number of the recipients of this offer of preferential tariffs were brokers with a minimal quantity of mail, in many cases, just a few letters per day. The Commission proceedings will thus examine what justification could exist for offering such customers a discount, if not to persuade them to accept a tied service.

If La Poste is discovered to have carried out the practice described above, it will be particularly objectionable, as La Poste benefits from a legally protected monopoly on its reserved services, including those implicated in the alleged tying. This means that, other operators are unable to compete with La Poste

⁸⁶ Case T-53/01, *Poste Italiane v. Commission*, 2001 OJ C 134/60 (withdrawn: 2001 OJ C 331/34) and Case T-53/01R, *id.*; and Case C-102/01 *Italy v. Commission*, 2001 OJ C 118/20 (withdrawn: see Order in Case T-53/01R).

⁸⁷ “Italy implements Commission decision on the provision of new postal services in Italy”, IP/01/1057.

⁸⁸ “Commission opens antitrust proceedings against La Poste (Belgium)”, IP/01/791 and “Antitrust decision against De Post – La Poste aims to protect competitive postal services from the monopoly”, IP/01/1738.

on the same terms. Tying services in a market that is open to competition to services protected by a legal monopoly would be particularly serious. It is not that private companies are unlikely to succeed in competing with the economic strength of the tying company but that it is legally prohibited from doing so in the market falling within the reserved sector.

The document exchange market needs a critical mass of subscribers in order to survive. In a document exchange there is a closed user group, both the sender and the recipient must be subscribers to the service. If certain large and important subscribers are lost, the critical mass may be lost with them.

The Commission's new, stricter attitude is clear from the comments of Commissioner Monti in relation to this case,

*"If the progressive liberalisation of postal services is to become a success, incumbent operators enjoying a statutory monopoly must not be allowed to extend their dominance to new services by abusing their unique market position".*⁸⁹

* * *

The cases described in this section demonstrate how the Commission is now being noticeably more proactive in the application of competition rules to the postal sector. This is a welcome change from the approach of the past, under which the Commission seemed reticent to intervene in the politically sensitive postal sector. The Commission is to be congratulated on its recent decisions (five decisions in only one year's time: Poste Italiane in December 2000, DPAG in March 2001, DPAG in July 2001, French Republic in October 2001 and Belgian La Poste in December 2001) and its on-going proceedings, which provide legal certainty in the sector and assure alternative operators and potential new entrants that anti-competitive conduct will not be tolerated in the postal sector, as in other deregulated markets.

E. Concentrations in the postal sector

The topic of concentrations is dealt with in detail by Jean-Yves Art in Chapter IX. Readers are therefore referred to this Chapter for a full discussion of this topic. In the present chapter, the examination will be confined to the following comments.

Following the TNT merger with the Dutch PTTs, Deutsche Post appears to have been particularly active, completing several significant acquisitions in recent years. Only its planned deal with Trans-o-flex has been withdrawn, following the expression of the Commission's concerns.⁹⁰

⁸⁹ IP/01/791.

⁹⁰ See M. Griffiths, "Failing to Install Effective Competition in Postal Services – The Limited Impact of E.C. Law", (2000) 21 *European Competition Law Review*, 399.

Fears have been expressed that this concentration of postal services in the hands of Deutsche Post will affect the competitive situation in the postal market as liberalisation progresses. One of the concerns that has been expressed is that Deutsche Post is using its monopoly rents to finance this acquisition strategy. It must be remembered that Deutsche Post is a highly profitable and economically powerful undertaking, benefiting from the high national postal tariffs in Germany. The issue of the alleged use of monopoly rents is usually mentioned in each merger decision involving Deutsche Post, following concerns expressed by third parties. The Commission has repeatedly stated that it is not able to examine such issues under the merger regulation and instead makes reference to the State aid investigation discussed above. One may wonder whether this analysis may still be regarded as valid, following the judgement of the Court of First Instance in *RJB Mining v. Commission*.⁹¹ The Court decided that, when analysing a merger, the Commission "*cannot ignore the consequences which the grant of State aid to those undertakings has on the maintenance of effective competition in the relevant market*" and that it is "*required to assess the transaction as a whole, not merely one part of the transaction*".⁹² This case was brought under the European Coal and Steel Treaty. Nonetheless, it may mean that the Commission can no longer afford to draw a clear line between its merger analysis and its State aid procedures. Many people are questioning the prominent and voracious acquisition activity of certain post offices, and the Commission should act to resolve the questions raised. If liberalisation is to be effective, it must be ensured that pre-liberalisation acquisitions are not allowed to unfairly prepare the ground for the post-liberalisation activities of the post offices.

