

to admit patients for any length of time without any legal formality and without power to detain.'

After quoting the above, Lord Goff then goes on to state (at p. 115 of his judgment):

'Here we find a central recommendation of the Percy commission, and the mischief it was designed to cure. This recommendation was implemented, in particular, by section 5(1) of the Act of 1959. That the Bill was introduced with that recommendation is confirmed by ministerial statements made in Parliament at the time: see Hansard (HL Debates, 4 June 1959, cols. 668 and 669).


Following the enactment of the Act of 1959, section 5 (1) was duly implemented in the manner foreshadowed by the Percy commission, a practice which (as is plain from the evidence before the committee) has been continued under section 131(1) of the Act of

1983, which is in identical terms. It is little wonder therefore that the judgment of the Court of Appeal in the present case, which restricts section 131(1) to voluntary patients, should have caused the grave concern which has been expressed in the evidence, both (1) about the need, following the Court of Appeal's judgment, to invoke the power of compulsory detention in many cases, numbered in their thousands each year, which for nearly 40 years had not been necessary and would, on the view expressed by the Percy commission, be wholly inappropriate, and (2) about doubts whether some categories of patients would or would not, in consequence of the judgment, require compulsory detention.'

At p. 116 of his judgment Lord Goff states:

'I am unable with all respect to accept the opinion of the Court of Appeal on the crucial

question of the meaning of section 131(1). I wish to stress, however, that the statutory history of the subsection, which puts the matter beyond all doubt, appears not to have been drawn to the attention of the Court of Appeal ...'

It seems that not only had this issue been fully thought through in the early 1950s, but a seamless harmony between common law and statute law was taken for granted. Perhaps somebody should be trawling through the minutes of the 19th century Lunacy Commissioners to rediscover what robust common sense and wisdom might be overlooked in present practice! 

Graham Ritchie
Ritchie Samuel, Cambridge

European Law

Liberalisation of postal services in the EU

by Cameron McKenna, Brussels



Richard Eccles



Robert MacLean

services and the improvement of quality of service (OJ 1998 L15/14). These proposals can be expected to set out a challenging time-scale for full liberalisation of the sector. The new measures will in any event result in incumbent monopoly operators facing competition in areas currently reserved to them. Directive 97/67 and the Commission's competition law decisions in the sector have all reflected a strong concern to maintain a strict link between the quality of service provided and the proportionality of any restrictions of competition. The Commission is understood to have undertaken a series of studies as the basis for the further liberalisation proposals now due, with regard, inter alia, to cross-border mail, the weight and price thresholds and the clearance, sorting and transport of mail.

Europe's postal services sector is already becoming highly competitive, largely no doubt in anticipation of further liberalisation at EC level. The Dutch and German post offices, amongst the largest in Europe, have in particular pursued

active policies of acquiring courier, express delivery and parcel distribution services companies. The Dutch PTT has acquired TNT and Deutsche Post AG has made various acquisitions in the last two years. The UK Post Office has taken advantage of the relaxation of investment constraints on it by the UK government in late 1998 to acquire the parcel services company German Parcel Paket-Logistik GmbH, reportedly Germany's fourth largest such company (announced in January 1999).

The challenge for the incumbent public postal services operators ('PPOs') will be to expand their activities outside their core geographical areas and core services so as to achieve an overall gain in business through the proposed liberalisation. This comes at a time when electronic communications are already eroding the core letter business of PPOs and putting pressure on their traditional revenues. The issues for the European Commission and the national regulatory authorities will be both to maintain the required levels of universal service and to

The postal services sector is now emerging at the forefront of the evolution of EC competition law. European Commission proposals were due at the end of 1998 and, at the time of writing are expected imminently, for further liberalisation of the sector. This follows the existing internal market directive on postal services, Directive 97/67 on common rules for the development of the internal market of Community postal

ensure that a pro-competitive structure of liberalised markets is maintained. The Commission has indicated that, as liberalisation takes place, it will be concerned to ensure that monopoly power is not used to extend a protected dominant position into liberalised activities, or as a means of unjustified discrimination in favour of major accounts at the expense of small users (preface to the Commission's Notice on the application of the competition rules to the postal sector, the postal services notice ('PSN'); OJ 1998 C39/2).

