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Section 2.2.2: International Organisations

Special Report 79

Special Report of the Monopolies Commission in accordance with Section 44 of the Postal Act in conjunction with Section 81 Paragraph 3 of the Telecommunications Act of 1996

2017

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Chapter 2

2.2.2 International Organisations

2.2.2.1 The Universal Postal Union influences postal services outside Europe in particular

182. Despite the political endeavour to set up a single European market, as regards cross-border delivery of letters and parcels it is often necessary to take recourse to partial services of the respective national postal companies with their own country-wide postal networks. Thus, transnational universal services in the sense of Article 3(7) of the EU Postal Services Directive and Sec. 1(4) of the German Universal Postal Service Ordinance (PUDLV) can only be provided in collaboration with the postal companies of other countries. The basic rules for international mail are established within the Universal Postal Union.³³⁵ The Universal Postal Union is a Specialized Agency of the United Nations which pursues in particular the goals of promoting communication between private persons and creating a unified postal market.³³⁶ In the bodies of the Universal Postal Union delegates of the governments of the individual member countries represent their national interests. In these they decide, on the one hand, on regulatory and intrastate issues such as the designation of national postal companies or universal service providers as so-called designated operators and making rules for transnational delivery of mail. On the other hand, they decide on operative matters such as the rates of the designated operators for delivering incoming cross-border mail and on technical and logistical standards for sending mail³³⁷ within the networks of the designated operators. They are supported in this activity by representatives of the respective operators designated by the national governments.

183. The rules of the Universal Postal Union apply exclusively to the transnational postal services of the designated operators. According to the constitution of the Universal Postal Union the designated operators can additionally enter into special agreements.³³⁸ The supervisory function over compliance with the regulations is executed by the Universal Postal Union itself.³³⁹ Due to competition-law reviews carried out in the early 1990s concerning agreements on the rates for intra-European postal services between six European postal administrations, the Universal Postal Union's rules on rates are for the most part not applied in Europe.³⁴⁰ For mail between European and non-European universal service providers the Universal Postal Union's rules on rates are nevertheless supposed to be applied.³⁴¹

184. For the Federal Republic of Germany the only designated operator to exercise the rights and duties within the Universal Postal Union is the Deutsche Post AG (DPAG). The legal basis for this is Article 4(1), first sentence, of the

³³⁵ The greater part of the traffic in cross-border letters globally takes place between industrialised countries; cf. UNCTAD, *In Search of Cross-border E-commerce Trade Data*, April 2016, p. 14 et seq. This constitutes further empirical evidence that foreign trade takes place primarily between companies based in countries with similar levels of economic development; WTO, *World Trade Statistical Review 2016*, 21 July 2016. A theoretical basis for such intra-sectoral trade is provided in the seminal Melitz, M., *The impact of trade on aggregate industry productivity and intra-industry reallocations*, *Econometrica* 71(6), 2003, pp. 1695-1725.

³³⁶ Universal Postal Union, Preamble, Universal Postal Convention 2016.

³³⁷ Universal Postal Union, <http://www.upu.int/en/activities/standards/upu-technical-standards.html>, accessed on 2 October 2017.

³³⁸ Universal Postal Union, Art. 8(1) of the Constitution of the Universal Postal Union 2016: "designated operators ... may ... make Special Agreements concerning the international postal service, provided that they do not introduce provisions less favourable to the public than those provided for by the Acts."

³³⁹ Universal Postal Union, Art. 135.2 General Regulations of the Universal Postal Union: "... the International Bureau shall see that the Special Agreements do not include conditions less favourable to the public than those which are provided for in the Acts of the Union." The International Bureau is the main headquarters of the Universal Postal Union. Nevertheless, some authors refute the supervisory competence of the Universal Postal Union, particularly when it comes to agreements between the designated operators and third parties; cf. Vivet, E./Leray, R., *Is the Universal Postal Union still relevant?*, in Crew, M./Parcu, P. L./Brennan, T. (eds.), *The Changing Postal and Delivery Sector – Towards a Renaissance*, Cham 2017, p. 342.

³⁴⁰ Paras. 194 et seq. in this Section.

³⁴¹ Dieke, A./Niederprüm, A./Thiele, S., *UPU-Endvergütungen und internationaler E-Commerce*, WIK Discussion Paper No. 412, 2016.

Act on the Agreements of 15 September 1999 of the Universal Postal Union (WPostVtr1999G).³⁴² The Federal Ministry for Economic Affairs and Energy has as yet made no use of the power vested in it under Article 4(2), third sentence WPostVtr1999G to determine by ordinance the necessary details on accreditation, including the selection procedure, within the Universal Postal Union. According to the constitution of the Universal Postal Union the nomination of several designated operators is not ruled out.

185. The Universal Postal Union has enacted a system of remuneration for cross-border mail between its member countries. This system specifies the postal rates that the designated operators in the chain of delivery of outgoing cross-border mail, i.e. within the sender's country, have to pay other designated operators for the transit of incoming cross-border mail within the country of destination. The rates system is in this respect a transfer payment system between designated operators for rendering partial services, in this case, the delivery of incoming cross-border items of mail. The final compensation, or charges, for letters are called "terminal dues"; those for packages are known as "inward land rates". The category of letters includes items of mail with a weight of up to 2 kg, while items weighing from 2 kg to 20 kg are calculated as parcels. Fees for transit and air carriage are regulated separately. The costs for consolidating outgoing cross-border mail, on the other hand, are not specified, but are subject to the designated operator's own pricing or national regulation on rates.

186. The remuneration system for delivering incoming cross-border letter mail has a multi-component structure oriented on the economic power of the member countries of the Universal Postal Union.³⁴³ Terminal dues for letters between industrial nations and selected threshold countries are calculated according to the so-called target system, whereas terminal dues for letters to, from and between threshold and developing countries are calculated according to the so-called transitional system. In the target system, the member countries are further grouped according to how long they have been a part of that system.³⁴⁴ The terminal dues under the target system are calculated for four formats of letters or parcels on the basis of 70 per cent of the comparable domestic rates for letters weighing up to 20g, 175g and 375g in the respective member countries. For the terminal dues of the target system, additional fixed maximum and minimum prices are set. In the transitional system, in contrast, the terminal dues are fixed rates. The terminal dues of the target system are higher than those of the transitional system, and the amount of the terminal dues in the target system depends upon the length of time the member country has been in the target system. As a rule all terminal dues are calculated per item and per kilogram, and the final amount is also related to the quality of the mail service.

187. The remuneration system for delivering incoming cross-border parcel mail is, unlike that for letters, not divided into groups of countries. The inward land rates are calculated on the basis of 71.4 per cent of the inward land rates calculated in the year 2004 by each of the designated operators, including an adjustment for inflation and a bonus for service innovations. These rates may not go below a certain set uniform minimum price per item and per kilogram. Furthermore, there exists no quality system for rates regarding parcels, that is, the amount of the inward land rates is not related to the quality of service, as is the case with terminal dues. Also, the inward land rates, in contrast to the terminal dues, are not mandatorily applicable where no special agreements have been made.

³⁴² Gesetz zu den Verträgen vom 15. September 1999 des Weltpostvereins vom 18. Juni 2002, BGBl. 2002 II p. 1446, last amended by Art. 455 of the Regulation of 31 August 2015, BGBl. I p. 1474.

³⁴³ Universal Postal Union, Statistics and Accounting Guide, January 2017 Edition. The long-term goal is to integrate all member countries in a uniform remuneration system; Universal Postal Union, press release of 29 September 2016. The different terminal dues are intended to contribute to ensuring the functionality of international mail exchange with the economically weaker countries of the world.