VI. ABUSE OF MARKET POWER IN THE POSTAL SECTOR: A BRIEF REVIEW OF SEVERAL ABUSIVE PRACTICES

As this overview has demonstrated, the postal sector provides the potential background for a wide variety of competitive abuses, which have developed through a historically lax approach by regulators. Due to the particular structure of the postal industry, with historic operators, many of which are still wholly or partially State owned, holding down a strongly dominant position in the face of alternative operators who are nibbling at the edges of the sector, competition issues are bound to arise. As a result of the strong dominance of the incumbents, regulators must be particularly alert to the possibility of infringements of Article 82 EC, in all possible forms.

Market power could have been abused in the voracious takeover policy of certain postal operators. As stated above, the Commission is still investigating whether an abuse of competition law principles can be established in terms of a

⁹¹ Case T-156/98, *RJB Mining v. Commission*, [2001] E.C.R. II-337.

⁹² Paragraphs 144 and 124 of the judgement.

violation of the State aid principles or an abuse of dominant position under Article 82 EC. Now that a State aid investigation has been commenced, it is hoped that this matter will be thoroughly pursued and competition law principles applied to this area. The fear of many alternative postal operators, that takeovers funded by reserved sector revenues will foreclose the market before further liberalisation takes place, will continue to cast doubts over the future viability of the sector, until this matter has been thoroughly addressed.

It may also be tempting for operators holding a legal monopoly to find ways to refuse to supply their services to certain alternative operators. An allegation of a refusal to supply a delivery service for certain cross-border mail items lies at the root of the BPO's complaint against Deutsche Post, described in Section V, above. On the basis of an allegedly discriminatory policy that differentiated mail items that Deutsche Post considered to be non-genuine from those that it considered genuine, Deutsche Post selectively refused to deliver certain incoming cross-border mail items.

Refusal to supply has also been a feature of the remail cases that have been considered by the Commission. Remailers have found that cross-border mail items that they have handed over to foreign post offices for delivery have been intercepted and delayed by certain Member State post offices. Article 43 UPC (formerly Article 25 or 23 UPC) usually acts as the justification for these interceptions. In the IECC case, despite its Statement of Objections, the Commission did not condemn the use of Article 25 UPC to intercept remail items, and this view was further supported by the Court in the GZS and Citicorp cases (as detailed in Section 4, above). In its judgement in the latter cases the Court held that being obliged to deliver large quantities of remail items would jeopardise Deutsche Post's task of general economic interest, whilst declining to support this conclusion by reference to any evidence. The Court and the Commission both appeared to endorse the refusal to supply reserved services to remailers, despite the later comments of the Court of Justice in the IECC judgement that remailing has a positive effect on competition and provides customer choice. The awaited British Post Office decision may herald the start of a more positive era for alternative operators.

The importance of access to the incumbent's services cannot be over emphasised. Where access to certain reserved services is necessary to complete the supply of unreserved service, no competition can take place in the latter sector, if the incumbent does not cooperate. A customer is not interested in a service that efficiently collects mail but is then unable to assure its delivery by the reserved sector operator.

The endorsement of the use by post offices of Article 43 UPC to intercept and surcharge mail is difficult to understand. Article 43 UPC allows post offices that intercept remail to charge the full domestic rate of postage on that mail. The domestic rate of postage is intended to pay for a complete postal service: collection from post boxes or post offices, transportation, sorting and delivery.

Whilst delivery is no doubt the most time consuming and expensive element of this process, some savings must be made by the fact that the collection and parts of the sorting and transport activities are undertaken by the remailer. Indeed, such savings are reflected in the fact that most of Europe's post offices have agreed between themselves to pay terminal dues of a percentage of the internal rate for cross-border mail. If, for example, a foreign post office is charged 70% of the domestic tariff for an item of mail handed over to a destination post office for delivery in the territory of the destination post office, it is surely discriminatory for the dominant, indeed often monopolistic, destination post office to charge 100% of the domestic tariff (minus any terminal dues already paid) when an equivalent item of mail for delivery in the same territory is handed to it by a remailer. This appears to be a clear example of unfair pricing and the application of dissimilar conditions to equivalent transactions by a dominant postal operator, in breach of Article 82 EC.

