The REIMS II exemption decision: enhancing competition in the cross-border mail market through third party access

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1. Introduction

On 23 October 2003, the European Commission adopted a decision in case COMP/C1/38170 REIMS II prolonging for an additional five years the exemption of the REIMS II (Remuneration of Mandatory Deliveries of Cross-Border Mails) Agreement (‘REIMS II’), i.e. the instrument by which 17 European Public Postal Operators (‘PPOs’) (1) collectively determine the remuneration they pay each other for the delivery of incoming cross-border mail in the country of destination, so called terminal dues (‘TDs’) (2).

This has been the second time that the Commission has assessed the compatibility of the REIMS II Agreement with EC Competition Law. On 15 September 1999, the Commission had already exempted the REIMS II Agreement for a period of two years expiring on 31 December 2001 (3). An amended REIMS II agreement was notified on 18 June 2001 with the request for a renewal of the 1999 exemption.

The decision of the Commission to renovate the exemption is based on two main elements: the acknowledgement of the effective benefits for consumers as a result of the implementation of the agreement and the strict requirements imposed on the parties in the decision, notably the decision to condition the exemption to the awarding to third parties of a non-discriminatory access to REIMS II delivery terms and conditions.

2. A short history of terminal dues

In 1969 the Universal Postal Union (‘UPU’) introduced a system for the remuneration of delivery of cross-border mail in the country of destination, the ‘terminal dues’. The method used, as well as the one subsequently introduced in 1987 in the framework of the European Conference of Postal and Telecommunications Administrations (‘CEPT’), a sub grouping within the UPU, were not satisfactory, since they did not properly reflect the real costs of delivery in the country of destination. In 1993, the Commission issued a statement of objections stating that the CEPT system was contrary to Article 81(1) since it fixed a uniform rate for the delivery of incoming international mail. The Commission also considered that Article 81(3) was not applicable and that the method for calculating TDs should at least involve a more accurate approximation of these costs, for example by calculating TDs as a percentage of domestic tariffs in the country of destination. However the Commission decided not to proceed to a prohibition decision in that case in view of the subsequent signature, on 2 June 1995, of the first REIMS I Agreement under which TDs were for the first time to be linked to domestic tariffs on a European-wide basis. The approach adopted by the Commission was endorsed by the Court of First Instance in its judgment of 16 September 1998 in Case T-110/95 (IECC/Commission).

Further to the expiration of the REIMS I on 30 September 1997, the same parties except the PPO of the Netherlands decided to sign REIMS II, which maintained the framework of the previous agreement although introducing some relevant changes mainly regarding the application of the penalty system.

3. The REIMS II agreement

The main aims of the REIMS II agreement are to provide the parties with a compensation for the delivery of cross-border mail which reflects more closely the real costs of delivery of each party, and to improve the quality of cross-border mail services.

According to REIMS II as re-notified, TDs are calculated as a percentage of the domestic tariff for priority mail. In reality REIMS II identifies different levels of remuneration for different products. The main levels of remuneration are the so-called Level 1 and Level 3. The former is the remuneration paid for the delivery of priority mail and relates to what are generally known as TDs. The latter relates to the generally available

(1) The PPOs of all EU Member States except The Netherlands and those of Norway, Iceland and Switzerland.
(2) IP/03/1438 of 23 October 2003.
domestic rates’ in the country of delivery to which all the parties are obliged to grant each other access. This remuneration level, which will normally be lower than TDs (Level 1), is important as a possible low cost alternative to them.

In the notified agreement, TDs were to be increased over a transitional period ending in 2004. During this period two intermediate steps were foreseen (73.3% on 1 January 2002 and 76.6% on 1 January 2003) before reaching the final level of 80% in 2004.

In REIMS II the link with the improvement of the quality of the relevant services is achieved via the introduction of a system of quality-of-service standards for the delivery of priority mail (1).

4. The relevant markets

The REIMS II Agreement concerns the markets for normal — as opposed to express — cross-border mail between the countries concerned i.e. cross border mail from one REIMS II country to another REIMS II country.

The relevant product market is to be further divided into a market for the forwarding of outgoing cross-border mail, on which PPOs and to an increasing extent private companies collect mail from customers in the originating country for delivery in other countries, and a market for delivery of incoming cross-border mail on which PPOs (and for a very small part other postal operators) offer mail delivery services for cross-border mail to PPOs and private mail companies. This distinction has been reinforced by the full liberalisation of outgoing cross-border mail by Directive 2002/39/EC (2).