DIRECTIVE 97/67

The current EC postal services regime is contained in two main measures: Directive 97/67 and the PSN. Directive 97/67 harmonises the universal service obligations to be imposed by member states and the activities that may at present be reserved to PPOs and requires the implementation of specific provisions on tariff and accounting transparency, to avoid cross-subsidisation. Directive 97/67 moreover makes the provision of universal service, as clearly defined in the directive, a pre-condition of continued reservation of services to a PPO. In addition, the directive specifies the following 'essential requirements':

- confidentiality of correspondence;
- security of the postal services network as regards transport of dangerous goods; and
- where justified, data protection, environmental and regional planning.

The criteria of the universal service obligation, together with these essential requirements in the directive, in effect constitute a clarification of art. 90(2) of the EC Treaty with regard to postal services within the directive's specified price and weight limits.

At present, most member states have defined the postal services activities reserved to the incumbent PPO by reference to the weight of the postal item and, in some cases, the price. Article 7(1) of the directive harmonises the services which may be reserved as being the clearance, sorting, transport and delivery of items of domestic correspondence within a price limit (of less than five times the public tariff for an item of correspondence in the first weight step of the fastest standard category, provided that they weigh less than 350g). Recitals

17 and 18 indicate that the price limit is intended to distinguish between the reserved service and the express service, which is liberalised, due to the fact that the added value of express services can most effectively be determined by reference to the extra price that customers are prepared to pay. The value-added is measured by reference to a number of factors, in particular faster and more reliable collection, transportation and delivery of postal items, together with certain supplementary services, such as guaranteed delivery by a given date and various forms of personalised treatment for customers, such as delivery to the addressee in person and/or confirmation to the sender of delivery.

Member states are required by art. 9 of the directive to introduce general authorisations for non-reserved services which are outside the scope of the universal service, to the extent necessary in order to guarantee compliance with the essential requirements (principally confidentiality of correspondence and security of the network as regards dangerous goods, as mentioned above). Non-reserved services which are within the scope of the universal service are to be made the subject of authorisation procedures, including individual licences, to the extent necessary to guarantee compliance with the essential requirements and to safeguard the universal service.

Member states are required by art. 22 of Directive 97/67 to designate national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. These national regulatory authorities are to ensure that compliance with the required cost accounting system is verified by an independent competent body. The Commission also states in its PSN that the national regulatory authorities should ensure that contracts for the provision of reserved services are made fully transparent, are separately invoiced and distinguished from non-reserved services, that terms and conditions for services which are in part reserved and in part liberalised are separate, and that the reserved element is open to all postal users, irrespective of whether or not the non-reserved component is purchased (para. 8.6(b)(iv)).

FURTHER LIBERALISATION

The most significant aspects of Directive 97/67 are, however, arguably the second stage of liberalisation that is provided for in art. 7(3). This requires the Parliament and Council to decide not later than 1 January 2000:

'without prejudice to the competence of the Commission, on the further gradual and controlled liberalisation of the postal market, in particular with a view to the liberalisation of cross-border and direct mail ... with effect from 1 January 2003'.

It is the Commission's proposals for these measures which were due for the end of 1998. The European Parliament has, however, passed a resolution stating that in the absence of these proposals, these deadlines of 1 January 2000 and 1 January 2003 no longer apply. Article 11 further requires the Parliament and Council to adopt harmonisation measures to ensure that users and universal service providers have access to the public postal network under transparent and non-discriminatory conditions. In the same vein, art. 10 also requires the Parliament and Council to adopt measures necessary for harmonised procedures for authorisations to be granted at national level, governing the commercial provision to the public of non-reserved postal services.



The Commission is reported to have undertaken or commissioned a number of studies as the basis of its proposals, concerning lowering the weight and price limits on reserved activities, liberalisation of incoming and outgoing cross-border mail, liberalisation of direct mail and liberalisation of clearance, sorting and

transport of mail. The latter development could result in allowing only delivery, but not the clearance, sorting and transport of mail, to be reserved. A study has also been commissioned on costing and financing of the universal service obligations in the postal sector.