³⁴⁴ Group I includes all those member countries of the Universal Postal Union that were already part of the target system prior to 2010. These are Belgium, Denmark, Finland, France, Germany, the United Kingdom, Greece, Ireland, Italy, Luxembourg, the Netherlands, Spain, Sweden, Portugal and Austria. Groups II and III include the member countries that were part of the target system as of 2010, 2012 and 2016, respectively. These include Slovenia, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Malta, Poland and Slovakia, as well as Bulgaria, Lithuania and Romania.

2.2.2.2 The International Post Corporation influences the intra-European postal system in particular

188. For cross-border mail inside the European Economic Area the remuneration system of the Universal Postal Union for the most part does not apply.³⁴⁵ Instead, the rates for the delivery of incoming cross-border mail in a European country of destination are established in bilateral agreements and other multilateral accords between the postal service providers. The most significant multilateral agreements to date for the European postal system are those concluded by the members of the International Post Corporation (IPC). These, in turn, have a decisive influence on the volume of cross-border universal services in the sense of Article 3(7) of the EU Postal Services Directive and Section 1(4) PUDLV.

189. The IPC, established in 1989, was the product of a working group of the European Conference of Postal and Telecommunications Administrations (CEPT). This was a collaborative organisation of the national postal administrations of the European states in the area of postal and telecommunications regulation. The IPC now encompasses 24 postal service providers – some of them privatised – from Europe, North America and Australia. The DPAG is a member of the IPC.³⁴⁶ Requirements for membership in the IPC are, in particular, membership in the Universal Postal Union and an obligation to provide universal services.

190. As in the Universal Postal Union, the members of IPC conclude agreements on technical standards for cross-border mail services and on measuring the quality of those services. The relevant goal is to increase the interoperability of the postal networks. One example is the “INTERCONNECT” programme launched by the IPC in 2013 to establish a world-wide delivery network for e-commerce.³⁴⁷ At the centre of the endeavour is the development of a digital platform on which the postal service providers participating in INTERCONNECT can offer online traders, as well as small and mid-size enterprises, a full range of delivery services based on state-of-the-art technology. Over 30 postal service providers have already joined the programme. A total of over 180 further postal service providers or designated operators are participating in developing innovations within the IPC, including for instance a uniform barcode system and a tracking system.

191. The basic purpose of the IPC is to ensure that the members conclude agreements on rates for international postal service. To this end, the members of the IPC have developed an instrument known as the Remuneration of Mandatory Deliveries of Cross-Border Mails Agreement (REIMS). The REIMS Agreement regulates remuneration for cross-border delivery of letters. The REIMS Agreement has been revised several times during its existence (REIMS I—REIMS V). The Agreement has for years been considered as the central remuneration system for the European postal system. According to estimates, close to one-third of the mail services rendered bilaterally between the designated operators in Europe are processed on the basis of the REIMS V Agreement.³⁴⁸

192. In addition to the REIMS Agreement, the IPC in 2015 drafted the so-called INTERCONNECT Remuneration Agreement – Europe (IRA-E) for the INTERCONNECT Programme, the purpose of which is to regulate remuneration for letters and parcels. One primary goal of the IRA-E Agreement is to increase the competitiveness of the postal service providers in online trade by lowering the “terminal dues”.³⁴⁹ More details on this are not generally known to the public.

³⁴⁵ This is mainly due to the competition-law assessments of the European Commission concerning the agreements between six European postal administrations, valid until the early 1990s, on rates for postal services within Europe; see para. 197 in this Section.

³⁴⁶ According to their own data they convey 80 per cent of the global volume of over 420 billion mail items and earn a combined revenue of more than EUR 210 billion.

³⁴⁷ Cf. e.g. IPC, Annual Review 2016, May 2017.

³⁴⁸ Cf. e.g. Belgian Post International, Need for a Clearer Regulatory Framework For Terminal Dues, Presentation, Valencia 29-30 April 2010, p. 9.

³⁴⁹ IPC, Managing intercompany pricing, https://www.ipc.be/en/services/Intercompany_pricing/Managing_pricing, “One of the main objectives targeted under the IRA-E was to lower the Terminal Dues level in order for postal operators to be more competitive on the e-Commerce market.” Accessed on 25 April 2017.

193. The IPC also supports the European Parcel Group (EPG), an association of designated operators based in Europe and the USA, in building an integrated delivery network for parcel services. Furthermore it supports the Express Mail Service (EMS) in its attempt to improve international express services. Details on the remuneration system of the EPG for delivering incoming cross-border parcels are, as with the REIMS Agreements, not known to the public. However, it is said to provide for bulk discounts and to link the amount of remuneration to the quality of the service provided, in contrast to the Universal Postal Union's system of inward land rates.³⁵⁰ The remuneration for delivering inward cross-border express parcel, according to the EMS standard agreement, is generally based on the individual costs of the postal service provider and requires notification.³⁵¹

194. The REIMS Agreement has several times in the past been the subject of competition-law reviews. The European Commission in 1993 issued a Statement of Objections addressed to six postal administrations³⁵² in which it deemed the terminal dues agreed between the postal administrations for mail within Europe a breach of Article 85 EEC Treaty (= Art. 101 TFEU) because they generated a foreclosing effect.³⁵³ Though the European Commission here only examined the specific agreements of the European postal administrations, it did in fact call into question whether the remuneration system of the Universal Postal Union was compatible with European competition law.³⁵⁴ Further, it viewed certain clauses of the Universal Postal Convention (1989) as abusive within the meaning of Article 86 of the EEC Treaty (= Art. 102 TFEU). Subsequently, in 1995 almost all the postal administrations or public postal operators of the EU Member States concluded an agreement on the remuneration of mandatory delivery of cross-border letter mail,³⁵⁵ the so-called REIMS I, in which they stipulated, in particular, an indexation of the terminal dues in the amount of up to 80 per cent to the rates of comparable domestic postal services. Two years later the public postal operators drafted a new agreement, REIMS II, which they have since amended several times, most recently in 2003.

195. The European Commission first exempted the REIMS II Agreement in 1999.³⁵⁶ It found the indexation of the terminal dues to the rates for comparable domestic postal services a restraint of competition within the meaning of Article 85 EEC Treaty (= Art. 101(1) TFEU) because this amounted to concerted price fixing.³⁵⁷ It held the indexation to the rates of domestic postal services, which were determined by the domestic and not the international market situation and competitive conditions, to considerably impact pricing. And yet it deemed the conditions for exemption under Article 85(3) EEC Treaty (= Art. 101(3) TFEU) met, as it could not perform an examination of costs due to insufficient data. The Commission did, however, make the exemption of the REIMS II Agreement contingent on the introduction of a transparent cost accounting system in accordance with Article 14 of Directive 97/67/EC. In addition, the Commission put a cap of 70 per cent on any increase of the terminal dues, since it had not been supplied with sufficient evidence of a cost-oriented calculation of the terminal dues.

³⁵⁰ FTI Consulting, Intra-Community cross-border parcel delivery – A study for the European Commission, Ref. Ares(2015)5412659 - 27/11/2015, 2011, p. 134 et seq.

³⁵¹ Universal Postal Union, EMS Standard Agreement, <https://www.prc.gov/sites/default/files/uspsreports/2014-10-02%20EMS%20Std%20-%20St%20Maarten.pdf>, accessed on 25 April 2017. The notification takes place via an administrative institution of the International Bureau of the Universal Postal Union; EMS, <http://www.ems.post/faq>, accessed on 25 April 2017.