The geographic dimension of the markets must be considered national since national boundaries mark the scope of national monopolies. Moreover, collection and delivery are organised on a national basis and prices systems differ for every country.

5. The 1999 Exemption decision

In 1999, the Commission considered that the agreement constituted a restriction of competition, falling within the scope of Article 81(1), because it collectively established a common level of TDs expressed as a percentage of the domestic tariff in the receiving country. The Commission concluded that, although the amounts in absolute terms were not fixed, the agreement had the effect of jointly fixing prices. By linking the price for the cross-border service to the price for the domestic service, the price of which is determined primarily by domestic considerations, the parties eliminated or reduced their freedom to set the prices they charge for the delivery of incoming cross-border mail.

As regards Article 81(3), reference was made to the following main elements: (1) the need for the PPOs to increase TDs in order to cover their costs, (2) the fact that the penalty mechanism would bring to substantial improvements in the quality of service for incoming cross-border mail, (3) the likelihood that the availability of a low-cost alternative to TDs would reduce the financial impact of the increases of TDs.

At the same time, in absence of adequate data on parties’ costs for delivery of inbound cross-border mail, the Commission considered that the parties had not provided sufficient evidence that the ultimate level of remuneration was an adequate proxy for these costs. As a consequence parties were allowed to raise TDs to a level equal to only 70% of the domestic tariffs whilst the final increase to the 80% would have been allowed only in presence of the necessary evidence in terms of accurate cost data (3).

6. The new decision/The new elements

The considerations mentioned above are also at the basis of the new exemption decision which has however modified the assessment made in 1999 with regard to the requirements imposed on the parties for the awarding of the exemption. These modifications are mainly due to the presence of several new important elements which were not known in 1999, namely:

6.1. The Parties’ cost data

Further to the implementation by the Parties of the obligation to introduce a transparent cost

(1) The standards are defined as the percentage of incoming cross-border mail which has to be delivered within one working day after the day of its arrival. A penalty system, or curve, is applied when the agreed standards are not met. The larger the gap between the quality target and the quality of service actually achieved, the higher the penalty applied.


(3) For this purpose the Commission imposed on the parties the obligation to develop, by the end of 1999, a transparent cost-accounting system, as provided for in Directive 97/67/EC, ensuring that all significant cost elements can be identified, quantified, compared and controlled.
accounting system, the Commission has obtained detailed accounting data regarding each party's costs for cross-border mail delivery.

This information, not available at the time of the 1999 exemption decision, has permitted the Commission to make a more accurate assessment of the agreement.

6.2. Level 3 access

The 1999 decision obliged the parties to take all the necessary steps in order to grant each other effective access to generally available domestic rates, so called Level 3.

The investigation carried out in the course of the procedure showed that the effective use of this opportunity had a difficult take-off although, more recently, the volumes of REIMS II mail making use of Level 3 tariffs have risen substantially. The explanation given by the parties for this phenomenon is that, since Level 3 rates were meant to be a cheaper and less qualitative alternative to TDs, this possibility was limited as long as TDs were still low, but has risen substantially as soon as TDs started to go up. As TDs have gone up (mainly through reduction of penalties due to increased quality), so has the volume of cross-border mail making use of such access, rising from 33 million items in 1999 to 120 million in 2002.

6.3. The new Postal Directive

On 10 June 2002 the Council of the European Union and the European Parliament adopted Directive 2002/39/EC on further liberalisation of the European postal markets. One of the major changes introduced by this Directive is that, as from 1 January 2003, Member States are no longer allowed to include the market for outgoing cross-border mail in the reserved area unless it is necessary to ensure the provision of the universal postal service. This modification of the regulatory environment increases substantially the scope of the service area in which REIMS II parties are direct competitors, thus modifying the basis on which the applicability of both Article 81(1) and 81(3) have been assessed.

6.4. Quality improvement

The investigation carried out further to the re-notification of the agreement has also shown that REIMS II has effectively brought about substantial improvements in the quality of the relevant services.

In 1999 the evaluation of the impact of REIMS II on quality of service was mainly abstract and correlated to the inherent capability of the agreement to foster quality improvements. Four years after, it has been indeed possible to ascertain that since then quality of service has increased substantially. Despite some different critic opinions, the Commission believes that these improvements are mainly due to the application of REIMS II quality improvement mechanism based on penalties (1).