UNIVERSAL SERVICE

It is fundamental to Directive 97/67 that services which can be reserved, namely the clearance, sorting, transport and delivery of items of domestic correspondence (within the price band mentioned above), may only be reserved 'to the extent necessary to ensure the maintenance of universal service'. The directive imposes significant universal service obligations in art. 3 and 5. Member states are to ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users. This means that universal service providers are to guarantee, as a minimum, one clearance and one delivery to the home or premises of every natural or legal person, every working day and not less than five days a week (art. 3(3)). Universal service is to apply to the clearance, sorting, transport and distribution of postal items of up to 2kg, and of postal packages of up to 10kg (which may be increased by member states to 20 kg), and the delivery of postal packages from other member states of up to 20kg, as well as registered post and insured post services (art. 3(4) and (5)). The universal service is expressly to be provided on a non-discriminatory basis (and is to be an identical service to users under comparable conditions) and must comply with the 'essential requirements' (art. 5(1)).

In essence, Directive 97/67 and the PSN require universal service providers, particularly within the field of the reserved activities, to provide services satisfying the needs of customers to the same extent as competitive economic operators would have done. This includes providing an efficient service which takes into account technical developments. The Commission is concerned (para. 2.7, PSN) that postal operators granted special or exclusive rights may let the quality of service decline and omit to take necessary steps to improve service quality.

DIRECTIVE 97/67 AND ART. 59 & 90 OF THE EC TREATY

As from 11 February 1999, the date of required implementation of Directive 97/67, it will constitute a restriction on the provision of postal services, within the meaning of art. 59 of the EC Treaty, to prohibit transportation of postal items to other member states or to prohibit distribution of cross-border mail, unless the postal services are within the specified price and weight limits and it can clearly be shown to be necessary to ensure the maintenance of universal service. A member state may well infringe art. 59 of the treaty by reserving cross-border services to a single PPO even within the specified weight limits, if the required levels of universal service under the directive were not being met for cross-border services.

The directive serves to define the application of art. 90(1) of the EC Treaty in the postal services sector. Any special or exclusive rights granted to PPOs in respect of the cross-border provision of postal services extending beyond the limits permitted in Directive 97/67 or beyond what is necessary to ensure the maintenance of universal service, would need to be separately justified in the light of art. 90 and 59 of the EC Treaty (para. 5.4, PSN).

Conversely, special or exclusive rights whose scope does not go beyond the reserved services as defined in Directive 97/67 are stated by the Commission in its PSN to be prima facie justified under art. 90(2), although such presumption could be rebutted if the facts of a case showed that the conditions of art. 90(2) were not fulfilled, for example if the reservation of services went beyond what was necessary to ensure the maintenance of universal services.

The Commission states expressly in the PSN a key principle in much of the art. 90 case law, namely that where a member state grants exclusive rights to an operator for services which it does not in fact provide so as to satisfy the needs of customers to an acceptable level, the grant of an exclusive right by the member state induces the operator in question, by the simple exercise of such right, to limit the supply of the relevant service, due to the legal impossibility of competition by other entities as a result of the exclusivity (para. 2.7). This was a feature of the

ECJ's judgment in the *Port of Genoa case* (*Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* (Case C-179/90) [1991] ECR I-5889; [1994] 1 CEC 196, at para. 17). In that case, the ECJ found that the undertakings enjoying exclusive rights to organise dock work for third parties were, as a result, induced inter alia to refuse to have recourse to modern technology, thereby causing increased costs and delays in their operation (at para. 19 of the judgment). In the context of postal services, the ECJ held in the *Corbeau case* (*Re Corbeau* (Case C-320/91) [1993] ECR I-2533; [1995] 1 CEC 322) that member state legislation granting the exclusive right to a PPO to provide postal services was contrary to art. 90 where it went so far as to prohibit independent operators from providing separate services, such as express delivery services, which met customers' needs but which were not offered by the established PPO, where such services were disassociable from and did not compromise the effective performance of the postal services of general economic interest performed by the PPO holding the exclusive right. The Commission also found there to be an infringement of art. 90, in conjunction with art. 86, in its decision concerning the provision in Spain of international express courier services (Commission Decision 90/456, OJ 1990 L233/19), as regards Spanish legislation which reserved to the Spanish Post Office not only the basic letter collection, transport and distribution service but also international express services. However, the Post Office's express service was limited geographically in that it was only provided from post offices situated in certain major cities and did not cover all countries of the world, with the result that the demand for door-to-door express courier services was not fully satisfied, whilst due to the monopoly held by the Spanish Post Office, competitors were unable to offer such a service.

