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## **Legal Opinion on the Compatibility of the Proposed Target System for Terminal Dues with EU Law**

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## TABLE OF CONTENT

<b>I.</b>	<b>Introduction.....</b>	<b>4</b>
<b>II.</b>	<b>The Universal Postal Union System .....</b>	<b>4</b>
	<b>A. Overview of the Universal Postal Union .....</b>	<b>4</b>
	<b>B. The UPU Terminal Dues System.....</b>	<b>5</b>
	<b>C. The Decision-Making Process at the UPU Congress .....</b>	<b>6</b>
<b>III.</b>	<b>Compatibility of the UPU Target System of Terminal Dues with EU Law.....</b>	<b>7</b>
	<b>A. The EU Postal Directive .....</b>	<b>7</b>
	1. Overview of the EU Postal Directive.....	7
	2. Incompatibility of the Target System with the Postal Directive.....	8
	a) Relation between the costs and the level of terminal dues .....	8
	b) Discrimination.....	9
	3. The alleged non-binding nature of the UPU terminal dues' rules .....	11
	4. Partial conclusion.....	11
	<b>B. The EU Competition Rules .....</b>	<b>11</b>
	1. Article 101 TFEU .....	11
	a) The Target System of Terminal Dues as a Price-Fixing Agreement.....	12
	b) No foreseeable exemption.....	13
	(1) The link between the costs of handling incoming cross-border mail and terminal dues .....	14
	(2) The link between the quality of service and the level of terminal dues.....	16
	c) Additional conditions imposed for the exemption of REIMS II Agreement.....	19
	2. Article 102 TFEU .....	20

3.	Infringement of EU Competition rules by Member States .....	20
4.	Partial conclusion.....	22
<b>IV.</b>	<b>Ability of the Member States to take part in the UPU Convention and in Terminal Dues negotiations .....</b>	<b>22</b>
<b>A.</b>	<b>The Common Commercial Policy.....</b>	<b>22</b>
<b>B.</b>	<b>The <i>AETR</i> doctrine .....</b>	<b>24</b>
1.	The adoption of common rules on terminal dues by EU Institutions .....	25
2.	The action of the Member States “ <i>might affect those rules or alter their scope</i> ” .....	26
3.	Partial conclusion.....	27
<b>C.</b>	<b>Implications for the Member States’ participation in the 2012 UPU Congress.....</b>	<b>27</b>
1.	Regulatory nature of the terminal dues provisions .....	27
2.	Coordination of the Member States’ positions on terminal dues.....	28
3.	Partial conclusion.....	30
<b>V.</b>	<b>Conclusion of an international agreement infringing EU law .....</b>	<b>30</b>
<b>A.</b>	<b>Irrelevance of traditional international law tools designed to avoid conflict between legal instruments .....</b>	<b>31</b>
<b>B.</b>	<b>Responsibility of the Member Countries and the Designated Operators .....</b>	<b>33</b>
<b>VI.</b>	<b>Conclusion .....</b>	<b>34</b>

## **I. Introduction**

1. I have been asked to provide a legal opinion in connection with the preparation of the 25th Universal Postal Union Congress in Doha which will be held in September and October 2012. I understand that this Opinion will deal specifically with the proposal for a revised target system for terminal dues (“the target system”).
2. In this context, the specific questions that I have been asked to consider are in the following terms:

*“May Member States and/or designated operators of the EU and EEA participate in the target system of terminal dues proposed for the 2012 Universal Postal Convention in view of (1) the requirements of EU competition rules and/or (2) in the case of EU Member States, provisions of the EU Treaties and EU jurisprudence which define the respective competences of the Member States and the European Union?”*

3. In the remainder of this Opinion I propose firstly to outline the specificities of the Universal Postal Union (“UPU”) and the system it created as regards terminal dues. Then I go on to consider the compatibility of the target system of terminal dues proposed for the 2012 Universal Postal Convention with the law of the European Union (“EU”).<sup>1</sup> I finally consider the consequences for EU Member States and postal operators of the participation in the negotiation and adoption of this system.

## **II. The Universal Postal Union System**

### **A. Overview of the Universal Postal Union**

4. Established in 1874, the Universal Postal Union, with its 192 member countries, is an intergovernmental organisation acting as the primary forum for cooperation between postal sector players. One of the roles of the UPU is to set the rules for international mail exchanges and make recommendations to stimulate growth in mail, parcel and financial services volumes and improve quality of service for customers. The agreements concluded under the framework of the UPU only govern postal services provided by

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<sup>1</sup> This Opinion will cover both EU Member States and non-EU Members of the European Economic Area (“EEA”), *i.e.* Iceland, Lichtenstein and Norway.

certain postal operators called designated operators (“DOs”). A designed operator is a “governmental or non-governmental entity officially designated by the member country to operate postal services and to fulfil the related obligations arising out of the Acts of the Union on its territory.”<sup>2</sup>

5. Every four years, the UPU Congress, the supreme authority of the Union bringing together all the member countries, meets to define the future world postal strategy, the Union’s four-year roadmap, and lay down standards and regulations for international exchanges of mail and parcels. The Congress also provides a forum for the discussion of important global issues. The Universal Postal Convention will be reviewed at the next Congress in 2012.

## **B. The UPU Terminal Dues System**

6. Terminal dues are the remuneration for the costs of handling and delivering cross-border mail in the country of destination. Originally postal administrations did not directly compensate each other for the delivery of international mail since it was assumed that each mail item generated a reciprocal response.<sup>3</sup> In the framework of the UPU, it was however decided in 1969 that a postal administration<sup>4</sup> that sends a letter-post item to another country would remunerate the destination postal operator for processing and delivering that item.
7. Terminal dues are an important source of revenue for UPU member countries and the system continues to evolve from one Universal Postal Congress to another. As the member countries are not at the same stage of development and there are significant variations in their mail volumes, postal tariffs and cost absorption, the aim of the UPU system for terminal dues is to progressively incorporate the developing and least developed countries into a target system that already applies to industrialized countries. A key element of the Beijing Congress in 1999 was the differentiation between developing and industrialized countries and the creation of two separate terminal dues regimes. At the same time it was agreed that all countries in principle should adopt a cost-related terminal dues system. At the 2004 Bucharest Congress, the terminal dues for industrialized countries was called the “target system” and the terminal dues system for developing countries was called the “transitional system”.

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<sup>2</sup> UPU, Constitution (2008), Article 1bis(1.6bis).

<sup>3</sup> Commission Decision 1999/695/EC - *REIMS II* - 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, OJ L 275, at §8.

<sup>4</sup> The term “designated operators” was only introduced in 2008.

8. During the next UPU Congress held in Doha in September-October 2012, the system of terminal dues will be reviewed, for which a proposal has already been made. According to this proposal, the purpose of the UPU terminal dues system is to compensate the destination country for the cost incurred for the handling, transport and delivery of letter-post items from abroad. The proposed system is trying to move towards terminal dues more related to costs but, especially because of the cap and floor system, the rates would remain far from being related to the actual costs of handling international mail.<sup>5</sup>

### **C. The Decision-Making Process at the UPU Congress**

9. According to the Constitution of the UPU, the Congress consists of the representatives of member countries,<sup>6</sup> that is to say any person empowered to negotiate and sign or merely to negotiate on behalf of a member country. The Rules of Procedure of Congresses state that a delegation, *i.e.* the person or body of persons designated by a member country to take part in a Congress, will represent the member country.<sup>7</sup> It is also admitted that delegations may include representatives responsible for governmental and regulatory matters and broader sector interests, including customer organizations, public and private operators, trade unions, special interest groups from trade and civil society, etc.<sup>8</sup>
10. It is my understanding that in practice designated operators are often part of the delegation sent by a member country to the UPU Congress. Although the final vote remains in the hands of the member countries' official representatives, at least as far as terminal dues are concerned, negotiations take place between members of the designated operators without the member countries being present. If such a situation can easily be explained by the technicality of the issue, it will be shown that, from an EU law perspective, the question of the legality of such a practice can be raised.

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<sup>5</sup> The proposed system will be detailed below.

<sup>6</sup> UPU, Constitution (2008), Article 14(2).

<sup>7</sup> UPU, Rules of Procedure of Congresses, Article 2(1).