Another way in which a postal operator may abuse its market position is by offering volume discounts and rebates. Action of this kind by Deutsche Post in its commercial parcels sector was condemned by the Commission in its UPS decision. In its decision, the Commission stated that by offering fidelity rebates based on a customer's requirements, Deutsche Post effectively foreclosed access to these customers for alternative operators and potential market entrants by preventing them from reaching the critical mass required to run a commercial parcel service in Germany.⁹³

The fact that in the postal sector many incumbent operators have commercial businesses in the non-reserved sector, as well as dominance in the reserved sector, provides the conditions for abusive tying.

Tying takes place when an operator holds a dominant position in one market and uses that dominant position to try to leverage market power on a neighbouring market, by making the purchase of a product or service on the market in which it holds a dominant position subject to the purchase of its services on the neighbouring market. This is not just a theoretical possibility; as explained in the post scriptum herein, the Commission condemned the Belgian Post Office. In its press releases the Commission indicated that its investigations revealed that La Poste was granting rebates to customers of its traditional mail services, over which La Poste holds a statutory monopoly, to customers that subscribed to a new business mail service, which is in competition with the document exchange (DX) service offered by the complainant.

The effects of this type of abuse can be particularly severe, particularly in the present situation, where the alternative operator is legally prevented from fighting the incumbent on the market in which it is dominant, as it is protected by its statutory monopoly. This makes it important for regulators to address issues of this kind, and the Commission is to be congratulated for pursuing this case to

⁹³ Paragraph 37 of the Decision.

an end. If liberalisation of the postal sector is to be a success, the incumbent operators must not unfairly be allowed to prepare the ground for themselves by minimising the competition they will face.

In addition to market vigilance from regulators, abuses can be made more visible by the use of transparent accounting by incumbents. This can help to ensure that anti-competitive tactics such as predatory pricing and cross-subsidisation are not used by incumbents to improve their market positions. However, analytical accounting may not be as useful in the assessment of market conduct as it would appear to be, due to the ruling of the Court in UFEX.⁹⁴ The Court of First Instance clearly stated that when analysing whether a service was being supplied by the holder of a legal monopoly at an unfair price, the key measure was not the monopoly's costs of providing that service, but its market value. It remains to be seen how much emphasis will be put on analytical accounting in future competition proceedings. Nonetheless, cost accounting remains important for matter such as the calculation of terminal dues. In its REIMS II decision,⁹⁵ the Commission accepted the terminal dues could be set as a percentage of the domestic tariff, in the absence of the calculation of the true cost of the service. However, the REIMS II agreement is not intended to last forever; indeed, the Commission exemption granted to it expires on 31st December 2001.⁹⁶ It is hoped that a more cost-oriented system will follow. Analytical accounting will be needed to implement such a system.

CONCLUSION

A fresh and more proactive approach appears to be emerging in regard to the application of competition law to the postal sector, which is to be welcomed. The postal sector is no longer a "no-go" sector for regulators, and they must continue to be as vigilant for anti-competitive behaviour as they have been since the year 2000. The Postal Directive, which is intended to be a first step towards the liberalisation of the sector must be used as a regulatory sword, rather than a shield for incumbents to hide behind when faced with commercial competition. The Postal Directive and its accompanying Guidelines both explicitly state that they are "*without prejudice*" to competition law. Everyone interested in postal issues is aware of the political and social aspects of the sector. However, it cannot be ignored that the EC Treaty does not provide for consideration of these aspects when competition rules have to be applied. Therefore, the EC postal legislation cannot constitute an obstacle to the application of the competition law principles enshrined in the EC Treaty. Moreover, the UPC should not

⁹⁴ Case T-613/97, *supra* note 73.

⁹⁵ Commission Decision 1999/695/EC, *supra* note.