Accordingly, as a result of the harmonisation of reserved activities and of the universal service obligations in Directive 97/67, the member states are expected by the Commission to withdraw special or exclusive rights for the supply of postal services for all activities which the directive does not allow to be reserved, unless art. 90(2) would apply, that is unless the performance of the particular tasks assigned to PPOs for the

provision of a service of general economic interest would be obstructed in law or in fact. Also, to the extent that the harmonised universal service standards are not being met even within the field of reserved activities, the Commission's PSN sets out the view that special or exclusive rights should be abolished to the extent necessary to facilitate competition even within the reserved areas.

OBLIGATIONS AGAINST CROSS-SUBSIDISATION

Article 90(1), in conjunction with art. 86, will apply to the use without objective justification of a dominant position in a reserved market to obtain market power on a related or neighbouring market. Accordingly, Directive 97/67 contains very specific provisions, and the PSN very clear statements, against cross-subsidisation between reserved and non-reserved services. Subsidising activities open to competition by allocating their cost to reserved services is regarded as likely to distort competition in breach of art. 86, being an abuse of the PPOs' dominant position in the reserved market. Moreover, users of the reserved services would, as a result of the cross-subsidisation, have to bear costs which are unrelated to the provision of those services.

Directive 97/67 requires member states to adopt measures concerning tariffs and transparency of accounts of universal service providers. Prices must be affordable, geared to costs, transparent and non-discriminatory (without excluding the right of the universal service provider to conclude individual agreements on prices with customers) (art. 12). The accounts of universal service providers must (by the second anniversary of entry into force of the directive, i.e. by 11 February 2000) be kept separately for the reserved sector and non-reserved services (art. 14). The universal service providers' accounting systems must allocate costs in accordance with specified principles which, by reference to the directive and the PSN, can be summarised as follows:

- Universal service providers must keep separate accounts within their internal accounting systems at least for each of the services within the reserved sector on the one hand and for the non-reserved services on the other (art. 14(2)).
- Such accounts kept by universal services providers for non-reserved services must distinguish between services which are part of the universal service and other services (art. 14(2)).
- Services made up of elements falling within the reserved and competitive services should also distinguish between the costs of each element (para. 8.6(b)(vi), PSN).
- Costs which can be directly assigned to a particular service must be so assigned (art. 14(3)(a)).
- Common costs which cannot be directly assigned to a particular service should, where possible, be allocated on the basis of direct analysis of the origin of the costs themselves and, if this is not possible, common cost categories should be allocated on the basis of an indirect linkage (based on comparable cost structures) to another cost category for which a direct allocation is possible (art. 14(3)(b)).
- Where the above direct or indirect means of cost allocation cannot be applied, the cost category should be allocated on the basis of a general allocator based on the ratio of all expenses directly or indirectly allocated to the reserved services and other services respectively (art. 14(3)(b)(iii)).
- The price of competitive services offered by a PPO should, because of the difficulty of allocating common costs, in principle, be at least equal to the average total cost of production, i.e. they should cover the direct costs plus an appropriate proportion of the common and overhead costs of the operator (objective criteria such as volumes, time or labour usage or intensity of usage, being used to determine the appropriate proportion) (para. 3.4, PSN).

The Commission is well aware that price and service discrimination between customers or classes of customers can easily be practised by PPOs running a universal postal network, given the significant overheads which cannot be fully and precisely assigned to any one service in particular. The provisions of Directive 97/67 (and the related statements in the PSN) are therefore important measures to determine how accounts should be prepared in order to identify whether any cross-subsidisation

is taking place. The Commission stated in the PSN (s. 3.4) that it would commence investigations under art. 86, or art. 86 and 90(1) (or art. 92) on a case-by-case basis, if services were offered systematically and selectively at a price below average total cost.