7. The new decision/Article 81(1) of the EC Treaty

The new exemption decision confirms and reinforces the assessment made in 1999 as regards the applicability of Article 81(1). Indeed, developments in postal markets have led the Commission to identify competitive concerns which are even more important than those referred to in 1999. To an increasing extent PPOs are in direct competition with each other, most of all in those home markets for outgoing cross-border mail which have been opened to competition. Bearing the above in mind, the conclusion must be drawn that the restrictions of competition brought about by the REIMS II agreement have become more serious, thus requiring more stringent requirements for the concession of an exemption.

8. The new decision/Article 81(3) of the EC Treaty

8.1. Promotion of technical and economic progress and improvement in the distribution of goods

As in 1999, in the new exemption decision the Commission has considered that the REIMS II agreement produces improvements which fulfil the first prerequisite for exemption under Article 81(3).

The first important improvement to be taken into consideration is the increased correlation between terminal dues and the Parties' costs for the delivery of incoming cross-border mail. An imbalance between costs of delivery and remuneration, in

(1) For example, between 1998 and 2000, the percentage of cross-border mail delivered within one day from entering the country of destination has improved, on average, by 6%. In Italy, the improvement amounts to 50% and in Norway to 13%. Indicators show that the improvements continued after 2000.
fact, would oblige PPOs to cover the losses suffered in the delivery of international mail by making use of profits generated by delivery of domestic mail, thus creating distortions in the allocation of revenues from different categories of end-users. In this regard, it has been considered as an improvement the fact that the REIMS II TDs increase the above mentioned correlation.

The main benefit that the Commission has taken into consideration is, however, the increase in the quality of the relevant services which the agreement has produced. The decision recognises that the quality of the relevant services has improved substantially in the period in which REIMS II has been applied. Although it has been argued by some third parties that those improvements have causes other than REIMS II, notably improvements in the quality of domestic mail delivery, the causal link between such improvements and REIMS II has been considered sufficiently strong to be taken into consideration in the assessment of the case (1).

According to the decision, the link between TDs payable to the receiving party and improvements in the quality of the cross-border delivery service (2) has worked and works as a strong incentive for the parties to improve service quality.

8.2. Benefits for consumers

The decision takes carefully care that consumers will benefit from the highest possible advantages from the exemption of REIMS II. As regards the main benefits already mentioned, i.e. the improvements in the quality of service and the better correlation between TDs and costs, the awarding of a fair share of these benefits to consumers is a natural consequence. Quality of service is in fact easily perceived by consumers, as are increases of domestic mail tariffs which may be the consequence of cross-subsidisation of losses incurred in the delivery of cross-border mail.

Another important element this respect is the fact that, as in 1999, the Commission has conditioned its exemption on the availability of a viable and less-costly alternative to TDs for the delivery of cross-border mail and has imposed a condition in this respect. Such an alternative, in fact, reduces the financial impact of the increases of TDs necessary to make them consistent with the parties' costs.

8.3. Indispensability

The requirement of indispensability set forth at Article 81(3) (a) has been interpreted in the sense that an agreement setting TDs at the same percentage of domestic tariffs for all the parties is to be considered indispensable for the attainment of the relevant benefits and improvements. It has been considered, however, that the common level of TDs agreed upon by the parties must reflect, on average, their actual costs for delivery of inbound cross-border mail. In this regard, since they have failed to demonstrate that 80% of the domestic tariffs is a sufficiently accurate approximation of their costs, the parties have been requested to reduce the TDs levels indicated in the notified agreement. The parties have therefore agreed on a new set of TDs levels to be applied during the exemption. According to the decision these TDs sufficiently reflect, on average, the parties' costs. The restriction of competition connected with the joint fixing of TDs percentages by the parties is therefore to be considered indispensable within the meaning of Article 81(3) (a).

8.4. Non elimination of competition

The application of the criterion set forth in Article 81(3) (b) constitutes the main difference with the 1999 decision since it has brought what is perhaps the most important result of the whole exemption procedure i.e. the imposition of non-discriminatory access to REIMS II TDs for third party postal operators.