<sup>8</sup> UPU, General Regulations, Article 104 referring to the composition of the Postal Operations Council, Commentary by the UPU International Bureau, Article 104.3.

### III. Compatibility of the UPU Target System of Terminal Dues with EU Law

11. One of the questions I am asked to address in this Opinion relates to the compatibility of proposed target system of terminal dues with the substantial requirements of EU law. I demonstrate in this section that the UPU target system of terminal dues diverge from the requirements not only of the Postal Directive,<sup>9</sup> but also of the EU Treaties and more specifically of its competition rules.

#### A. The EU Postal Directive

##### 1. Overview of the EU Postal Directive

12. The European Union has created a framework for postal services having as its primary objective the achievement of an internal market for postal services with high quality universal services. This objective is pursued by the opening up of the sector to competition in a gradual way on the basis of Postal Directive 97/67/EC as amended by the second and third postal directives, respectively in 2002 and 2008.<sup>10</sup> Article 1 indicates that the Directive establishes common rules concerning various aspects of the regulation of postal services such as, *inter alia*, the conditions governing the provision of postal services, the provision of a universal postal service within the Union, the financing of universal services, tariff principles and transparency of accounts for universal service provision.

13. The directive provides for common rules applicable to the determination of terminal dues.<sup>11</sup> Under Article 13, the Member States are called upon to encourage their universal service providers to respect those principles when entering into agreements on terminal dues for intra-EU cross-border mail.<sup>12</sup> Universal service providers have to ensure that

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<sup>9</sup> The Postal Directive - Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, as amended by Directive 2002/39/EC of 10 June 2002, OJ L 176; and Directive 2008/6/EC of 20 February 2008, OJ L 52.

<sup>10</sup> *Id.*, cited note 9. It is irrelevant for the purpose of this Opinion that the Third Postal Directive has not yet been implemented in countries such as Norway, as the principles to which I refer in this Opinion were already in place under the Second Directive.

<sup>11</sup> *Id.*, Article 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.”

<sup>12</sup> Despite the apparent discretion granted to the Member States by the word “encourage”, the system laid down by the Directive provides for an obligation to respect those principles.

terminal dues are fixed in relation to the costs of processing and delivering incoming cross-border mail, relate to the quality of service achieved, and are transparent and non-discriminatory.<sup>13</sup> Article 13(2) provides for the possibility, to implement such principles, to conclude transitional arrangements designed to avoid undue disruption on postal markets or unfavourable implications for economic operators. Such a possibility is however limited to the minimum required to achieve those objectives.<sup>14</sup>

14. If the scope of Article 13 is limited to agreements on terminal dues for intra-EU cross-border mail, the directive also provides for principles applicable to terminal dues for international cross-border mail, *i.e.* to and from the EU. According to Article 12 Member States must ensure that the tariffs for each of the services forming part of the universal service are affordable, cost-oriented, give incentives for an efficient universal service provision, and are transparent and non-discriminatory.<sup>15</sup>

## 2. Incompatibility of the Target System with the Postal Directive

### a) Relation between the costs and the level of terminal dues

15. The relation between the real costs of delivery of cross-border mail and the rate of terminal dues is an essential principle governing the determination of tariffs for universal services in the Postal Directive. It is true that it is a declared UPU goal to gradually migrate to a truly cost-related system.<sup>16</sup> However, the target system, as proposed for the Doha Congress, is, for most countries, not properly cost related. In practical terms, terminal dues charges are constrained by cap and floor provisions, which prevent a genuine application of the cost-based principle at the core of the Postal Directive.

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<sup>13</sup> These principles are reinforced by the preamble of the Directive which states that “in order to ensure sound management of the universal service and to avoid distortions of competition, the tariffs applied to the universal service should be objective, transparent, non-discriminatory and geared to costs”, at Recital 26.

<sup>14</sup> Recital 27 of the Postal Directive states that “the remuneration for the provision of the intra-[EU] cross-border mail service, without prejudice to the minimum set of obligations derived from Universal Postal Union acts, should be geared to cover the costs of delivery incurred by the universal service provider in the country of destination”, “this remuneration should also provide an incentive to improve or maintain the quality of the cross-border service through the use of quality-of-service targets”, and “this would justify suitable systems providing for an appropriate coverage of costs and related specifically to the quality of service achieve.”

<sup>15</sup> Postal Directive - Article 12 relates to tariffs for each of the services forming part of the universal service which, according to Recital 13 and Article 3(7), covers both national and cross-border services, irrespective of whether or not it concerns intra or extra-EU mail.

<sup>16</sup> Declaration at the 1999 Beijing UPU Congress.

16. In the proposed target system, domestic tariffs are used as a reference for calculating terminal dues rates, which should in principle be aligned with 70% of the domestic tariff (reflecting the average incoming mail handling costs).<sup>17</sup> The calculation of the terminal dues rates is based on two domestic tariffs, *i.e.* the tariffs for a 20 grams and a 175 grams letter post items.<sup>18</sup> In addition, the already existing floor and cap mechanisms will be maintained for the 2014-2017 cycle. While the UPU created the floor mechanism to deal with subsidised tariffs, break-even pricing and below-cost pricing, the cap system aims at moderating the impact of terminal dues on international tariffs.<sup>19</sup> Different floors and caps are foreseen depending on the year the country joined the target system. Different rates are applicable for the four years of the cycle and these rates are determined per item and per kilogramme.
17. The existence of floor and cap rates results in terminal dues that do not correspond to the actual market price and to the actual costs of handling delivery of international mail. In practical terms, such a system creates flat rates for terminal dues which do not fully compensate most industrialised countries for the actual costs of delivering international mail because industrialised countries' costs are typically above the global average.<sup>20</sup> As a result of the target system, the terminal dues actually charged and those that would be charged if they were truly aligned on costs present major differences, especially in countries with high costs of delivery.
18. A removal of the caps and floors would allow the target system to become cost related. This is especially true for the removal of the cap, which often leads to a remuneration below real costs.

b) Discrimination

19. The Postal Directive generally prohibits discrimination especially in determining the tariffs of universal postal services, including terminal dues. Article 5(1) provides that:

*“Each Member State shall take steps to ensure that universal service provisions meet the following requirements:*

*[...]*

*- it shall offer an identical service to users under comparable conditions.”*

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<sup>17</sup> Postal Operations Council, Approval of draft Congress - Doc 20.Add 2 - Proposal for the UPU terminal dues system 2014-2017, at §§36-42.

<sup>18</sup> *Id.*, Article 28.

<sup>19</sup> *Id.*, at §38.

<sup>20</sup> Such as in the Nordic Countries and Italy.

Articles 12 and 13 similarly prohibit discrimination in fixing tariffs and terminal dues for the provision of universal services.

20. The UPU Convention has created two terminal dues regimes: (i) a target system for mail exchanged between industrialised countries; and (ii) a transitional system for mail exchanged between developing countries or between a developing country and an industrialised one. This distinction remains in the proposal. Because of their level of economic development, certain EU Member States belong to the second system for which terminal dues differ from the ones applied to the countries belonging to the target system.
21. As neither of the two terminal dues system are aligned with domestic postage, the UPU Convention results in reality in *three* different rates for the delivery of identical mail items (*i.e.* the respective rates for domestic items, target countries items, and transitional countries items). This in turn leads to two forms of discrimination on grounds of nationality. As far as intra-EU cross-border postal services are concerned, the existence of the two distinct systems provided for in the UPU Convention means that the level of terminal dues charged by designated operators for identical services will vary according to the originating Member States. In addition, the application of different rates to domestic and EU/EEA mailers creates another form of discrimination on the basis of origin.
22. Although the Directive does not expressly prohibit discrimination on grounds of nationality, it is clear from its wording that discrimination in the provision of universal services is prohibited on the basis of Article 5(1) and Article 13 which provides for the principle of cost-based, non-discriminatory terminal dues. In addition, discrimination on grounds of nationality is more generally prohibited by Article 18 TFEU “[w]ithin the scope of application of the Treaties.”<sup>21</sup>

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<sup>21</sup> Case C-148/02 Garcia Avello [2003] ECR I-11613, at §31: “It is in this regard settled case-law that the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way”. See also, concerning the application of the article to legal persons: Case C-43/95 Data Delecta Aktiebolag v MSL Dynamics Ltd. [1996] ECR I-04661, at §16: “In prohibiting ‘any discrimination on grounds of nationality’, Article [18] of the Treaty requires perfect equality of treatment in Member States of persons in a situation governed by Community law and nationals of the Member State in question.” See also Case C-73/08 Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française [2010] ECR I-02735, at §31: “the Court’s case-law makes clear that every citizen of the Union may rely on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope *ratione materiae* of European Union law.”