⁹⁶ A request for a new exemption has since been made: OJ (2001) C 195/11.

be allowed to be used to avoid the application of Article 82 EC to the conditions under which incumbents receive incoming cross-border mail.

The development of the sector is also being hindered by the difficulties with the new proposed Postal Directive.⁹⁷ Political differences between the Member States over the rate of future liberalisation have so far produced a stalemate. This position can only advantage incumbents, at the expense of present and indeed future competition. Not only are incumbents given the opportunity to benefit from monopoly rents for a longer period whilst the debate goes on, they are also given time to prepare the ground for future competition, by buying competitors and attempting to drive others out of markets so that they are not well positioned to participate in the next wave of postal market liberalisation. These effects could be long-lasting; alternative operators driven out of a particular market are not likely to be eager to re-enter it, and consumers may lose faith in companies that have previously been driven out of the market.

For years it seemed as if there were a sector specific non-application of competition law. Abuses that would most likely have been condemned in other industries have been left untouched in the postal sector. The postal sector is undoubtedly politically sensitive. However, once the Member States have agreed to liberalise a sector to a certain degree, that liberalisation must be allowed to take place, with the support of the competition authorities. Once a policy has been decided, the task of the regulators is to police the liberalised sector to guard against possible abuses. Effective regulation means not just that a result is achieved, but that it is achieved in an efficient and decisive way, allowing the sector to feel certain that it can develop, protected from anti-competitive abusive behaviour. Confidence is a very important factor in introducing competition into a previously monopolised sector. Entrants know that they will have to contend with consumer loyalty and a well-known brand; they should be confident that they will not also have to contend with underhand practices.

Competition should develop relatively easily in the postal sector. Unlike the telecommunications sector, entrants into the postal industry do not need to build or procure access to physical network infrastructure to anywhere near the same extent. For instance, someone could enter the express market as a small or local operation and start trading immediately, with a minimum of equipment. Alternative operators must be assured of a level playing field between themselves and the historic operators by demonstrations from regulators that competition rules will be applied effectively to the sector. This will provide the legal certainty necessary to give potential new entrants the confidence they need to enter the market.

The dawn of the new millennium seems to have brought a new approach from

⁹⁷ Amended proposal for a European Parliament and Council Directive amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, 201 OJ C180/291 E.

the Commission. In the last year or so competition law has been applied to the postal sector far more vigorously than in the previous decade. Agreement on the new Postal Directive may have been delayed and its contents diluted, but today competition law applies autonomously to the sector and the Commission is beginning to demonstrate that anti-competitive behaviour will be investigated and where necessary, condemned under competition law rules. The postal sector is partially liberalised and should be treated as such. It seems that regulators are finally understanding that cossetting the incumbents will not bring economic benefits. It must be hoped that this new fresh approach has not come too late for potential operators in this sector, which undoubtedly has the potential for significant competitive development.

POST SCRIPTUM (FEBRUARY 2002)

Since this article was first written, a number of important changes have occurred. Five issues should be addressed.

1. Common Position of the Council on the proposed new Postal Directive

The Council adopted a common position with a view to the adoption of a Directive of the European Parliament and of the Council amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, on 7 December 2001.

The new version of Article 7 of the Directive inserted by this Common Position confirms the principle deriving from the *Corbeau* case-law that all value-added mail services cannot be reserved, since they are clearly distinguishable from the "standard mail services", which may still be reserved by Member States to universal service providers, "to the extent necessary to ensure the provision of universal service".

In this respect, the Council proposes clear limits to the standard mail services (in French, "*services de courrier traditionnel*") which may be reserved, i.e. the clearance, sorting, transport and delivery of ordinary items of domestic correspondence and incoming cross-border correspondence within the following reduced weight and price limits: "*The weight limit shall be 100 grams from 1 January 2003 and 50 grams from 1 January 2006. These weight limits shall not apply as from 1 January 2003 if the price is equal to, or more than, three times the public tariff for an item of correspondence in the first weight step of the fastest category, and, as from 1 January 2006, if the price is equal to, or more than, two and a half times this tariff*".