³⁵² Specifically, postal administrations from Sweden, the UK, France, Belgium, Finland and Switzerland.

³⁵³ European Commission, Statement of Objections, 32.791 – Remail, 5 April 1993, paras. 62 et seq.

³⁵⁴ *Ibid.*, para. 70: “This document deals primarily with the CEPT agreement which is subject of the complaint. It does not examine the compatibility of the terminal dues arrangements of the 1984 or 1989 UPU Conventions with the EC Treaty. It is sufficient to say here that the effects of these arrangements would be very likely to raise similar competition issues.”

³⁵⁵ In this Section for the most part the terminology applied by the European Commission in its respective decisions is used. The changing designations reflect the fact that some postal administrations have since been reorganised and privatised.

³⁵⁶ European Commission, decision of 15 September 1999, COMP/36.748 – REIMS II, OJ EU L 275 of 26 October 1999.

³⁵⁷ *Ibid.*, para. 19: “Domestic tariffs usually distinguish between different weight steps (such as 20, 50 and 100g for letters). According to the Agreement, these different tariffs are converted, on the basis of a standard structure, into linear tariffs for the purpose of calculating terminal dues. In doing so, the Agreement distinguishes between three categories: Letters up to C5 size and a maximum weight of 100 g; Flats up to C4 size and a maximum weight of 500 g; Packets of all shapes up to limits of weight and size set by the UPU.”

196. Four years later the European Commission again exempted the REIMS II Agreement, which in the meantime had been revised.³⁵⁸ The European Commission found that the REIMS II Agreement had competition-restricting effects going beyond the price-fixing named in the exemption decision of 1999 and extending to the competition between the public postal operators on the market for outbound cross-border mail, but that the requirements for exemption provided for in Article 85(3) EEC (= Art. 101(3) TFEU) were still conditionally applicable.

197. Since the 2003 exemption the agreements have been revised several times, to be replaced most recently in 2012 by the REIMS V Agreement. The legal conformity of these agreements has not been examined by the European Commission, because as of 2004 it no longer opens procedures to check conformity with EU competition law unless sufficient evidence is given for violations of the law.³⁵⁹ No information about the contents of the agreement's successors REIMS III, REIMS IV and REIMS V is known to the public. It is likewise unknown between which designated operators the REIMS V Agreement, valid since 2012, applies.

2.2.2.3 Distortions of competition: economic aspects

198. Generally, for postal services outside the European Union those rules of the Universal Postal Union apply that have been agreed by the member countries. For postal services within Europe, however, there are different agreements for letters and for parcels. These agreements are concluded by the national postal companies and postal service providers themselves, which is why their contents, and especially the rates of remuneration for both inward cross-border mail services and inward cross-border parcel services in the country of destination, can be closely linked for reasons of corporate strategy.

199. For intra-European letter mail, on the one hand, multilateral agreements – REIMS V and IRA-E – are concluded by members of the IPC, and bilateral agreements are concluded between members and non-members of the IPC and between non-members, on the rates for delivering incoming cross-border mail.³⁶⁰ The rates system of the Universal Postal Union is presumed, though it does not apply explicitly for reasons of competition law, to have an influence on the tariffs agreed on in the bi- and multilateral negotiations.³⁶¹ Thus, it must be assumed that the terminal dues of the Universal Postal Union function as a threat or default point for the terminal dues under the REIMS Agreement,³⁶² since the members of the IPC are also designated operators of the Universal Postal Union, and these are obligated to carry cross-border mail at the rate of the terminal dues of the Universal Postal Union if no other bilateral or multilateral agreements apply. The terminal dues of the Universal Postal Union are a good bit lower than the actual costs of conveying incoming cross-border mail.³⁶³ The Universal Postal Union itself in 2016

³⁵⁸ European Commission, decision of 23 October 2003, COMP/C/38.170 — REIMS II renotification, OJ EC L 56 of 24 February 2004. For context, cf. e.g. Baratta, R. The REIMS II exemption decision: enhancing competition in the cross-border mail market through third party access, *Competition Policy Newsletter* (1), Spring 2004.

³⁵⁹ European Commission, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules laid down in Articles 81 and 82 of the Treaty, OJ EU L 1 of 4 January 2003.

³⁶⁰ Non-members of the IPC can be national postal companies, private postal operators and in principle even bulk mail customers, because not all national postal companies that are members in the Universal Postal Union are also members of the IPC. Due to the significance of the IPC for letter mail within Europe and the membership of the DPAG in the IPC, rates agreed between non-members will not be discussed in the following.

³⁶¹ A majority of European regulatory bodies indicated in a survey that in their opinion the terminal dues of the Universal Postal Union and not those of the IPC represent the “default rates” for bilateral agreements; WIK-Consult, *Main Developments in the Postal Sector (2010–2013) – Final Report*, Bad Honnef August 2013, p. 95.

³⁶² Cf. for instance Okholm, H. B. et al., *An Economic Perspective on Terminal Dues*, in: Crew, S./Parcu, P. L./Brennan, T. (eds.), *The Changing Postal and Delivery Sector – Towards a Renaissance*, op cit., p. 80. The agreements of the Universal Postal Union, especially those concerning terminal dues, are considered a plausible threat, even though they are not in conformity with European competition law, as far as they are understood as a (hypothetical) minimum price.

³⁶³ With regard to international mail between industrial countries market studies make out a difference between the rates for domestic letter mail and terminal dues of about 40 per cent on average; cf. e.g. Campbell, J. I. jr., *Quantifying the Distortive Effects of UPU Terminal Dues*, in: Crew, M. A./Brennan, T. J. (eds.), *The Future of the Postal Sector in a Digital World*, Springer 2016, p. 320 et seq.; WIK-Consult, *Main Developments in the Postal Sector (2010–2013) – Final Report*, op cit., p. 99 et seq.

confirmed that the terminal dues do not cover the designated operators' costs, in particular those of industrialised countries.³⁶⁴ The last terminal dues examined by the European Commission under the REIMS II Agreement also do not cover costs.³⁶⁵ Therefore, it is quite possible that the terminal dues under the current REIMS Agreement may be higher of those of the Universal Postal Union but still not above the actual costs of transporting mail in the country of destination.³⁶⁶ The terminal dues under the IRA-E Agreement, on the other hand, should due to the original purpose of the IRA-E Agreement be lower than the terminal dues under REIMS, though also higher than those of the Universal Postal Union.³⁶⁷ The tariffs stipulated in bilateral negotiations between the members of the IPC and non-members can be expected to be at least as high as the terminal dues under the REIMS Agreement. Otherwise they would give non-members a relative cost advantage, which would have to be borne by the members. Whether the tariff is above or below the actual costs of delivery within the country of destination cannot be estimated without knowing the relevant rates.

200. For mail within Europe weighing up to 2kg the disparities in the agreed tariffs can be summarised as follows:

$$\text{Tariff (Universal Postal Union)} \leq \text{Tariff (IRA-E)} \leq \text{Tariff (REIMS)} \leq \text{Tariff (bilateral)} \approx \text{Costs.} \quad (1)$$

The distortions of competition should be slighter the closer the terminal dues are to the actual costs of delivering incoming cross-border mail within the country of destination.³⁶⁸ The terminal dues agreed on in the bilateral and multilateral negotiations thus generate smaller price-related distortions of competition than do the terminal dues of the Universal Postal Union. Applying this to letter mail outside Europe, where the terminal dues of the Universal Postal Union predominate, the distortions can accordingly be larger.