### **3. The alleged non-binding nature of the UPU terminal dues' rules**

23. There is a possibility foreseen by the UPU Convention to allow DOs to agree on bilateral or multilateral agreements, the terminal dues provisions being compulsory only in the event that such an agreement has not been entered into between operators. Therefore, it could be argued that DOs are able to conclude other agreements, such as the REIMS Agreements, in which case they would not have to apply the UPU target system. These bilateral or multilateral agreements would in turn respect the provisions of the Postal Directive. However, such a mechanism should not be considered sufficient to ensure that EU law is respected. First, not all DOs accept to take part in the REIMS Agreements, especially when the UPU system is favourable to their interest. Moreover, the UPU rules, by acting as a default, influence the bilateral or multilateral agreements reached between their parties as the DOs that are favoured by the UPU rules will have stronger bargaining power than the ones that are under-compensated under those rules. Therefore such a provision does not suffice to ensure an effective application of the EU postal rules.

### **4. Partial conclusion**

24. The system of terminal dues as proposed for the next UPU Convention infringes the provisions of the Postal Directive, especially because of the non-alignment of terminal dues on the real costs of providing international mail delivery services and the discrimination, based on origin, it creates.

## **B. The EU Competition Rules**

25. In this section, I show that the EU DOs, and potentially EU Member States, would breach EU competition rules, and in particular Articles 101 and 102, if they were to enter into the UPU's proposed terminal dues system.

### **1. Article 101 TFEU**

26. Terminal dues systems have already been reviewed under EU competition rules and more specifically under Article 101(1) TFEU which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in

particular those which directly or indirectly fix purchase or selling prices or any other trading conditions.<sup>22</sup>

27. In 1995, the postal administrations of several European countries decided to enter into an agreement for the remuneration of mandatory deliveries of cross-border mails (REIMS I). The system foresaw a gradual increase of terminal dues, but the postal operators not meeting the quality targets fixed by the agreement were prevented from benefiting from these increases. REIMS I was notified to the Commission in 1995 and expired in 1997. The same year, the REIMS II agreement was signed, followed by REIMS III and REIMS IV which entered into force in January 2010. REIMS IV provides for a system of terminal dues based on costs and service quality, postal operators being required to meet delivery quality of service targets in order to receive the full REIMS payment. Although it is considered to be the main terminal dues system in Europe, REIMS IV does not strictly speaking constitute regulation of terminal dues within the EU since it is an agreement signed by certain postal operators only.
28. The REIMS II Agreement was reviewed by the Commission who issued two exemption decisions in 1999 and 2003.<sup>23</sup> In its decisions, the Commission considered that even though REIMS II, as it fixed prices between undertakings, infringed Article 101(1), it presented certain pro-competitive aspects and efficiencies leading to the fulfilment of the conditions of 101(3) and it could therefore be authorised.<sup>24</sup>
29. In the remaining of this section, I demonstrate that the UPU target system of terminal dues similarly constitutes a price-fixing agreement prohibited under Article 101(1), but that it cannot benefit from an exemption under Article 101(3) as it does not present the pro-competitive aspects and efficiencies that were present in the REIMS II Agreements.

a) The Target System of Terminal Dues as a Price-Fixing Agreement

30. The proposed target system of terminal dues is in several ways analogous to the system created by the REIMS Agreement. Although the proposed UPU target system will be signed by the Member States, it will be negotiated between the designated operators. The system will thus fall within the definition of an agreement between undertakings under Article 101(1) TFEU.

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<sup>22</sup> Article 101(1) TFEU.

<sup>23</sup> The compatibility with EU competition law of the agreements subsequent to REIMS II was not assessed by the Commission as the new Regulation 1/2003 no longer requires notification of agreements.

<sup>24</sup> Commission Decision *REIMS II*, cited note 3.

31. The target system constitutes an agreement *inter alia* between European postal operators by which they collectively determined terminal dues. In its REIMS II decision, the Commission held that even if the Agreement did not fix the actual amounts to be paid but only established a percentage, by linking this percentage to domestic tariffs, it had the result of fixing prices within the meaning of Article 101(1). By fixing, in an agreement entered into between themselves, terminal dues as a percentage of domestic tariffs, the parties eliminated or reduced their freedom to determine the level of remuneration for the delivery of cross-border mail.<sup>25</sup> In light of the Commission's findings that the REIMS II Agreement was caught by the prohibition of price-fixing provisions, the same conclusion must be drawn for the UPU target system of terminal dues. The fact that the system fixes the rates of terminal dues between European DOs, as well as between European and non-European DOs does not prevent the application of EU competition rules.<sup>26</sup>

b) No foreseeable exemption

32. Despite the REIMS II Agreement constituting a prohibited price-fixing agreement, it was granted an exemption by the Commission. Its main benefits were, on the one hand, the creation of a link between the rate of terminal dues and the quality of the services and, on the other hand, a more cost-related approach. The Commission considered that improvements in efficiency and the elimination of cross-subsidy would flow from the agreement.

33. Article 101(3) provides for a possible exemption of an agreement otherwise caught under the first paragraph when it “contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.” In addition the agreement should not impose “restrictions which are not indispensable to the attainment of these objectives” and should not lead to a possible elimination of competition. While in REIMS II these conditions were recognised as met given the pro-competitive effects and efficiencies generated by this agreement, these conditions cannot be met by the proposed UPU system given that

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<sup>25</sup> Id., at §64. This analysis was repeated by the Commission in Commission decision 2004/139/EC - *REIMS II renotification* - 23 October 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement, OJ L 56, at §95: “*By linking the price for cross-border delivery service to the price for the domestic service, which is determined primarily by domestic considerations, the Parties eliminate or reduce their freedom to set the prices they charge for the delivery of incoming cross-border mail.*”

<sup>26</sup> Case 22-71 *Béguélin Import v S.A.G.L. Import Export* [1971] ECR 949, at §11: “The fact that one of the undertakings participating in the agreement is situated in a non-member country is no obstacle to the application of that provision, so long as the agreement produces its effects in the territory of the Common Market.”

the pro-competitive effects and efficiencies it could arguably generate are insufficient to justify the application of the exemption contained in Article 101(3) TFEU.

- (1) The link between the costs of handling incoming cross-border mail and terminal dues

34. As noted above, the proposed UPU target system is analogous to the system created by the REIMS II Agreement which provided for terminal dues to be based on a percentage of the postal tariffs of the country of destination. These tariffs were converted, on the basis of a standard structure, onto linear tariffs for the purpose of calculating terminal dues. The Agreement distinguished between four levels of terminal dues.<sup>27</sup>

35. When reviewing the REIMS II system, the Commission acknowledged that when the level of terminal dues does not cover the costs of delivery of cross-border mail, the resulting deficit on incoming cross-border mail had to be covered by the postal operators by profits obtained from the provision of domestic mail services or outgoing cross-border mail service. A cross-subsidisation would result from such a system that would be unsustainable in the long run.<sup>28</sup> The Commission held that:

*“To the extent that the increases in terminal dues result in a level of terminal dues which is closer to real costs of delivering the mail, the Agreement will merely entail a reduction of the cross-subsidisation which must take place under the current arrangements.”*<sup>29</sup>

The Commission added that:

*“A move towards a more cost-based system leads to a more secure financial position and therefore allows the postal operators to maintain and improve this service. This is an advantage which may be considered as representing an improvement in the provision of the services concerned [...]”*<sup>30</sup>

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<sup>27</sup> Commission Decision *REIMS II*, cited note 3, at §22: Level 1: Priority mail items presented in mixed bags; Level 2: The delivering postal operator may offer rebates on the Level 1 remuneration on the basis of work sharing/preparation of mail. The same discounts must be offered to all sending REIMS II postal operators when equal conditions are met; Level 3: All the Parties are obliged to grant each other access to the "generally available domestic rates" in the country of delivery; and Non-priority mail: The terminal dues to be applied to mail designated as "non-priority" are 10 % less than the terminal dues for Level 1 mail.