The reasoning behind the imposition of this requirement is mainly based on two elements: (i) the fact that REIMS II is only open to postal operators entrusted with the obligation of providing the universal postal service (thus

(1) As regards the influence of domestic mail quality, according to the Commission the available data show that since the entry into force of the REIMS II Agreement, quality of service for cross-border mail has improved more than quality of service for domestic mail.

(2) According to REIMS II quality improvement mechanism, the receiving party can claim higher TDs from the sending parties only if it manages to meet the quality-of-service targets set out in REIMS II. Otherwise, penalties will be applied which may considerably reduce the TDs to which it is entitled.
limiting participation to PPOs) and, (ii) the liberalisation of outgoing cross-border mail.

The effect of the combination of these two elements is that, without allowing third parties access to delivery on an equivalent foot as REIMS II parties, competition on the outgoing cross-border mail markets risks to be strongly reduced if not eliminated.

Without third party access, in fact, a private postal operator providing outgoing cross-border mail services has basically two alternatives, either to turn the mail over to the sending party, paying the full international tariff in the country of origin, or, to transport the mail to the receiving country to hand it over to the receiving party and pay the full domestic tariff in the country of destination. In both cases it would be obliged to pay a much higher price than that paid for the same service by any REIMS II party competing with him thus being de facto unable to compete on price with them.

When competition between the parties to an agreement risks to be severely curtailed, as it is the case with REIMS II, the likelihood that the criterion at issue is fulfilled is influenced by the intensity of competition from third party operators. Without having access to TDs on REIMS II terms, however, competitive pressure from third parties would be too weak to avoid a substantial elimination of competition. This is why the decision states that, in order to maintain an acceptable level of competition in this market, competing postal operators should be granted access to REIMS II TDs at non-discriminatory conditions and conditions exemption to the respect of this requirement.

9. Requirements imposed in view of the exemption

The requirements imposed in the exemption decision are of two categories: modifications of the notified agreement, and conditions to the exemption.

9.1. Reduction of TDs

The most important amendment of the notified agreement has been the reduction of the TDs levels to be applied during the exemption period.

Further to its analysis of the cost data, the Commission made clear that the final level of 80%, to be reached in 2004 according to the re-notified agreement, was still not indispensable to achieve the benefits of the agreement and that the maximum level of TDs compatible with an exemption would have not been superior to the weighted average of the parties' costs (1). As a consequence, in January 2003, the parties amended REIMS II whereby TDs will now go up more slowly over a longer transitional period: 2002: 73.3%, 2003: 74.5%, 2004: 75.7% and 2005/2006: 78.5% (2). The Commission considered these levels of TDs to be in line with the weighted average of parties' costs.

9.2. Low cost alternatives to TDs/Level 3 access

The need to have a low cost alternative to TDs has been addressed by means of both an amendment to REIMS II and a condition to the exemption. On the one hand the important increase in the use of this particular canal of delivery (the Level 3 access) in the last three years has confirmed that the genuine availability of access to generally available domestic rates is still essential. Therefore in the new decision the same condition for the exemption already imposed in 1999 has been reproduced. On the other hand, in the course of its investigation comments were received in which some REIMS II parties as well as other operators expressed their concerns for the lack of harmonisation and transparency in the conditions for access to domestic bulk mail products. To address this concern, the Commission encouraged the parties to introduce a new harmonised product for international bulk direct mail (3).

(1) Weighted average means the average costs of delivery of all the parties multiplied by a weighting factor to take into account the volumes of mail handled by each party.

(2) It should be noted that the percentages above are only the gross values of TDs: if the quality of service targets are not met, TDs are subject to substantial reductions as a result of the penalties applied. In 2002 the penalties system prevented 10 out of the 17 Parties from charging the full TDs set forth in the Agreement.

(3) On 24 January 2003 most of the REIMS II parties signed the ‘Agreement for the Delivery of REIMS International Direct Mail’, which is aimed at introducing a low-cost, transparent and easily usable product for international direct mail.
9.3. Third party access to REIMS II delivery conditions

The requirement to give access to third parties to REIMS II TDs and delivery conditions has been imposed in the form of a condition to the exemption. Failure to respect this condition will therefore need to be analysed by the Commission in order to verify whether the infringement justifies withdrawing of the exemption.