201. For intra-European parcel mail the multilateral agreements of the EPG and the IPC and bilateral agreements are supposed to apply preferentially.³⁶⁹ The tariff under the IRA-E Agreement should, for reasons of incentive compatibility, be no higher than the tariff applying already under the EPG Agreement.³⁷⁰ In contrast, the inward land rates of the Universal Postal Union should be higher than the tariffs provided for by the Agreement of the EPG. This is so because the inward land rates are said to be too high for the European postal companies that are designated operators of the Universal Postal Union, which is why they for the most part do not orient their tariff

³⁶⁴ Universal Postal Union, *Research on Postal Markets – Trends and Drivers for International Letter Mail, Parcels, and Express Mail Services*, Bern 2016, p. 23: "In DCs, the DOs' rates for packets in the cross-border letter stream face very little if any price-based competition. International letter post up to 2 kg is underpinned by UPU terminal dues and favours the flow from developed countries, since the costs are usually lower than the true operational costs in advanced Posts (see Figure 12)."

³⁶⁵ As early as 1992 the European Commission pointed out in its Green Paper that the terminal dues were below costs; European Commission, *Green Paper on the Development of the Single Market for Postal Services*, 1992, COM(91) 476 final, p. 111 et seq.: "However, because of the imbalance in the current terminal dues system [...] between delivery unit costs and compensation received, most Member States find that their unit costs for delivering this traffic are not covered. [...] If terminal dues continue to under-compensate delivery unit costs, there might well have to be real increases in the tariffs for domestic mail."

³⁶⁶ On the non-coverage of costs by the terminal dues of the Universal Postal Union cf. paras. 198 et seq. in this Section. The incentives for designated operators to participate in the REIMS Agreement instead of the Universal Postal Union agreement lie within the presumed conformity with European competition law and the efficiency gains achieved by the technical and logistic innovations of the IPC, which give them a competitive advantage.

³⁶⁷ In reference to the original purpose of the IRA-E Agreement; para. 192 in this Section. To set the IRA-E rates below the already below-cost terminal dues of the Universal Postal Union would only be admissible under European competition law if a corresponding level of efficiency gains justify doing so. With regard to the notification procedure previously conducted by the European Commission, including the conditions imposed and the INTERCONNECT programme, which was only implemented in 2013, a reduction of the rates below the terminal dues of the Universal Postal Union seems improbable.

³⁶⁸ On the distortions of competition cf. paras. 203 et seq. in this Section.

³⁶⁹ IPC, https://www.ipc.be/en/services/Intercompany_pricing/Managing_pricing, accessed on 30 April 2017; FTI Consulting, *Intra-Community cross-border parcel delivery – A study for the European Commission*, op cit., p. 133 et seq.

³⁷⁰ In reference to the original purpose of the IRA-E Agreement; note 367 above. Unlike the multilateral agreements on letter mail, which are concluded by IPC members, the multilateral agreements on parcel mail are concluded by members of the IPC and the EPG. Though not all members of the EPG are also members of the IPC, it should be incompatible with incentives, at least for IPC members, to introduce a new remuneration system with higher rates as long as there is no legal necessity to do so.

setting on the inward land rates.³⁷¹ To what extent the inward land rates are lower or higher than the actual costs for delivering mail in the country of destination cannot be determined conclusively based on the information publicly available.³⁷² At least in some countries the inward land rates are in part considerably higher than the prices for comparable domestic postal services.³⁷³ The remuneration agreed on in bilateral negotiations between the members of the IPC and the EPG on the one hand and non-members on the other hand is expected to be at least as high as the rates agreed on within the EPG.³⁷⁴ Otherwise they would give non-members a relative cost advantage. Whether this tariff is above or below the inward land rates and the actual costs for delivery in the destination country cannot be estimated without knowing the actual rate.

202. For intra-European mail weighing more than 2kg the disparities in the agreed tariffs can be summarised as follows:³⁷⁵

$$\text{Tariff (IRA-E)} \leq \text{Tariff (EPG)} \leq \text{Tariffs (Universal Postal Union, bilateral)} \approx \text{Costs.} \quad (2)$$

The distortions of competition should be lower the closer the tariffs are to the actual costs of delivering incoming cross-border parcels.³⁷⁶ The tariffs agreed in the bilateral and multilateral negotiations therefore seem to give rise to greater price-related competitive distortions than do the inward land rates of the Universal Postal Union. With respect to parcel mail outside Europe, accordingly, the distortions can be smaller when inward land rates apply.

203. The disparities of the agreed tariffs and their below-cost levels can generate a number of price-related distortions of competition for the cross-border mail system:³⁷⁷

- in the competition between postal service providers for the delivery of incoming cross-border mail;
- in the competition between postal service providers for the delivery of outgoing cross-border mail;
- between buyers of cross-border letter and parcel mail service;
- between buyers of domestic and cross-border mail service;
- in the competition between domestic and foreign (online) traders as well as between those in industrialised and those in threshold and developing countries;

³⁷¹ FTI Consulting, Intra-Community cross-border parcel delivery – A study for the European Commission, op cit., p. 135. On this see Universal Postal Union, Market Research on International Letters and Lightweight Parcels and Express Mail Service Items – Report, op cit., p. 61: “Nonetheless, it appears that the higher in-land rates are encouraging operators to form alliances with their key trading partners, and agree on exchange rates outside of the UPU system of remunerations”.

³⁷² Para. 198 in this Section.

³⁷³ Cf. e.g. Universal Postal Union, Market Research on International Letters and Lightweight Parcels and Express Mail Service Items – Report, Bern 2010, p. 30 et seq. and p. 60 et seq., and Parcel Post Remuneration Group (PPRG), APPU Member Country Meeting Kolkata – 22 January 2016, presentation, p. 20: “based on a survey, the domestic rates are predominantly lower for IC’s and DC’s but reducing the floor rates would impact DC’s significantly and the minimum income guarantee is important for infrastructure investment and quality improvement”. That inward land rates are higher than the terminal dues for mail items of equal weight could be a consequence of additional services offered, such as insurance. As yet no other attempts to explain this fact are known; Wojtek, R., UPU Compensation Rates for Packages Under EU Competition Law: Are There Lessons to Be Learned from Other International Fee Arrangements?, in: Crew, M. A./Brennan, T. J., op cit., p. 333.

³⁷⁴ Para. 199 in this Section.

³⁷⁵ For express mail a differentiation does not seem necessary, as the members of the EMS already carry approximately 97 per cent of the global volume of mail by quantity and can charge cost-oriented rates according to the EMS Statutes; cf. EMS, Members of the EMS Cooperative, <http://www.ems.post/members-ems-cooperative>, accessed on 25 April 2017.

³⁷⁶ On the distortions of competition cf. 203 et seq. in this Section.

³⁷⁷ Copenhagen Economics, The Economics of Terminal Dues – Final Report, U. S. Postal Regulatory Commission, 30 September 2014. The distortions of competition described in the following can be greater the higher the rates for domestic mail are over the actual costs of delivery. For reasons of clarity and due to the significance of letter mail for the international postal system the distortions outlined here shall be described using letter rates as examples. This is based on the presumption that the rates for domestic delivery of (letter) mail are cost-oriented when an effective regulation prevails.

- further, through transfer payments between designated operators.