<sup>28</sup> *Id.*, at §69.

<sup>29</sup> *Id.*, at §79.

<sup>30</sup> *Id.*, at §69.

36. As it was demonstrated in the section of my Opinion devoted to the Postal Directive,<sup>31</sup> if the UPU target system of terminal dues is moving towards a more cost-based approach, the existence of caps and floors has the effect of creating flat rate terminal dues which do not reflect the real cost of handling the delivery of international mail and do not compensate most “high costs” countries whose costs of distribution are generally above the global average.<sup>32</sup>
37. This system leads certain DOs to be underpaid and others to be overpaid. As the Commission explained in its decisions, when facing under compensation for the delivery of incoming international mail, DOs will charge more for outgoing international mail than would be justified by the cost of terminal dues paid to destination post offices. In addition, when terminal dues are not fixed in relation to costs, it can create incentives to circumvent the system and distort competition between postal operators.
38. The negative impact of a non-cost related approach has been underlined by the US Department of Justice which stated that:
- “Divergence between the price of a service or product and the cost of providing that service or product leads to an inefficient allocation of economic resources.  
[...]  
Divergence between terminal dues and the cost of completing delivery of international mail also affects the abilities of remailers and postal administrations to compete with one another.”*<sup>33</sup>
39. It results from those considerations that, unlike in the case of the REIMS II agreement, the step made by the proposed target system towards greater relation between costs of delivering incoming cross-border mail and the level of terminal dues is by no means sufficient to produce the pro-competitive effects necessary to offset the anti-competitive effects of the price agreement in question.

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<sup>31</sup> Section III.A.

<sup>32</sup> See 2010 UPU Study, Adrenale Corporation, “Market Research on International Letters and Lightweight Parcels and Express Mail Service Items” (2010) notes at §30 that “[I]n ICs [industrialised countries] the level of participation of TDs [terminal dues] in the setting of international tariffs, especially with lighter letters, is fairly low. This produces a large margin at the posting country; encouraging competing postal operators to offer substantially lower prices and siphon-off considerable cross-border volumes from the DOs [designated operators].”

<sup>33</sup> U.S. Department of Justice analysis, *Evaluating a Proposed Agreement on Terminal Dues*, 1988, at pp. 15-16.

(2) The link between the quality of service and the level of terminal dues

40. The second, and main, improvement produced by the REIMS II Agreement was the introduction of a system of incentives designed to increase the quality of cross-border mail services, notably the delivery of incoming cross-border mail. Such improvement resulted from the creation of a link between increases in terminal dues and improvements in the quality of service. The Commission indicated that:

*“The link between terminal dues payable to the receiving Party and improvements in the quality of service is a strong incentive to improve service quality.”*<sup>34</sup>

41. The REIMS II Agreement allowed the destination country to claim higher terminal dues only if the quality-of-service targets set out in the Agreement were met. Terminal dues were to be increased over a transitional period until they reach a maximum of 80% of domestic tariffs.<sup>35</sup> However, in the event that a country did not meet the targets, substantial penalties, going from a 1.5% to a 50% reduction of the terminal dues, were foreseen.

42. When reviewing the REIMS II Agreement, the Commission noted that:

*“Under the REIMS II Agreement as originally notified, it was possible that terminal dues would rise even if the quality of service provided by the [postal operator] concerned actually deteriorated.”*<sup>36</sup>

The Agreement was therefore amended to establish the principle that no increase of terminal dues were to take place during the transitional period if quality of service were to decrease.

43. The Commission also held that the Agreement would not only improve the quality of service in relation to incoming cross-border mail, but also in relation to outgoing cross-border mail as the Agreement required the sending operators to *“use their best efforts to afford outgoing priority mail a quality of service which conforms to the standard”* set out in the Agreement.<sup>37</sup>

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<sup>34</sup> Commission Decision *REIMS II renegotiation*, cited note 25, at §111.

<sup>35</sup> Commission Decision *REIMS II*, cited note 3, at §17.

<sup>36</sup> *Id.*, at §46.

<sup>37</sup> Commission Decision *REIMS II renegotiation*, cited note 25, at §117.

44. The 1999 Beijing Congress decided that terminal dues payments should reflect quality of service in order to promote the improvement of letter-post services worldwide. The 2002 Postal Operators Council set the principles and general rules for the link between quality and terminal dues, to start with industrialized countries. The Quality of Service link (“QS Link”) system is composed of 3 main elements: (i) a participation in the Global Measurement System (GMS), or another system agreed by the UPU; (ii) a commitment to delivery standards and performance targets; and (iii) a remuneration rule including incentives for participation in the measurement and incentives/penalties depending on achievement of agreed targets.

45. The proposed Article 28 of the UPU Convention does not provide for any link between the level of terminal dues and the quality of service. However, Article 27(5) states that “*terminal dues remuneration shall be based on quality of service performance in the country of destination*”, allowing the Postal Operations Council to authorise to supplement the remuneration provided for in Article 28 to encourage the participation in monitoring systems and to reward DOs for reaching their quality targets. The UPU system provides for such a link in Article RL 215-1 of the Letter Post Regulations which would remain unchanged in the proposed Convention. This provision, which is only applicable to countries in the target system, states that:

*“Terminal dues remuneration between designated operators of countries in the target system shall be based on quality of service performance of the designated operators of the country of destination.”*

46. The proposed remuneration principles to be followed for the next cycle with respect to the link between quality of service and terminal dues are as follows:

*– incentive for participation in the QS Link to terminal dues at 5% of the base terminal dues rates;*  
*– no bonus for reaching the quality-of-service target;*  
*– penalty of 0.33% for each percentage point of performance below the quality-of-service target;*  
*– penalties cannot lead to adjusted terminal dues rates lower than 95% of the base terminal dues rates for the target system countries or lower than the minimum terminal dues rates provided for in the Convention; and*

– *penalties cannot result in terminal dues rates lower than 100% of the base terminal dues rates for the transition system countries.*<sup>38</sup>

47. Contrary to the REIMS II agreement, the proposed target system does not make increases in terminal dues dependent upon the quality targets being met. It merely provides for a flat 5% increase of terminal dues to operators willing to participate in the QS link.<sup>39</sup> This, in my view, does not sufficiently encourage postal operators to increase the quality of service. The possibility of obtaining increased terminal dues when targets are met provides for a more effective incentive to improve the quality of service than the certainty of obtaining a bonus for the mere participation in the quality of service measurement scheme.
48. The system of penalties proposed is also weaker than the system at stake in REIMS II as while a penalty of 0.33% can be imposed for each percentage point of performance below the quality-of-service target, penalties cannot lead to adjusted terminal dues rates lower than 95% of the base terminal dues rates for the target system countries.<sup>40</sup> The rate of the penalties is a particularly relevant element to be considered as the lower the penalties are, the less incentives the system produce.
49. As far as quality standards are concerned, the REIMS II Agreement provided for standards to be defined as the percentage of incoming cross-border mail which has to be delivered within one working day after the day of arrival in the office of exchange of the receiving postal operator (J+1), provided that it arrives there before the latest arrival time.<sup>41</sup> The UPU system provides that standards are fixed based on standards applicable in the domestic service with respect to comparable items and conditions.<sup>42</sup> Such a system

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<sup>38</sup> Postal Operations Council, Approval of draft Congress - Doc 20.Add 2 - Proposal for the UPU terminal dues system 2014-2017, at § 40. See also the proposed amendment to Article RL 215 in the same document.

<sup>39</sup> The UPU quality of service link to terminal dues comprises the UPU quality of service measurement system, service standards and targets, and the applicable rules to adjust the remuneration of terminal dues to the quality of service results.

<sup>40</sup> Postal Operations Council, Approval of draft Congress - Doc 20.Add 2 - Proposal for the UPU terminal dues system 2014-2017, at § 60. See also proposed amendment to Article RL 215.3, which would provide: “Subject to the minimum rates provided in articles 28.7 and 8 of the Convention, designated operators shall be subject to a penalty if the quality targets fixed have not been met. This penalty shall be 1/3% of the terminal dues remuneration for each percent under the performance target. The penalty shall in no case exceed 10%. Owing to the 5% incentive for participation, the maximum penalty shall not lead to remuneration lower than 95% of the base terminal dues rates.”