This new wording clarifies that any value-added mail service (e.g. express mail service) cannot be reserved, *whatever be the price or weight*. This only confirms the principle resulting from applicable EC case-law, applying EC competition rules. The Commission had already made that clear in its 2000 proposal (see

§ 2.9.2 in fine of COM 2000 (319) final): all special services do not fall within the universal service, and therefore cannot be reserved (see also Recitals 18 and 21 of the current directive).

The common position adopted by the Council rejects the Commission's proposal to define these "special services" (value-added mail services), which must be distinguished from universal postal services that can be reserved. Commenting on the common position, the Commission stated that "*further refining will continue to take place through the case by case approach*" (§ 3.3.1 of SEC (2001) 1961 final of 10 December 2001), i.e. upon complaints against post offices willing to extend their postal monopoly to these non-traditional mail services. It will be up to the Commission, national postal regulators, national competition authorities and national judges to decide what constitutes a value-added mail service which does not fall within the universal service. This result is contrary to the objective allegedly pursued by the Council and the European Parliament in the Postal Directive: the law will be decided by judges and regulators, and not by politicians, in accordance with the applicable legal principles already defined by the European Court of Justice.

If the European Parliament does not oppose the Council's common position (the EP committee responsible for the directive adopted the common position on 21 February 2002⁹⁸), these provisions, which represent a compromise, are likely to become those of the new postal directive by April 2002.

2. Commission Decision condemning La Poste following Hays' complaint

On 5 December 2001, the EC Commission adopted a decision condemning La Poste for abuse of dominant position. The Commission imposed a fine of €2.5 million.

The Commission's investigation demonstrated that La Poste had launched a new business-to-business service which competed with the DX service and abused its dominant position by making a preferential tariff in the general letter mail service (business-to-customer mail) subject to the acceptance of its business-to-business service. According to the Commission's decision, after Hays' customers indicated that they were not interested in the new business-to-business mail service offered by La Poste, the latter unilaterally terminated the preferential tariffs offered on the business-to-customer mail service. La Poste maintained this tying policy until the targeted clients subscribed to the new business-to-business mail service. The Commission considered that La Poste exploited financial resources of the postal monopoly in order to leverage its dominant

⁹⁸ This committee stated in its report that "*the weight and price limit will continue to apply (...) to express services*"; this simply shows that the MEPs do not sometimes understand the necessary legal implications of the existing texts (current directive) and case-law (*Corbeau*) and of the text that they vote (the common position).

position in that market into the separate market for business-to-business mail services.

This case was the subject of a press release by the Commission. EC Competition Commissioner Monti commented: *"Today's decision should make it abundantly clear that the Commission will not accept that postal incumbents exploit their resources of their statutory monopoly in order to eliminate competitors providing services in areas which are open to competition. In the period ahead, which will be marked by the co-existence of services covered by the postal monopoly and services which have been liberalized, the Commission will remain extremely vigilant that the beneficiaries of the monopoly do not extend their dominance into markets open to private operators"*.

The Court of Appeal of Brussels, seized with a similar action by Hays against La Poste based both on the abuse of a dominant position and on the unlawful receipt of State aid (cross-subsidies) which had not been notified to the Commission. The Court of Appeal stayed its proceedings while waiting for the Commission to take its decision on 5 December 2001. This decision to stay the proceedings was, strangely enough, taken only two days after the Commission Decision.

3. Commission Decision condemning French Republic following SNELPD's complaint

Concerning the implementation of the postal directive, the issue of the true independence of the postal regulator was mentioned. This matter saw a landmark development by virtue of the Commission decision of 23 October 2001 against the French Republic⁹⁹.

Indeed, following the complaint lodged by the SNELPD, the French association of the "routeurs" (companies providing various postal preparatory work) in 1998, the Commission decided that certain provisions of French law concerning the organisation of postal regulation were contrary to Article 86(1) EC read in conjunction with Article 82 EC. Indeed, the Commission took the view that the control of the non-discriminatory character of the pricing and technical conditions applied by La Poste vis-à-vis the routeurs was too limited and, furthermore, that this control was carried out by a public authority which was not sufficiently independent and neutral vis-à-vis La Poste (i.e. the minister of Economic Affairs and Finances, via the directorate general for industry, information technologies and postal matters, DiGITIP).

This decision constitutes yet another example of the Commission's new trend after 2000.

⁹⁹ See Commission press release IP/01/1476 of 23 October 2001.