204. Distortions between postal service providers in competition for the delivery of incoming cross-border letters (the “last mile”) can then be triggered when the tariff is lower than the actual costs of delivery. In the case of below-cost tariffs, competitors of the designated operators in the country of destination who are themselves not designated and thus not members of the Universal Postal Union could in the long run even be forced off the market. In contrast to the designated operator, namely, which can at least in part claim the losses accrued in its rendering of the universal service from the state or, in the framework of a rates regulation, at the expense of the consumers, their competitors receive no comparable compensation whatsoever for losses they accrue when competition takes place for prices below cost.³⁷⁸

205. Furthermore, distortions can arise between postal service providers in the competition in the sender’s country for the delivery of outgoing cross-border letters (the “first mile”). Such a distortion arises when designated operators have a cost advantage over their rivals in the amount by which the rivals’ price bilaterally agreed with the designated operator of the country of destination for foreign delivery exceeds the terminal dues. The price mark-up from a cross-border delivery for a designated operator in the sender’s country results from the difference between its published list price for the cross-border delivery of mail and the terminal dues payable by that operator to the operator based in the country of destination minus the costs resulting from the rendering of additional services preparatory to the cross-border delivery.³⁷⁹ The lower the terminal dues are, the greater the margin on the one hand and on the other the incentive to engage in predatory competition. If the terminal dues are negotiated individually, and if they lie below the costs of delivery in the addressee’s country, the designated operators profit in the competition with alternative postal service providers for high-volume mailers such as leading online traders by granting discounts that are not cost-oriented. If the alternative postal service providers, who are also reliant on partial services for the last mile, are not granted the same conditions, but charged a higher tariff for the same service, they encounter a competitive disadvantage in the form of less manoeuvring room for mark-ups for the same service. This room for manoeuvre could be reduced so far that a cross-border delivery becomes unprofitable for the alternative postal service providers.

206. Further, below-cost terminal dues e.g. for online traders with an international sales network raise the incentive to dispatch goods weighing up to 2 kg as a letter and not as parcel mail, so that the terminal dues apply instead of the higher tariffs for parcel services. In this way providers of letter services are advantaged over providers of parcel service in the delivery of incoming cross-border mail. Furthermore, this creates incentives for an inefficient development of the letter networks.

207. Below-cost terminal dues, as compared to cost-covering pricing, increase the incentive to import goods from outside the country, instead of buying them domestically, assuming that the designated operators pass on the terminal dues in full to their customers, e.g. online traders. This incentive becomes all the greater the lower the share of the terminal dues is passed on by the designated operators to the online traders. If the financial incentive is great enough, online traders can be induced to move their depots to foreign locations, especially in transit countries, and to export their goods from there. It is anyway the case that below-cost pricing increases the incentive to first delivery mail across domestic borders and then have it imported back into the country, a practice known as

³⁷⁸ Universal service providers as a rule receive a financial compensation for losses incurred in fulfilling universal service obligations. In Germany, the DPAG as a designated company, but not one under obligation to provide universal services, can have the costs of universal service taken into account by the Federal Network Agency in the context of ex-ante regulation; cf. Monopolies Commission, Special Report 79, op cit., Section 2.1.4.

³⁷⁹ E.g. taxes and duties on goods imports into the European Union. Thus the VAT and import customs on parcels conveyed by designated operators and originating in non-EU Members are supposed to be lower than parcels carried by express services; cf. Copenhagen Economics, E-Commerce Imports into Europe: VAT and Customs Treatment, May 2016.

remaining.³⁸⁰ Both practices artificially enhance demand for cross-border postal services and create incentives for what is at bottom an inefficient development of international letter networks.

208. Due to the increased incentive caused by below-cost terminal dues to import goods, (online) traders who sell their goods inside their home country have a cost disadvantage, *ceteris paribus*, compared with (online) traders based outside the country with respect to mail delivery in the country of destination. This disadvantage amounts to the sum by which the cost-based rates for domestic mail delivery exceed the below-cost terminal dues. How strong the incentive caused by the below-cost terminal dues is depends on the degree to which the designated operators pass on the terminal dues to the (online) traders.

209. If the terminal dues are not cost-covering, the operator delivering the cross-border mail in the country of destination incurs a loss in the amount of the difference between the terminal dues and the actual costs of domestic delivery.³⁸¹ This loss amounts to an implicit transfer payment to the operator in the sender's country. The former must refinance the losses at the expense of the consumers, e.g. by cross-subsidising profitable postal services. As an alternative it can claim them from the state or in the context of rate regulation, if the losses are suffered in the course of fulfilling universal service obligations. Accordingly, such implicit transfer payments constitute foreign state aid, which – in the sense of the original purpose of the Universal Postal Union – is paid primarily by industrialised countries to threshold and developing countries.

210. Regardless of whether the terminal dues cover costs, market and competitive distortions arise solely from the stipulated indexation to the rates of comparable domestic letter services. Thus, an indexation of rates for the delivery of incoming cross-border mail to the rates for comparable domestic letters, even if these happen to be cost-oriented due to relevant national regulation, reduces the incentive to realise efficiency gains. Though in principle there is an incentive to lower costs to increase the margin, it is not to the same degree as with genuine price competition without any price caps. Furthermore, the rates for comparable domestic letters do not reflect the competitive pressure that exists on markets for transnational letter services. In essence, such price fixing defeats the intended and original market-specific purpose of prices to indicate the scarcity of resources, in this case, of supply of cross-border letter services. This is normally associated with welfare losses, that is, losses for consumers and for firms.

2.2.2.4 Distortions of competition: legal aspects

211. Aside from economic distortions, agreements, particularly those on tariff systems and technical standards for mail delivery in the IPC and the Universal Postal Union, can be incompatible with the EU Postal Services Directive and with Articles 101 and 102 of the TFEU.³⁸² The TFEU and the EU Postal Services Directive are applicable to all cross-border postal operation inside and outside the European Union.³⁸³ As far as the agreements in the Universal

³⁸⁰ The Universal Postal Union, with Art. 12 Universal Postal Convention 2016, attempts to suppress remailing, and in Germany it is prohibited, at least for bulk mailing; German Federal Supreme Court, decision of 10 October 2002, III ZR 248/00, BGHZ 152, 198. In contrast, see European Commission, Statement of Objections of 5 April 1993, 32.791 – Remail, para. 80.

³⁸¹ Cf. e.g. Copenhagen Economics, Quantification of financial transfers caused by Universal Postal Union terminal dues – Final Report, Postal Regulatory Commission, 3 November 2015.

³⁸² In the following we follow in particular WIK-Consult, Main Developments in the Postal Sector (2010–2013) – Final Report, op cit., p. 89 et seq.; Geradin, D., Legal Opinion on the Compatibility of the Proposed Target System for Terminal Dues with EU Law, 29 April 2012; WIK-Consult, Study on the External Dimension of the EU Postal Acquis – Final Report, Study for the European Commission, Directorate General for Internal Market and Services, Bad Honnef, November 2010.