<sup>41</sup> Commission Decision *REIMS II renotification*, cited note 25, at § 41.

<sup>42</sup> Proposed Article RL 215bis.

leaves a greater margin of discretion to postal operators in respect of the standards than the strict J+1 standard provided in the REIMS II system.

50. In view of the assessment made by the Commission in its decisions, the insufficient link in the proposed target system between the level of terminal dues and the quality of service leads to the conclusion that this system does not contain any of the efficiencies present in the REIMS Agreement.

c) Additional conditions imposed for the exemption of REIMS II Agreement

51. Finally, the exemption was granted by the Commission provided that the parties complied with these additional conditions:

- i. Each REIMS II Party should grant any third-party postal operator access to REIMS II terminal dues under non-discriminatory conditions. The Commission underlined the risk of price discrimination in favour of the parties to the agreement and to the detriment of other operators carrying outgoing cross-border mail from one REIMS II country to another, which would have to pay the full domestic tariff for the delivery of the mail items in the country of destination.<sup>43</sup>
- ii. The REIMS II parties should take necessary steps to grant operators of other parties access to the domestic operator's generally lower domestic tariffs for direct mail and other types of commercial mail. As direct mail and other types of commercial mail account for the most important part of cross-border mail, enabling the sending party to benefit from the delivering operator's domestic tariffs is "*essential to balance the negative effects of the REIMS II Agreement.*"<sup>44</sup> Such a system represents a viable low-costs alternative to REIMS II terminal dues.<sup>45</sup>

52. The exemption provided at Article 101(3) TFEU would not have been granted to the REIMS II Agreement if the above conditions had not been met.<sup>46</sup> Since the proposed UPU terminal dues system does not meet either of these conditions, it would not qualify for an exemption under Article 101(3) at least in respect of intra-EU cross-border mail amongst target countries.

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<sup>43</sup> Commission Decision *REIMS II renegotiation*, cited note 25, at §§169-172.

<sup>44</sup> *Id.*, at §173.

<sup>45</sup> *Id.*, at Article 2 and §§173-182.

<sup>46</sup> *Id.*, at §168.

## 2. Article 102 TFEU

53. Article 102 TFEU prohibits abuses by one or more undertakings of a dominant position within the internal market or in a substantial part of in so far as it may affect trade between Member States. This article provides that the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, constitute such an abuse (see Article 102(c)).
54. As I explained in the section devoted to the Postal Directive,<sup>47</sup> it is arguable that the system of terminal dues discriminates in that it leads to the payment of different rates of terminal dues for the delivery of identical postal items depending on the originating country of such items. If discrimination on grounds of nationality is not expressly cited in Article 102(c), the European Court of justice (“ECJ” or “the Court”) has had the opportunity to confirm that discrimination by a dominant undertaking on the grounds of nationality constitutes an abuse of a dominant position.<sup>48</sup> In *Deutsche Post AG*,<sup>49</sup> the Commission found that Deutsche Post was guilty of discrimination by treating different types of cross-border mail in different ways. The Commission was concerned about the effect of this discrimination on consumers.
55. Therefore the application of different terminal dues rates depending on the country from which the mail items originate could be regarded as an abuse of a dominant position on the part of the designated operators on the market of distribution of international mail. However, not all distinctions amount to discrimination. The relevant elements to be considered are the indispensability and proportionality of such system.

## 3. Infringement of EU Competition rules by Member States

56. I suggest in this Opinion that by entering into the UPU target system of terminal dues, not only the DOs but also the Member States could be found to have breached the competition provisions and distorted competition on the EU postal services market. This issue is of particular relevance since, although the UPU target system of terminal dues is negotiated among experts belonging to the DOs, it is effectively signed by the Member States. It may also be the case that, at the national level, Member States adopt legislation enforcing this system and requiring DOs to apply it.

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<sup>47</sup> See section III.A.

<sup>48</sup> Case 7/82 *GVL v Commission* [1983] ECR 483, at §56.

<sup>49</sup> Commission Decision *Deutsche Post AG - Interception of cross-border mail* [2001] L 331/40, at §§.121-134.

57. If Article 101 is addressed to undertakings, the Court has recognized the possibility to condemn Member States for breach of competition law provisions. Read in conjunction with Article 4(3) TFEU, Article 101(1) requires Member States not to introduce or maintain in force measures which may render ineffective the competition rules applicable to undertakings. In a case where the aeronautical authorities had approved tariff agreements contrary to Article 101(1), the Court indicated that:

*“[W]hile it is true that the competition rules set out in Articles [101 and 102] concern the conduct of undertakings and not measures of the authorities in the Member States, Article [4(3) TEU] nevertheless imposes a duty on those authorities not to adopt or maintain in force any measure which could deprive those competition rules of their effectiveness.”<sup>50</sup>*

58. The principle is that Member States cannot adopt or maintain in force any measure which would deprive EU competition rules of their effectiveness or prejudice their full and uniform application.<sup>51</sup> This would be the case in particular if:

*“[A] Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [101] or reinforce their effects or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.”<sup>52</sup>*

In such a case the national courts and all public authorities must disapply the provisions conflicting with EU competition rules.<sup>53</sup>

59. When national measures render ineffective EU competition rules, undertakings cannot be condemned for a breach of such rules unless the national measures merely *encourage* or *make it easier* for undertakings to engage in autonomous anti-competitive conduct.<sup>54</sup> In that case, undertakings remain liable under Article 101(1).

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<sup>50</sup> Case 66/86 *Ahmed Saeed* [1989] ECR 803, at §48. See also Case C- 311/85 *Vlaamse Reisbureaus v Sociaale Dienst* [1987] ECR 3801.

<sup>51</sup> P. Graig and G. De Búrca, *EU Law - Texts, cases and materials*, OUP, 2011, at p.1084.

<sup>52</sup> Case C-35/96 *Commission v Italy* [1998] ECR I-03851, at §34.

<sup>53</sup> Case C-198-01 *Conorzio Industrie Fiammiferi* [2003] ECR I-8055, at §48-51.

<sup>54</sup> *Id.*, at §52-57. See K.Lenaerts and P. Van Nuffel, *European Union Law*, Sweet & Maxwell, 2011, at p.358.

#### **4. Partial conclusion**

60. It follows from these considerations that the UPU target system of terminal dues, as proposed for the 2012 UPU Congress, does not present the pro-competitive effects and efficiencies that led to the exemption of the REIMS II Agreement from the prohibition of Article 101(1). The proposed system being a price-fixing agreement that presents an insufficient relation to costs and to the quality of service, it infringes Article 101(1) and cannot be justified under Article 101(3) TFEU. In addition, by discriminating between operators, based on the origin of the mail item, this system may also constitute an abuse of a dominant position. In respect of these infringements, Member States may be held liable for breach of EU competition rules should they mandate their DO to implement the UPU terminal dues system, hence introducing a measure which may render ineffective the competition rules applicable to undertakings.

#### **IV. Ability of the Member States to take part in the UPU Convention and in Terminal Dues negotiations**

61. The second question raised in this Opinion is whether, by participating in the 2012 Universal Postal Convention and voting on some of the rules proposed such as on the target system of terminal dues, the Member States would infringe the EU Treaty and/or the EU case-law on the repartition of competence between the EU and the Member States.

62. As far as postal services are concerned, two main sets of rules might prevent Member States from undertaking commitments at the 2012 Universal Postal Convention, that is the rules contained in the Treaty on the Common Commercial Policy and the case-law developed by the European Court of Justice on the implied powers of the EU.

##### **A. The Common Commercial Policy**

63. The Common Commercial Policy<sup>55</sup> (“CCP”) was created to govern the trade relations of the EU with non-EU countries.<sup>56</sup> Under Article 3(1)(e) TFEU, the CCP is explicitly

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<sup>55</sup> The relevant articles of the Treaties are Article 206 and 207 TFEU.