Two are the elements which is worth underlying with regard to the content of this requirement, both related to the interpretation of the non-discrimination principle in the sense that no ‘unjustified’ discrimination is allowed. First, where there are objective differences between REIMS II parties and third parties, the formers are entitled to apply different treatment provided it is proportional. Second, apart from these (rather limited) exceptions, third parties must be treated exactly in the same way as REIMS II parties. One practical consequence is that TDs applied to third parties will also be calculated taking into consideration the relevant penalties. This is quite important since penalties can amount up to 50% of the remuneration due. Another consequence is that the non-discriminatory access does not regard only TDs but also any other type of remuneration indicated in the REIMS II agreement including Level 3 and the one for the brand new IDM product mentioned above. Such a wide-ranging requirement makes will hopefully put third parties in the conditions of competing with the parties on the market for outgoing cross-border mail more effectively than they would in the absence of the REIMS II agreement.

10. Importance of the case

In light of the above, the importance of REIMS II and the consequences of the renewal of its exemption under strict conditions are threefold.

First, the exemption contributes to create a context of legal certainty as regards the compatibility with EC Competition Law of agreements collectively fixing TDs for the delivery of cross-border mail within the European Union. The decision moreover says an important word on the recurring issue of whether REIMS II TDs are an adequate proxy for the parties’ costs of delivering cross-border mail.

In this regard, the assessment made in 1999 has always been considered provisional since the Commission had not at its disposal the data on REIMS II parties’ costs.

In its new investigation, on the contrary, the Commission has been provided with the necessary elements, thus being able to assess whether or not the level of remuneration agreed by the parties is in line with the parties’ costs. The assessment contained in the decision at issue must therefore be considered rebus sic stantibus as definitive.

Second, the exemption decision is of particular importance for its effects on the neighbouring field of so called remailing activities (1). The assessment of whether REIMS II TDs are or not an adequate proxy for parties’ costs is in fact important for interpreting the relevant case law of the ECJ on the limits which PPOs must respect when charging internal postage to mail items which are the object of remailing activities (2). Such clarification should hopefully contribute to strengthen competitive pressure exercised by remailers on PPOs, especially as regards non-price competition.

Last but not least, the solution found regarding third party access is important since it permits to protect and at the same time enhance competition on the outgoing cross-border mail market thus ensuring the effect utile of the relevant provisions of Directive 2002/39/EC.

The decision to grant to third party postal operators non-discriminatory access to the REIMS II terms of delivery, although aimed at preventing a possible elimination of the competition on the relevant market, produces effects which go beyond the mere application of the criteria set forth in Article 81(3). The requirement at issue, concretely contributes to the creation of a real level playing fields in which third party operators are as much as

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(1) Remailing can be described as the practice of re-routing mail between countries utilising a combination of conventional transport services, express services and other postal services. Two types of remailing are mainly known, namely so-called A-B-A and A-B-C remailing. These practices are normally described in the following manner. AB-A remail: letters come from State A but are posted in State B for delivery in State A; A-B-C remail: letters come from State A but are posted in State B for delivery in State C. Centralised mail distribution.

(2) See Judgment of the Court of 10 February 2000, Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS) (C-147/97) and Citicorp Kartenservice GmbH (C-148/97) § 61. According to the Court, only in absence of an ‘agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail’, it is not contrary to Article 86 in conjunction with 82 of the EC Treaty to charge internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which the PPO belongs.
possible put in the same competitive position as REIMS II parties.

11. Conclusions

The opening of outgoing cross-border mail to competition is only the first of a series of regulatory interventions that are foreseen to take place in the next years. The debate on a possible completion of the single postal market after 2009 is ongoing but some Member States have already made clear that they will not keep their monopolies beyond that date. The competitive environment in which REIMS II is going to be applied further to the expiration of the new exemption will therefore be different from now and the assessment made in the decision at issue will certainly need to be revised taking into consideration the changes intervened. In such a context, the structuring the exemption decision, it has been necessary to cope with the need of piloting the transition to the new regulatory and competitive environment already en-visaged in the relevant rules of Directive 2002/39/EC. The requirements imposed in the exemption decision, in particular the imposition of third party access, are therefore of extreme importance to achieve the mentioned result. In a competitive environment which gradually but progressively opens the postal markets to competition it is paramount to prevent any possible pre-emption by the incumbents of any little window of competition already opened. The decision at issue succeeds in achieving this result and brings competition on the relevant markets to a level substantially higher than the one prior to the new exemption.