³⁸³ While Art. 13 EU Postal Services Directive describes principles for agreements on terminal dues for cross-border universal services within the Community and Art. 2(15) defines terminal dues as “the remuneration of universal service providers for the distribution of incoming cross-border mail comprising postal items from another Member State or from a third country”, Art. 12 lists general tariff-setting principles for universal services, which according to Art. 3(7) and Recital 13 “cover national as well as cross-border services”, where “cross-border mail” is defined according to Art. 2(11) as “mail from or to another Member State or from or to a third country”. For the application of European competition law it is however immaterial whether the agreements are concluded between European undertakings as well as between European and non-European undertakings, as long as the agreements have an effect on the internal market; CJEU, judgment of 25 November 1971, 22/71 – Béguelin Import v G.L. Import Export, ECR 1971, 949, ECLI:EU:C:1971:113, paras. 10–12 : “The fact that one of the undertakings which are parties to the agreement is situ-

Postal Union are concerned, Article 106(1) and Article 101 et seq. of the TFEU in conjunction with Article 4(3) TEU can be applicable, since within the Universal Postal Union the EU Member States, and not the designated operators, conclude the agreements.³⁸⁴ If the abovementioned agreements should prove to violate European law, they must be amended to comply with the law.

Intra-European postal services

212. With respect to the postal system within Europe it is questionable to what extent the IPC's multilateral tariff agreements, REIMS and IRA-E, are compatible with the EU Postal Services Directive. According to Articles 12 and 13 of the EU Postal Services Directive, the prices, tariffs or terminal dues for cross-border mail must in particular be cost-oriented, transparent and non-discriminating. It is possible that the tariffs under the REIMS and IRA-E Agreements are not cost-covering, as this was not the case with earlier versions of the REIMS Agreement. Detailed information about the agreements, including both the amount of the tariffs and other terms, are not publicly known, however. Also, they apply exclusively to the member firms. For cross-border delivery of mail, competitors must negotiate the tariff bilaterally with the members, which could always put competitors at a disadvantage.

213. It is likewise questionable whether the multilateral agreements of the IPC, REIMS and IRA-E, are compatible with the EU competition rules. According to Article 101(1) TFEU all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market and thus prohibited. Exempted from these are, under Article 101(3) TFEU, such agreements that lead to efficiency gains, allow consumers a fair share of the benefit and are indispensable for achieving these objectives, while not eliminating competition.

214. The REIMS and IRA-E Agreements on tariffs for the delivery of incoming cross-border mail are agreements between members of the IPC, that is, between undertakings that are also designated operators. These agreements are capable of affecting trade between the EU Member States and distorting competition within the internal market.³⁸⁵ Namely, due to the territorial fragmentation that has always prevailed in the postal markets, which is primarily limited to the respective national borders, these agreements restrict competition between the members on the one hand and between them and the non-members on the other hand.

215. The European Commission therefore already expressed "new competitive concerns" in the course of its last exemption decision on the REIMS II Agreement in 2003, concerns which had arisen in addition to those noted in the Commission's decision in the notification proceeding in 1999. These were rooted in the fact that the indexation of the terminal dues to the rates for comparable domestic postal services was tantamount to concerted price-fixing.³⁸⁶ The European Commission further noted that the indexation to the rates for domestic postal services, which were influenced by the domestic, and not the international, competitive and market conditions, also con-

ated in a third country does not prevent application of that provision since the agreement is operative on the territory of the common market".

³⁸⁴ The prohibition of cartels according to Art. 101(1) is addressed to undertakings. However, the EU Member States are required under Art. 4(3) TEU and Art. 106(1) and (2) TFEU to refrain from or cease to apply any measures that contradict the rules on competition, and in particular Art. 101 TFEU; on this see also CJEU, judgment of 11 April 1989, C-66/86 – Ahmed Saeed, ECR 1989, 803, ECLI:EU:C:1989:140, para. 48; CJEU, judgment of 9 September 2003, C-198/01 – Consorzio Industrie Fiammiferi, ECR 2003, I-8055, ECLI:EU:C:2003:430, para. 54.

³⁸⁵ On distortions of competition cf. paras. 203 et seq.; on the effect on trade of the price effects caused directly and indirectly by the tariff systems cf. Monopolies Commission, Special Report 79, op cit., Section 1.2.2.

³⁸⁶ European Commission, decision of 15 September 1999, COMP/36.748 – REIMS II, OJ EU L 275 of 26 October 1999, para. 19: (see note 23, supra) "Domestic tariffs usually distinguish between different weight steps (such as 20, 50 and 100g for letters). According to the Agreement, these different tariffs are converted, on the basis of a standard structure, into linear tariffs for the purpose of calculating terminal dues. In so doing, the Agreement distinguishes between three categories: Letters up to C5 size and a maximum weight of 100 g; Flats up to C4 size and a maximum weight of 500 g; Packets of all shapes up to limits of weight and size set by the UPU."

siderably affected free pricing.³⁸⁷ It observed that the competition-restricting effects even extended to competition on the market for cross-border mail in a different country in which a public postal operator is a designated operator. In this context the European Commission discerned, among other things, risks that the REIMS Agreement could be applied in a discriminatory manner to third-party postal service providers who are in competition with the designated operators to deliver outgoing cross-border mail.

216. The passing on of efficiency gains is already hampered due to the indexation of the negotiated tariff to the rates of comparable domestic postal services or historical prices. Even if the consumers profit in the short term from a potential passing on of the – below-cost – tariff to the detriment of competition, in the long term the distortion of competition means they will have to pay higher prices for cross-border postal services than would be the case with functional and unadulterated competition that provides incentives for efficiency. Furthermore, competition is eliminated in the sense of Article 101(3) TFEU, because the disadvantages for online commerce make it harder for market participants to generate dynamic efficiencies.³⁸⁸

217. Under Article 102, first sentence, of the TFEU, furthermore, the abusive exploitation of a market-dominating position is prohibited. According to Article 102, second sentence, lit. c, TFEU, this is triggered explicitly by applying different conditions for equal services to business partners, thus putting them at a competitive disadvantage. As explained above, the members of the IPC hold a market-dominating position, at least regarding the cross-border delivery of letters.³⁸⁹ Membership in the IPC requires, in particular, membership in the Universal Postal Union and an obligation to perform universal services, so that it has always been impossible for the competitors of the designated operators to become members. Under these conditions, the tariff agreements of the IPC, REIMS und IRA-E, can, if they do not cover costs, lead to false incentives for the member firms, so that the members of the IPC exploit their market position to the detriment of their competitors.³⁹⁰

218. Likewise, the exclusive agreements on the development and implementation of technical and logistics standards for cross-border mail delivery could also allow members to disadvantage their rivals. The development of these standards enhances the interoperability of the postal networks. This is on the face of it a positive development, as a high level of interoperability in the national postal networks is necessary for cross-border mail service. The development of standards in the IPC, however, is taking place without the participation of competitors. What is more, these competitors will not be allowed to use the developed standards, such as that for a uniform barcode system.³⁹¹ The exclusion of other market participants from developing and using technical and logistics standards reinforces their dependency on the postal networks of the commercial members of the IPC and puts them at a timing, technological, and financial disadvantage.

219. Similarly, the IPC's recently implemented INTERCONNECT programme, which aims to erect a digital platform to offer delivery solutions for global e-commerce, displays potential for abuse. The analysis of the data collected

³⁸⁷ In an opinion the European Commission clarified that its 1992 Green Paper, together with the recommendation that terminal dues should be oriented on the tariffs for domestic postal services, does not present a workable solution, but is rather to be interpreted as a "source of inspiration"; cf. European Commission, e-mail to International Express Carriers Conference of 17 November 1995, Case IV/32.791 – Remail, paras. 6 et seq.: "The Commission accepted that these costs could be difficult to calculate precisely and stated that domestic letter tariffs could be deemed an adequate indication of these costs. [...] You are quite right to observe that the Green Paper does not provide an enforceable solution to your complaint. However, it is a source of inspiration that adequately identifies the features required for a cost regime to be acceptable ..." Cf. also European Commission, Green Paper on the Development of the Single Market for Postal Services, 1992, COM(91) 476 final.