<sup>56</sup> Press Release of the European Commission (Trade) of 1 December 2009: “The creation of a common commercial policy followed as a logical consequence of the formation of a customs union among its Member States. The European Union's trade policy therefore establishes common rules including, among others, a common customs tariff, a common import and export regime and the undertaking of uniform trade liberalization measures as well as trade defence instruments. The Common Commercial Policy is explicitly placed under the exclusive competence of the Union (Article 3 of the Treaty of Lisbon). This confirms

(continued...)

placed under the exclusive competence of the Union, confirming the case-law of the ECJ.<sup>57</sup>

64. It follows from the existence of an exclusive competence on the part of the Union that the Union alone is able to legislate and conclude international agreements in this field. The reason is that allowing Member States to exercise a power concurrent to the power of the Union would:

*“amount to recognizing that, in relations with third countries, Member States may adopt positions which differ from those which the [Union] intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the [Union] and prevent the latter from fulfilling its task in the defence of the common interest”.*<sup>58</sup>

65. In the context of the revision of the UPU Convention, the question that arises is whether the provisions relating to the determination of terminal dues fall within the scope of the CCP, implying an exclusive competence of the EU to negotiate and conclude the agreement at the next UPU Congress.
66. Originally only applicable to trade in goods, the scope of the CCP was extended by the Court and the Treaties to include the provision of services. This extension was however limited to services traded like goods, *i.e.* the cross frontier supply of services (GATS mode 1).<sup>59</sup> This restrictive interpretation led to uncertainties as to whether all aspects of postal services discussed at the UPU Congress fell within the scope of the CCP and therefore under an EU exclusive competence. Following the Lisbon Treaty, the EU exclusive competence in the field of the CCP is no longer dependent on the category of services concerned, as the CCP now covers trade in services as a whole.<sup>60</sup>
67. In any event, provisions regarding terminal dues would be covered by the definition of services in the CCP provisions, even if the exclusive competence of the EU were to be limited to Mode 1 services. Pursuant to Article I-2 a) of the GATS, this category

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existing case-law of the European Court of Justice and means that the Union alone is able to legislate and conclude international agreements in this field.” Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=493>

<sup>57</sup> Opinion 1/75 [1975] ECR 1355.

<sup>58</sup> Id.; See also Case 41/76 *Donckerwolcke* [1976] ECR 1921; Opinion 1/78 [1979] ECR 2871; Opinion 2/91 [1993] ECR I-1061.

<sup>59</sup> Opinion 1/94 *WTO* [1994] ECR I-5267.

<sup>60</sup> Article 207(1) TFEU.

includes the supply of a service from the territory of one Member into the territory of any other Member, *i.e.* the supply of cross border services. The World Trade Organization provides as an example of such service, the situation where a user in country A receives services from abroad through its telecommunications or postal infrastructure.<sup>61</sup> Terminal dues would therefore fall within this category of services as they constitute the remuneration of the destination country for the delivery of cross border mail.

68. Such considerations mean that the regulation of terminal dues falls *a priori* within the scope of the CCP, excluding any action taken by the Member States to regulate external relations in this sector.<sup>62</sup> The Lisbon Treaty has clarified the rules governing the repartition of competences between the EU and the Member States, excluding any possibility for them to legislate on a matter for which the EU has an exclusive competence. This includes the right to negotiate and conclude international agreements. Member States will still play a role but limited to the implementation of Union acts or if empowered to act by the Union.<sup>63</sup> It is therefore highly questionable whether the negotiation and conclusion of the UPU Convention at the 2012 UPU Congress by the Member States is in accordance with EU rules on the repartition of competence.

## **B. The *AETR* doctrine**

69. The Member States' external action may also be limited by the exclusive competence of the EU arising from its internal competence. Article 216(1) TFEU states that:

*“The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”*

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<sup>61</sup> [http://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s3p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm)

<sup>62</sup> In its Opinion 2/91, cited note 58, the Court confirmed indeed that the existence of an exclusive competence on the part of the EU excluded any competence on the part of Member States which would be concurrent with that of the Union, in the Union sphere and in the international sphere.

<sup>63</sup> Article 2(1) TFEU states that “[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

70. Such a possibility flows from the *AETR* judgment, in which the ECJ held that, even if the EU treaties did not expressly confer a competence upon the EU to conclude an international agreement in a particular field, such a competence could also flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the EU institutions.<sup>64</sup> The Court, considering that the attainment of the objective pursued by those rules and the objectives of the treaties themselves would be compromised if Member States were free to adopt international agreements affecting EU rules,<sup>65</sup> held that:

“ [E]ach time the [EU], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”<sup>66</sup>

71. I will explain hereafter the reasons for which I consider that the rules developed under the *AETR* doctrine are applicable to the 2012 Universal Postal Convention. As the EU (i) has adopted common rules regulating postal services and terminal dues; and (ii) the adoption of the UPU target system of terminal dues by the Member States would affect those rules or alter their scope within the meaning of the case law, the EU Institutions should be considered as having acquired a competence to regulate the external aspects of postal services.

### 1. The adoption of common rules on terminal dues by EU Institutions

72. The *AETR* judgment establishes a parallelism between the internal and external competences of the EU in so far as the EU institutions have exercised their competence at the internal level by adopting common rules to implement a common policy. This condition has however been given a broad interpretation as it also includes the adoption of rules outside the scope of a specific common policy.<sup>67</sup> In that respect, the Court held that the exclusive competence of the EU institutions could flow from the fact that an international agreement fell into an area largely covered by EU rules, in particular in “*areas where there are harmonising measures.*”<sup>68</sup>

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<sup>64</sup> Case 22/70, *Commission v Council - AETR* [1971] ECR 263.

<sup>65</sup> Case C-266/03, *Commission v Luxembourg* [2005] ECR I-4805, at §41.

<sup>66</sup> *AETR*, cited note 64, at §17.

<sup>67</sup> Opinion 2/91, cited note 58, at §11.

<sup>68</sup> Opinion 1/03 *Lugano Convention* [2006] ECR I-1145, at §118.

73. I have demonstrated in this Opinion that the EU has developed a policy aiming to complete the internal market for postal services and to ensure, through an appropriate regulatory framework, that efficient, reliable and good-quality postal services are available throughout the EU to all its citizens at affordable prices. As for terminal dues, Articles 12 and 13 of the Postal Directive provide principles that Member States should ensure are respected by postal operators when determining the tariffs of cross-border delivery of mail. It is therefore apparent that the EU has adopted common rules regulating the provision of postal services, including terminal dues.

**2. The action of the Member States “*might affect those rules or alter their scope*”**

74. Even where the EU has adopted common rules regarding a specific field, it will only benefit from an exclusive competence to conclude international agreements if a Member State’s action “*might affect those rules or alter their scope*”.<sup>69</sup> As already explained in this Opinion, the UPU target system of terminal dues can be considered as affecting EU rules in the field of postal services as the system infringes the provisions of the Postal Directive. But even in the event that such provisions were reconcilable, *quod non*, the very broad approach developed by the Court would be likely to lead to a similar finding that EU rules are affected by the provisions of the UPU Convention.

75. In Opinion 2/91, the Court adopted an expansive interpretation of this condition considering it as fulfilled when the commitments arising from an international agreement were merely *liable to* affect EU rules even though there was no contradiction between the international agreement and the directives at stake. As the international agreement at stake in that case was concerned with an area largely covered by EU rules progressively adopted with a view to achieving an even greater degree of harmonization, the Member States were prevented from undertaking such commitments outside the framework of the EU institutions.<sup>70</sup>

76. The Court went even further when it recently ruled that a mere proposal submitted by Greece to the International Maritime Organisation (“IMO”), which initiated a procedure potentially leading to the adoption by the IMO of new rules, had an effect on EU rules. According to the Court, Greece “*took an initiative likely to affect the provisions of the Regulation, which is an infringement of the obligations under Article [4(3) TEU], [91*

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<sup>69</sup> *AETR*, cited note 64, at §17 and Opinion 2/91, cited note 58, at §9.

<sup>70</sup> Opinion 2/91, cited note 58, at §25-26.

TFEU] and [100(2) TFEU].”<sup>71</sup> This case is of particular relevance for the assessment of an action by the Member States at the next UPU Congress as it implies that even a non-binding measure may affect existing EU rules. During the next UPU Congress, the Member States will have taken part in the proposals submitted for the regulation of terminal dues (and other aspects of the UPU Convention to be reviewed). These proposals could thus be considered as affecting not only the provisions of the Postal Directive, but also of the European policy in the Postal sector in general.

### **3. Partial conclusion**

77. As the adoption of the proposed target system of terminal dues would be susceptible to affect EU rules on postal services, it can be convincingly argued that the Member States do not have competence to negotiate and adopt such a system.