OTHER ACCOUNTING AND FINANCIAL OBLIGATIONS

The accounts required to be kept by universal service providers should also, in the view of the Commission, make it possible to assess fully the conditions applied at the various access points of the public postal network (para. 8.6(b)(vi), PSN). The postal services network is defined in Directive 97/67 as being the universal service provider's system for providing the universal service, comprising its system for clearing postal items from access points (physical facilities including letter boxes, where postal items can be deposited with the PPO) throughout the territory, the routing and handling of those items from network access points to the distribution centre, and subsequent distribution to the addressee (art. 2(2)). The Commission is concerned that the confidentiality which often applies to conditions of access, including tariffs, applied by PPOs to intermediaries, may facilitate the application of discriminatory conditions to equivalent transactions (contrary to art. 86(c)) (para. 2.8 and 8.6(b)(vii), PSN). The Commission states that member states and PPOs should ensure that intermediaries, including operators from other member states, can choose from amongst available access points to the public postal network and obtain access within a reasonable period and at prices based on costs which take into account the actual services required (para 8.6(b)(vii), PSN).

Article 13 of Directive 97/67 also requires that universal service providers' terminal dues, i.e. charges for distribution of incoming cross-border mail from another member state (or from a third country), are transparent and non-discriminatory, based on the costs of processing and delivery, and comprise remuneration levels related to the quality of service achieved. It should be noted that in its art. 19(3) Notice (under Regulation 17/62, OJ 1998 C371/7) concerning the *Reims II*

Agreement concluded between fourteen PPOs, the Commission stressed the aims of the agreement as being to provide for compensation to the parties for cross-border deliveries in a way which more closely reflects the real costs of delivery than previously, and to improve the quality of the cross-border mail service, by a system of quality of service standards (expressed in terms of the percentage of incoming cross-border mail from a particular PPO which has to be delivered within one working day after the day of its arrival in the exchange office of the receiving PPO). Further, the parties were required to undertake to the Commission to comply with obligations to be imposed on them, according to which they will have to introduce a transparent cost accounting system, as required by art. 14 of the directive, and to provide annual reports on the development of international and domestic tariffs and costs and on the development of cross-border flows. The case therefore provides a further example of the Commission's concern to find some justification for restrictions of competition by reference to appropriate levels, or improvements, of quality of service.

CONCLUDING REMARKS


The forthcoming proposals now due from the Commission can be expected to

set out a challenging time-scale for full liberalisation of the postal services sector, primarily by reference to price and weight limits that currently define the reserved sectors under Directive 97/67. It is also likely, by reference to the studies which the Commission has undertaken or commissioned, that the new proposals could contain time-scales for further liberalisation of incoming and outgoing cross-border mail, direct mail, and also of the clearance, sorting and transport of mail, possibly resulting in only delivery being permitted as an activity to be reserved to universal service providers. These various aspects of the liberalisation process could well be phased in at different points in time with a view to completing that process over the next few years.

Political opposition can be expected from some member states which may wish to water down the proposals or to defer the time-scale. It is to be hoped that the new measures, when adopted, contain clarity and certainty and do not, as a result of political compromise, contain imprecise references back to principles of art. 90 of the EC Treaty.

Meanwhile, the very specific provisions of Directive 97/67, supplemented by the contents of the PSN, comprise a clear indication of the Commission's views on cost allocation

for the purposes of accounting separation to avoid cross-subsidisation between reserved and non-reserved activities. These can be taken as a guideline by analogy in other liberalised sectors of the cost-accounting standards expected by the Commission of undertakings engaged in both reserved and liberalised activities within the same sector.

More generally, it is likely that DG IV will be requested or will take the initiative under art. 90, in conjunction with art. 86, of the EC Treaty, to scrutinise situations where PPOs seek to use their economic strength, derived from a historical monopoly of reserved activities, to gain an unfair competitive advantage in newly-liberalised areas. Under both art. 85 and 86, the Commission can be expected to apply a strict test on the relationship between quality of service and the proportionality of any restrictions of competition, which is also already a key feature of Directive 97/67. 

**Richard Eccles and
Robert MacLean**

Cameron McKenna, Brussels

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