³⁸⁸ European Commission, Notice – Guidelines on the application of Art. 81(3) EC, 2004/C 101/08, paras. 105 et seq. on the significance of dynamic efficiencies.

³⁸⁹ On the competitive conditions of cross-border mail cf. Monopolies Commission, Special Report 79, op cit., paras. 40 et seq.

³⁹⁰ Paras. 203 et seq. in this Section.

³⁹¹ Para. 190 and Monopolies Commission, Special Report 79, op cit., para. 46; statements of market participants to the Monopolies Commission. Alternatively, the organisation GS1 for instance promotes the use of global technical logistics standards accessible without discrimination, e.g. allocating company-neutral transport numbers for wares and goods (Global Trade Item Numbers) as well as other unambiguous labelling of transport objects.

allows the postal service providers participating in the programme to rapidly tailor their service offers to the needs of the customers. Also, they can sell services for advertising purposes to third parties and thereby generate other types of operative revenue. Competitors of the designated operators that have no access to the INTERCONNECT programme will thereby without doubt suffer considerable competitive disadvantages and possibly even be pushed off the market. Furthermore, the programme could emanate a market-foreclosing effect, because potential competitors would then have higher informational costs to enter the market. To what extent an exclusive membership of the designated operators in the IPC impedes the access of competitors to essential facilities or information in the sense of an “essential facility” pursuant to Article 102 TFEU should also be examined.

220. It must be noted that the multilateral agreements coordinated by the IPC, REIMS and IRA-E, raise severe competition-law concerns. Since the notification of the REIMS II Agreement in 2003 and the entry into force of Regulation 1/2003 the European Commission has not assessed any more agreements between designated universal postal service providers. The concerns about these agreements are heightened by the fact that the legal framework has changed with the entry into force of the second and third EU Postal Services Directives in 2002 and 2008, respectively. The letter markets in all Member States of the European Union were liberalised, up to the end of 2012, as a consequence of this new legislation. The market liberalisation resulted in the designated operators now being in direct competition as regards cross-border postal services – with each other and with other postal service providers on their respective domestic markets. The potentially competition-restraining effects of the above-named agreements can now be brought to bear all the more forcefully. The Monopolies Commission consequently advocates a competition-law review of the IPC-coordinated multilateral agreements by the competent competition agencies.

Extra-European postal services

221. With regard to mail outside Europe it is questionable to what extent the terminal dues and inward land rates of the Universal Postal Union are compatible with the EU Postal Services Directive. According to Articles 12 and 13 of the EU Postal Services Directive, the prices or tariffs or terminal dues for cross-border mail must in particular be cost-oriented, transparent and non-discriminating. That the terminal dues of the target system, within which the majority of the EU Member States is grouped, is precisely not cost-oriented, is stated by the Universal Postal Union itself in a current market study. In addition, the stipulated pricing limits preclude a cost-based price competition in the first place. The inward land rates as well, though representing a country-specific and nevertheless indexed tariff, do not allow a fully cost-based remuneration of cross-border parcel services. Furthermore, the agreements on tariffs in the Universal Postal Union can be discriminatory in at least three aspects:

- First, the designated operators of the EU Member States may have to pay different terminal dues for the same cross-border postal service within the European Union – depending on how long the operator’s EU Member State has already been a member of the target system.
- Second, the rates payable for cross-border postal services differ from those for comparable domestic postal services because of the lack of cost-orientation of the terminal dues and inward land rates.
- Third, the terminal dues and inward land rates apply only for cross-border postal services between designated operators. For cross-border postal services between designated operators and alternative postal operators, bilateral agreements must be made.

At least the terminal dues are transparent in the sense that the tariffs and their respective criteria for calculation are published on the internet site of the Universal Postal Union. Concrete values for the inward land rates, on the contrary, are not publicised.

222. Furthermore, the agreements in the Universal Postal Union, especially those concerning terminal dues, could be incompatible with the EU rules on competition.

- The prohibition of competition-restraining agreements pursuant to Article 101(1) TFEU applies strictly to undertakings. The Court of Justice of the European Union has nevertheless ruled that measures of the

Member States may not take priority over the application of the competition rules of the Treaty. The public authorities, then, may not establish any rule that prescribes or facilitates cartel agreements or amplifies their effects or which is divested of its public character by virtue of the fact that the public authority transfers responsibility for decisions that have an impact on the economy to private commercial players.³⁹²

- According to Article 106(1) TFEU the Member States likewise may not enact or maintain any measures that contradict the EU Treaties, and especially the competition rules, with regard to public undertakings and to undertakings on whom they confer special or exclusive rights.

In this respect, similar concerns exist as with respect to the agreements of the IPC. The relevant tariff systems for the designated operators of the EU Member States for letters and parcels are developed by the states represented in the Universal Postal Union with the participation of the designated operators, and then enacted by the member countries. Even if the consumers seem to profit in the short term from a (possible) passing on of the – below-cost – terminal dues and inward land rates, due to the distortion of competition the prices they have to pay in the long run tend to be higher for cross-border postal services than would be the case with functional and unadulterated competition that provides incentives for efficiency.

223. According to Article 102, first sentence, of the TFEU, furthermore, the abusive exploitation of a market-dominating position is prohibited. It has been noted above with respect to the agreements of the IPC that the international tariff systems in many cases lead to unequal treatment.³⁹³ This is also true of the tariff systems agreed upon in the Universal Postal Union. Thus for instance the amount of the terminal dues for the delivery of incoming cross-border letter services is calculated according to the membership of the relevant EU Member State in the target system where the letter originates.³⁹⁴ As the terminal dues and inward land rates are not cost-oriented in their structure, the rates for the delivery of incoming cross-border mail normally does not correspond to those for comparable domestic mail. The fact that the terminal dues and inward land rates apply exclusively to the designated operators puts the non-designated postal service providers at a disadvantage from the outset. Also, mail from the operational venues, or so-called offices of exchange, of the designated operators, is discriminated against.³⁹⁵ Beyond this, the non-designated postal operators are discriminated against in that they cannot collaborate on or profit from the technological standards developed by the Universal Postal Union for the delivery of mail. This greatly increases their dependency on the postal networks of the designated operators.

224. This unequal treatment also raises questions under the EU state aid provisions (Arts. 107 et seq. TFEU), among other things. The EU Member States contribute to developing tariff rules within the Universal Postal Union that improve the financing of only the designated operators and thus provide the latter with advantages in competition with other postal service providers within the European Union. This appears problematic at least when individual companies who are under no obligation to provide universal postal services, such as the DPAG, profit from the tariff rules.

225. Under Article 34 TEU the Member States of the European Union are obliged to coordinate their activities in international organisations and at international conferences and to represent the standpoints of the Union in them. The relevant standpoints of the Union for the postal sector, and those that touch on the activities within the Universal Postal Union, arise from the EU Postal Services Directive and from a common trade policy pursuant to

³⁹² CJEU, judgment of 17 January 1984, 43/82 – VBVB und VBVB, ECR 1984, 19, ECLI:EU:C:1982:119, para. 40; judgment of 10 January 1985, 229/83 – Leclerc, ECR 1985, 1, ECLI:EU:C:1985:1, para. 14; judgment of 21 September 1988, 267/86 – Van Eycke/ASPA, ECR 1988, 4769, ECLI:EU:C:1988:427, para. 16.

³⁹³ On the competitive conditions regarding cross-border mail cf. Monopolies Commission, Special Report 79, op cit., para. 40 et seq.