## **C. Implications for the Member States’ participation in the 2012 UPU Congress**

### **1. Regulatory nature of the terminal dues provisions**

78. The following section deals with the implications for the Member States of the developments relating to the exclusive competence of the EU to negotiate and enter into the proposed UPU target system of terminal dues. In this regard, I suggest that two different perspectives can be adopted.

79. The first one - to which I adhere in this Opinion - is to consider that as the EU has already adopted common rules on terminal dues, by agreeing on rules on terminal dues at the UPU Congress, the Member States would be going beyond their competence, encroaching upon the EU’s exclusive competence to negotiate and conclude international agreements on this issue.

80. A second approach would be to distinguish between two types of issues raised at the UPU Congress:

- i. Governmental or regulatory issues - such as the determination of the principles governing the provision of cross-border services. In relation to terminal dues, this category would cover for instance the determination of principles, such as the

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<sup>71</sup> Case C-45/07, *Commission v Greece*, [2009] ECR I-00701, §§21-23.

application of a more cost-related approach and of non-discriminatory and transparent terminal dues.

- ii. Operational or commercial issues - this category would include the determination of the actual rate (e.g. per kilogramme and per piece) that postal operators will charge each other for the provision of cross-border services.<sup>72</sup>

81. Pursuant to this second approach, it would be theoretically possible for EU governments to collectively agree on an UPU provision that sets general pricing principles, similar to those embodied in Articles 12 and 13 of the Directive, while leaving their DOs (or even the governments acting as owners) free to negotiate specific terminal dues rates within the limits of the principles of the Directive without further coordination at the EU level.<sup>73</sup>

82. Although such an approach may be desirable, it does not correspond to the proposed target system for the Doha Congress. Under the proposal, the terminal dues provisions for the target system would be incorporated in the Convention (Article 28), not in the (more operational) Regulations, and they would directly regulate the terminal dues to be charged by the DOs.<sup>74</sup> These provisions are therefore regulatory in nature and not equivalent to, for example, a contractual agreement between two EU postal operators acting within the context of pricing principles set by the Directive.

## 2. Coordination of the Member States' positions on terminal dues

83. It was shown in this Opinion that by negotiating and concluding the UPU Convention, the Member States would intervene in an area falling within the exclusive external

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<sup>72</sup> In a 2010 Study commissioned by the European Commission, the authors observed that "[a]cts of the UPU include both governmental or regulatory functions, on the one hand, and operational or commercial functions, on the other." See Study for the European Commission, Study on the External Dimension of the EU Postal Acquis, WIK-Consult/ Jim Campbell, November 2010, at p.163.

<sup>73</sup> Id.

<sup>74</sup> While a distinction between the governmental and operational roles of the bodies of the Union was raised at the 1999 Beijing Congress, it was made clear that the operational issues would be addressed in the Regulations and the governmental issues in the Convention. UPU, 1999 Beijing Congress, Doc 85.2, Resolution C110. A group was created with the mission to recommend reforms "to more clearly define and distinguish between the governmental and operational roles and responsibilities of the bodies of the Union with respect to the provision of international postal services." See also UPU, 2008 Geneva Congress, Doc 17, paragraph 23: "The recast of the Convention and its Regulations [by the Bucharest Congress] was to ensure greater clarity in distinguishing between the governmental and operational roles of the Union and its bodies. The principles of the recast were that the Convention should contain principles established by governments, while the Regulations should contain the operational and commercial rules applied by the designated operators entrusted with fulfilling the obligations arising from the Acts without any changes of substance."

competence of the EU. However, the exclusive competence of the EU does not preclude Member States from actively participating in the UPU, provided that the positions they adopt are coordinated at the EU level beforehand.<sup>75</sup> Such a coordination is particularly important for the preparation of the UPU Congress as the EU is not a party to the UPU. In this regard, the Court has stated that:

*“[T]he fact that the [EU] is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the [EU]’s interest.”*<sup>76</sup>

84. The Court added that in a situation where the EU has failed to take measures of coordination, implying a breach of the duty of sincere cooperation on its part, the Member States are not entitled to take initiatives likely to affect EU rules. Member States may not adopt measures design to obviate any breach by an institution of rules of EU law.<sup>77</sup>

85. Concerning UPU Congresses, efforts have been made towards coordination between Member States and the EU. In 2004, the Commission adopted a Communication to the Council on the UPU Congress 2004 reaffirming the importance of ensuring *“that the Commission participates to the fullest extent possible in work in the UN system which concerns issues for which it is responsible within the EU.”*<sup>78</sup> The Commission also stated that it was essential to ensure compatibility between the UPU system and the EU framework and that it was:

*“necessary to ensure that the rules and the positions taken by the Member States in the coming UPU Congress are compatible, complementary and coherent with [EU] legislation in particular with that included in [the Postal Directive].”*<sup>79</sup>

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<sup>75</sup> Opinion Advocate General Case C-45/07 *Commission v Greece* [2009] ECR I-00701.

<sup>76</sup> Case C-45/07, cited not 71, at §31. See also Opinion 2/91, cited note 58, at §5 where the Court held that “although, under the ILO Constitution, the [EU] cannot in itself conclude Convention No 170, its external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the [EU]’s interest.”

<sup>77</sup> *Id.*, at §26.

<sup>78</sup> Communication from the Commission to the Council - The Universal Postal Union Congress 2004, COM(2004) 398 final, at §14 which refers to Communication from the Commission to the Council and European Parliament, “The European Union and the United Nations: The Choice of multilateralism”, COM(2003) 526 final, at p. 22.

<sup>79</sup> *Id.*, at §41.

86. The Commission called for a common EU position during the negotiations and coordination among the Member States and with the Commission.<sup>80</sup> Despite the Council resolution that followed this Communication, the Member States showed “*little apparent coordination*” in the 2004 and 2008 Congresses, submitting individual proposals, including with respect to terminal dues, sometimes inconsistent with each other.<sup>81</sup> Yet, as stated in the WIK / Campbell study,<sup>82</sup> the Commission clarified in this Communication that, whether the EU has exclusive competence or not, all Member States are obliged to somehow coordinate their positions.<sup>83</sup> Although this goal was reiterated by the Council in 2008, no common position was found.<sup>84</sup>

87. The situation of EEA countries should, however, be distinguished from the situation of EU Member States. The EU is not allowed to represent EEA countries at the international level and these countries have not transferred such competence to the EFTA.

### 3. Partial conclusion

88. To conclude on the implications for Member States as regards the revision of the UPU target system of terminal dues, I consider that because of the regulatory nature of the provisions to be reviewed, Member States would act beyond their competences if they were to negotiate them individually. Since the EU is not a party to the UPU, the Member States should coordinate their position as they should act in the Union’s interest.

## V. Conclusion of an international agreement infringing EU law

89. In the event that no coordination, or at least no sufficient coordination, is foreseen, the Commission could make use of its legal powers to remedy any infringement by the Member States and/or DOs of EU law. Before elaborating on that point, I explain that if an agreement is reached on the proposed terminal dues system, Member States will not be able to escape their liability under EU law by relying on traditional international tools designed to avoid conflicts between legal instruments.

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<sup>80</sup> Id., at §51.

<sup>81</sup> See Study for the European Commission, Study on the External Dimension of the EU Postal Acquis, WIK-Consult/ Jim Campbell, November 2010, at p. 151.

<sup>82</sup> Id., at p. 149.

<sup>83</sup> The Commission cited various provisions such as Article 34 TEU, Articles 207 and 351 TFEU.

<sup>84</sup> “Common Understanding Paper”, Council, Document 11860/08. A proposal brought by a EU Member States which would have brought terminal dues closer to domestic tariffs was opposed by some Member States.

**A. Irrelevance of traditional international law tools designed to avoid conflict between legal instruments**

90. In my opinion none of the traditional international law tools that Member States could invoke to ensure that EU law will be respected despite their participation in the UPU target system should be considered sufficient to guarantee that EU rules would not be affected by the UPU Convention.