³⁹⁴ A discrimination on grounds of nationality by a market-dominating undertaking constitutes a breach of Art. 102 TFEU; CJEU, judgment of 2 March 1983, C-7/82 – GLV/Commission, ECR 1983, 483, ECLI:EU:C:1983:52, para. 56. Also cf. European Commission, decision of 25 July 2001, COMP/C-1/36.915 — Deutsche Post AG/interception of cross-border mail, OJ EU L 331 of 15 December 2001, para. 129.

³⁹⁵ Universal Postal Union, Art. 13(7) Universal Postal Convention 2016.

Article 207 TFEU and the AETR doctrine.³⁹⁶ Essentially, the abovementioned positions of the Union aim for the implementation of a regulation framework to realise an internal market for postal services under consideration of the applicable European competition rules. The competences of the Union in the Universal Postal Union – and thus of the Member States in the safeguarding of Union interests – are strictly limited to the design of the legal and regulatory framework for the international postal system, to the extent that it affects the internal market. What must be delimited from this are operative matters such as the design of the tariff systems for the delivery of incoming cross-border mail. However, the fact that the delegates of the European Member States have until now taken decisions on both regulatory and operative measures contains at least the risk of conflicts of interest.³⁹⁷ This was not altered by the joint declaration of the representatives of the European Member States at the 2008 Congress of the Universal Postal Union of their intention to fulfil the obligations arising from the Treaty on European Union.³⁹⁸ Nevertheless the representatives of the German delegation in 2016 advocated for an independent examination of the Constitution of the Universal Postal Union with the goal of considering a separation of the procedural processes regarding voting on regulatory and operative topics.³⁹⁹

226. Against this background, the Monopolies Commission welcomes the fact that the federal government is weighing the opening of access to the Universal Postal Union for competitors of the DPAG as well.⁴⁰⁰ The federal government concludes that in the international postal services arena there exists no “level playing field”, insofar as designated operators that are still predominantly in state hands can assert their interests within the Universal Postal Union. The Monopolies Commission recommends the federal government to declare in its turn to the Universal Postal Union all postal service providers that declare their willingness to provide cross-border services and file an application under Article 4(2), first sentence WPostVtr1999G, as “designated operators”.⁴⁰¹ The necessary details of accreditation should be determined by the Federal Ministry for Economic Affairs and Energy through a legal ordinance in accordance with Section 4(2), third sentence WPostVtr1999G. As an alternative, the German delegation to and participation in the Universal Postal Union could temporarily be advertised for tender among all postal service providers in Germany. A competition-friendly rule on accession to the Universal Postal Union could simultaneously be an example for other EU Member States and create the basis for a level playing field throughout Europe with non-discriminatory access to important infrastructures and institutions. This would considerably lessen the incentives for abuse of any market-dominating positions by the designated operators in the field of cross-border postal services, especially letter mail and B2C mail. Participation by DPAG’s competitors in the development of concepts for technical and logistics solutions to enhance the interoperability of the postal networks could shift market development into high gear.

227. Furthermore the Monopolies Commission recommends the federal government to work within the Universal Postal Union towards designing the tariff systems of the Universal Postal Union, insofar as they effect the mail in the internal market, in such a manner that they meet the requirements of the EU Postal Services Directive and of European competition law. This means:

³⁹⁶ Die AETR doctrine goes back to a judgment of the Court of Justice of the European Union according to which powers are implicitly conferred on the European Union in international relations, including in those areas necessary for the execution of its explicitly conferred powers in international relations – e.g. the creation of an internal market. Thereby the European Union is not assigned new powers in international relations, but only granted the necessary competences so as to be able to execute the competences explicitly granted it; CJEU, judgment of 31 March 1971 – 22/70 (ERTA/AETR), ECR 1971, 263, ECLI:EU:C:1971:32.

³⁹⁷ On the conflict of interests of the state arising from its share ownership in the DPAG cf. Monopolies Commission, Special Report 79, op cit., Section 2.1.7.

³⁹⁸ Universal Postal Union, Decisions of the 2016 Istanbul Congress, Bern 2017, p. 113: “The delegations of the member countries of the European Union hereby declare that their countries will apply the Acts adopted by this Congress in accordance with their obligations pursuant to the Treaty on European Union, the Treaty on the functioning of the European Union and the General Agreement on Trade in Services (GATS) of the World Trade Organization.”

³⁹⁹ Campbell, J. I. jr., Major Decisions of the 2016 UPU Istanbul Congress and Implications for International package Delivery Services, 16th WIK Königswinter Postal Seminar, November 2016, p. 11.

⁴⁰⁰ Notification by the Federal Government, BT-Drs. 18/10040 of 13 October 2016, paras. 116 et seq.

⁴⁰¹ Monopolies Commission, Special Report 74, Post: 2015: Postwendende Reform – Jetzt!, Baden-Baden 2016, paras. 65 and 247.

- The agreements on rates for the delivery of incoming cross-border letters and parcels should accordingly be free of discrimination, that is, they should apply to all postal service providers (designated or not) of the EU Member States equally.
- Furthermore, the rates structure – at least within Europe – should be cost-oriented. Thus, it should encompass solely those costs that would accrue from the delivery of incoming cross-border mail in the respective EU Member State under competitive conditions. To guarantee this, the existing price limits and indexation would have to be eliminated. While such a reform of the tariff system does not seem readily practicable considering the purpose of the association, at least the price limits should be revoked.
- In addition, as compensation to the developing countries for rising terminal dues and inward land rates, a fund could be established to which the members of the Universal Postal Union could contribute amounts corresponding to their economic power.
- Also, the rates for outbound cross-border mail to countries outside the European Union should be designed in a cost-oriented manner to ensure that no economic disadvantage arises from the fulfilment of universal service obligations. Beyond this, the rates should be transparent, which necessitates the comprehensive provision of information.

Not only the postal operators would profit from such a reform of the tariff systems, but also and in particular the consumers and the (online) traders, which would be in line with the Digital Single Market strategy of the European Commission. It could also be necessary to amend the current rules of the Universal Postal Union to make them compatible with the law on state aid.

228. If it initially proves not to be possible to structure the terminal dues in a cost-oriented manner, it could be sufficient to provide competitors with non-discriminatory access to the postal infrastructure of the designated operators and the tariff systems, for this would allow competitors to attain a decisive cost advantage over the designated operators. They could then offer comprehensive domestic delivery for below-cost rates to the detriment of the designated operators, who as market-dominant players would have to provide partial services for their rivals, i.e. last-mile delivery of domestic and inbound cross-border mail alike, for below-cost charges. Further, the competitors could attempt to attain arbitrage gains. Thus it could be less costly for them to first transfer mail items intended for domestic delivery outside the country, then to bring them back across the border and deliver them for below-cost charges. This would significantly shift market power potential. The designated operators would subsequently have an incentive to subject their terminal dues to a cost-oriented structure.

229. The Monopolies Commission sees in the competence of the Member States to decide on legal or regulatory matters and on operative issues alike a source of considerable conflicts of interest. It therefore recommends that the federal government work to instate a strict division of decision-making power, making the representatives of the national governments of the Member States exclusively competent for legal and regulatory issues, and the representatives of the designated operators exclusively competent for operative matters. In decisions on legal and regulatory matters the federal government should meticulously coordinate its activities with the representatives of the governments of other European Member States within the meaning of Article 34 TEU. The guidance of the European Commission should always be sought in such coordination efforts.