91. For instance, the UPU Constitution allows member countries to file a “reservation” to selected provisions of certain acts of the UPU. A reservation is defined as “*an exemption clause whereby a member country purports to exclude or to modify the legal effect of a clause of an Act, other than the Constitution and the General Regulations, in its application to that member country.*”<sup>85</sup> However EU Member States are not allowed to use this possibility as the acts of the UPU provide that member countries may not file a reservation to a provision in the Constitution, the General Regulations, or the terminal dues provisions of the Convention.<sup>86</sup>

92. The ECJ has already looked into the existence of a clause, in an international agreement, providing that the agreement in question does not affect the application by Member States of the relevant provisions of EU law. In Opinion 1/03, when reviewing whether the conclusion of the agreement in question was capable of affecting EU rules, the Court considered the initiative taken by the Member States seeking to avoid contradictions between EU law and the agreement and stated that:

*[T]he existence in an agreement of a so-called ‘disconnection clause’<sup>87</sup> providing that the agreement does not affect the application by the Member States of the relevant provisions of [EU] law does not constitute a guarantee that [EU] rules are not affected by the provisions of the agreement because their respective*

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<sup>85</sup> UPU, Constitution (2008), Articles 1bis(6ter) and 2.

<sup>86</sup> UPU, Constitution (2008), Article 22; Convention (2008), Articles 28(11), 29(8).

<sup>87</sup> Disconnection clauses are clauses “inserted in many multilateral conventions, according to which in their relations inter se certain of the parties to the multilateral convention would not apply the rules of the convention but specific rules agreed among themselves.” Report of the International Law Commission on the work of its fifty-seventh session, Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10), at §463.

*scopes are properly defined but, on the contrary, may provide an indication that those rules are affected.”*<sup>88</sup>

93. In addition the Court added that such a mechanism is not in itself a decisive factor in resolving the question of the nature of the competence of the EU and the Member States, as this question must be answered *before* the conclusion of the agreement.<sup>89</sup>

*“The purpose of this clause is to prevent conflicts in the application of the two legal instruments. Therefore it does not provide in itself an answer, before the conclusion of the agreement, to the question whether the [EU] has exclusive competence to conclude that agreement. On the contrary it may provide an indication that that agreement may affect [EU] rules.”*<sup>90</sup>

94. Therefore, even if a reservation could be adopted with respect to terminal dues, *quod non*, following the ECJ case law, such a reservation could not be considered sufficient to guarantee that EU rules would not be affected by the UPU Convention. The approach flows from the fact that, according to the Court, *“the failure of [a] Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with [EU] law.”*<sup>91</sup>

95. The Court has also rejected arguments that could be drawn from the fact that the EU is not a member of an international organisation and that Member States should thus be allowed to assume its obligations, concluding that:

*“[T]he mere fact that the [EU] is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect [EU] rules promulgated for the attainment of the objectives of the Treaty.”*<sup>92</sup>

96. Finally, the Court considered that various international law mechanisms such as the suspension or even the denunciation of the agreement are *“too uncertain in [their] effects to guarantee that the measures adopted by the [EU Institutions] could be applied*

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<sup>88</sup> Opinion 1/03, cited note 68, at §130.

<sup>89</sup> Id.

<sup>90</sup> Id., at §154.

<sup>91</sup> Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, at §101.

<sup>92</sup> Case C-45/07, cited note 71, at §30.

*effectively*". These measures would not allow Member States to fulfil their EU obligations as they are not sufficient in order to ensure the full effectiveness of EU law.<sup>93</sup>

## **B. Responsibility of the Member Countries and the Designated Operators**

97. As suggested in this Opinion, if the Member States were to negotiate and conclude the proposed target system of terminal dues at the 2012 UPU Congress, they would be considered not only as encroaching upon the exclusive competence of the EU,<sup>94</sup> but also as infringing the provisions of EU law on postal services and, along with the DOs, EU competition rules.
98. When entering into international agreements, Member States are not totally free to exercise their power at will. The duty of sincere cooperation imposes on them to "*exercise their international powers without detracting from Union law or from its effectiveness*"<sup>95</sup> and require them to facilitate the achievement of the Union's tasks, as well as to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. The Court confirmed that this duty is of general application and does not depend either on whether the Union competence concerned was exclusive or on any right of the Member States to enter into obligations towards non-member countries.<sup>96</sup>
99. Where a EU Member State fails to comply with EU law, the Commission has powers to try to bring the infringement to an end, and, where necessary, may refer the case to the ECJ under Article 258 TFEU for failure of the Member State to fulfil its obligations under EU law. The Commission can thus initiate proceedings against Member States on the basis of the different EU provisions that are being violated, including Article 4(3) TFEU on the principle of sincere cooperation.
100. Although the conclusion of the target system of terminal dues could lead to infringement proceedings against EU Member States, the Commission would not be allowed to bring any action against third countries. However, as they are parties to a price-fixing agreement between undertakings, DOs from third countries are subject to the provisions of Article 101(1) TFEU. It is irrelevant for the application of EU competition rules

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<sup>93</sup> Case C-246/07, *Commission v Sweden*, [2010] ECR I-03317, at §§39-41; See N. Lavranos, *Protecting European Law from International Law*, *European Foreign Affairs Review*, 2010, 15, at p. 279.

<sup>94</sup> If there is not at least prior coordination of their position at the EU level.

<sup>95</sup> K. Lenaerts and P. Van Nuffel, *European Union Law*, Sweet & Maxwell, 2011, at p.874.

<sup>96</sup> Case C-246/07, cited note 93, at §69-71.

whether the undertakings concerned are EU or non-EU companies, as long as the agreement has an effect on the EU market.<sup>97</sup> Therefore postal operators such as the United States Postal Service could potentially be found as infringing EU competition rules and be fined by the European Commission.

101. In addition, although the aim of this Opinion is to discuss whether EU Member States and/or DOs of the EU and EEA Member States may participate in the target system of terminal dues proposed for the 2012 Universal Postal Convention, it should be borne in mind that the findings contained in this Opinion are not necessarily limited to EU Member States and their DOs. Certain member countries of the UPU, such as the United States, have also implemented rules on postal services and terminal dues, which may be in contradiction with the proposed target system of terminal dues. As already expressed by the US Department of Justice in 1988,<sup>98</sup> it appears difficult to reconcile the UPU target system of terminal dues with the requirements of US postal and antitrust law.<sup>99</sup> The principles found in this Opinion are also relevant for third countries and their postal operators for which the UPU target system may also cause issues under their own legal provisions.

## VI. Conclusion

102. I have been asked to answer the question of the possibility for EU and EEA Member States and Designated Operators to negotiate and enter into the proposal for a target system for terminal dues in the framework of the Universal Postal Union. I suggest that EU and EEA Member States are not allowed to enter into the target system of terminal dues proposed for the 2012 Universal Postal Convention for the following reasons:

- i. As the proposed target system does not provide for cost-based terminal dues, it is incompatible with Article 12 and 13 of the Postal Directive. This system also constitutes a price-fixing agreement, which is caught under Article 101(1) TFEU

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<sup>97</sup> Articles 101 requires that the agreement or concerted practice has an effect on trade between Member States. This article is applicable irrespective of where the undertakings concerned are located within or outside the EU. What the Commission will look at is whether the agreement or concerted practice was implemented or had effects within the EU. See Commission Decision 85/202/EEC *WoodPulp* [1985] OJ L85/1.

<sup>98</sup> See U.S. Department of Justice, cited note 33. Although it refers to the UPU system as it was in 1988, its main feature and the underlying principles are common to the target system of terminal dues, *i.e.* terminal dues not related to costs.

<sup>99</sup> See Towards a United States Position at the Doha Congress of the Universal Postal Union, J. Campbell, 2011.

and which cannot be exempted under Article 101(3) since it does not contain pro-competitive effects and efficiencies capable of offsetting its anti-competitive effects. In addition, the proposed terminal dues system discriminates between designated operators depending on the origin of the mail. Such a discrimination is prohibited by the Postal Directive, as well as by Article 102 TFEU.

- ii. It is also highly questionable whether EU Member States are allowed, under the provisions of the EU Treaties and the EU case law on the repartition of competences between the Member States and the EU, to negotiate and conclude an international agreement on terminal dues. I therefore suggest that the Member States should at least coordinate the position they will defend at the UPU Congress in order to present a united front that will neither depart from the principles defined in the Postal Directive nor from the EU competition rules. The EU should be involved in this process to ensure that sufficient coordination actually takes place.