

INTERNATIONAL POSTAL POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE POSTAL SERVICE

OF THE

COMMITTEE ON

GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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DEPARTMENT OF JUSTICE

Statement by

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Before the
Subcommittee on Postal Service
House Government Reform Committee

on
International Postal Policy

Washington, D.C.
March 9, 2000

I am delighted to have the opportunity to submit to the Subcommittee the views of the Department of Justice on the role of competition in shaping the future of markets for international mail services. This Subcommittee knows the vital role that competition plays in the American economy, and the importance of the antitrust laws in preserving that competition. As international markets take shape, it is extremely important that the United States' membership in multinational organizations such as the UPU is consistent with fundamental national policy objectives, and ensuring competition is one of the most fundamental. At the outset, I would like to provide a brief overview of the antitrust laws of the United States and then turn to thoughts about certain international postal issues.

THE ANTITRUST LAWS OF THE UNITED STATES

I would like to start by discussing the purpose and scope of the antitrust laws. For over a century, the United States has committed itself to protecting free and unfettered competition in the vast majority of markets in the economy. The Sherman Act, passed in 1890, has been called the Magna Carta of free enterprise. In general, the United States operates a free-market economy subject to the antitrust laws. Time and again, relying on free-market competition has allowed consumers numerous benefits, including more innovation, more choice and lower prices than that of economies where free competition has been limited.

The main provisions of the Sherman Act are Section 1 and Section 2 of the Act, and they are, in conjunction with Section 7 of the Clayton Act, the primary antitrust enforcement tools. Section 1 of the Sherman Act prohibits contracts and conspiracies in restraint of trade. Section 2 of the Sherman Act prohibits monopolization or attempts to monopolize. Section 7 of the Clayton Act prohibits mergers or acquisitions that may tend to substantially lessen competition.

PAST JUSTICE DEPARTMENT VIEWS ON INTERNATIONAL POSTAL ISSUES

The normal presumption in a market economy is that private enterprises should provide goods and services in competition with each other. Competition between private companies yields cost efficiencies and innovations. In testimony before this Committee last year, I have stated the Department's support for the application of the federal antitrust laws to competitive activities of the Postal Service.

Since the enactment of the Postal Reorganization Act of 1970, the Department has engaged in an active program of competition advocacy with respect to international postal issues. In the years since the reorganization of the United States Post Office, we have opposed efforts to erect restrictions on competition in international mail services. These are some of the international issues we have addressed:

- In 1986 the Antitrust Division prepared comments urging the USPS to suspend or limit its International Priority Airmail Service pending development of a factual record adequate to ensure against anticompetitive cross-subsidization; in a separate proceeding the Antitrust Division urged the USPS to reject proposed rules that would restrict the ability of remail services to compete for international mail traffic.
- In 1988 the Antitrust Division submitted comments critical of the USPS proposal for modifications to the terminal dues system for delivery of international mail.
- In 1991 the Antitrust Division reiterated its opposition to the USPS proposal for modifications to the terminal dues system.
- In 1998, we took an active role in urging support for a legislative amendment transferring responsibility for international postal policy from the USPS to the State Department. The President signed the measure into law, thus formalizing the end of the USPS' direct representation of US interests at meetings of the Universal Postal Union, the international standards-setting body. We feel very strongly that the following "Sense of Congress" resolution included in that legislation is appropriate policy:
"It is the sense of Congress that any treaty, convention,

or amendment entered into under the authority of section 407 of title 39 of the United States Code, as amended by this section, should not grant any undue or unreasonable preference to the Postal Service, a private provider of postal services, or any other person.”

Pub. L. No. 105-277, Div. A, 101(h), Oct 21, 1998.

Today, we are addressing the interests at stake in markets for international mail services, and the role that competition policy should have in shaping international agreements affecting the structure of international markets. In addressing these issues, there is a fundamental starting point -- that to the extent possible, all who wish to compete should have equal opportunity to compete for a customer's business. Not everyone can be a winner in a competitive marketplace, but the rules affecting the market should not be such that they favor a particular competitor over other competitors without a compelling justification.

As a result of legislation enacted in 1998, the Secretary of State is responsible for the negotiation of international postal agreements on behalf of the United States. This was a major advance for competition in our view. The Department of State replaced the USPS, which otherwise could have potentially favored its own parochial interests at the expense of competing private parties. With this change, all affected parties will have the ability to provide appropriate input to the State Department before a policy on behalf of the United States is adopted and expressed.

In our view, the State Department, in a very short time, has obtained several important concessions from the UPU executive committee and member countries on key reform initiatives that implicate competition. That is not to say that everything is perfect. We are aware of the recent General Accounting Office Study on the implementation of the Department of State's role

that, while generally positive, noted that process improvements could be made.

Particular substantive areas of interest to the Antitrust Division -- and to the subcommittee and participants at the hearing today -- include commitments and concessions in policy affecting remail activities and terminal dues fees.

Remail and Terminal Dues

The UPU sets the basic principles and guidelines for the exchange of mail between member countries. Unlike first class (non-urgent) letter mail within the United States — which is subject to a statutory U.S. Postal Service (“USPS”) monopoly — outbound international mail has been open to competition since 1986. Parties competing in the delivery of international mail — known as “remailers” — collect outbound international letter mail from their customers, sort it, bag it by country of destination, and directly deposit it into the foreign postal system. Remailers may be private competitors but also may be postal administrations that establish operations in other countries. Competition between remailers and the USPS has provided consumers with greater options in mail delivery, and significant benefits in the price and quality of international mail service.

Remail can take at least three different forms: (1) mail from an originating country deposited directly in a foreign postal system for ultimate delivery back to the originating country, called “ABA” remail; (2) mail deposited directly in the mail system of a foreign country for ultimate delivery in that country, called “ABB” remail; and (3) mail deposited directly into the mail stream of one foreign country to be ultimately delivered in a third country, called “ABC” remail.

The UPU currently recognizes a restrictive policy toward remail, a policy that attempts to deter remailing activity through the imposition of penalties by postal administrations for remail intercepted in transit. Specifically, Article 40 allows a country that is the final recipient of ABA and ABC remail to intercept that mail and claim additional compensation. It allows postal administrations a great deal of discretion in their handling of remailed materials. Postal administrations may refuse delivery of remailed materials outright or they may demand additional postage payment for delivery.

The receiving country may claim the additional postage due from the mailer or from the foreign postal administration where materials were posted. If no party agrees to pay the additional postage fees, a postal administration may return materials to the sender. Paragraphs 1 through 3 of Article 40 allow postal administrations to demand payment of the full domestic tariff when ABA mail is intercepted. Paragraph 4, which is generally applied to ABC remail, allows a charge of up to eighty percent of that country's domestic tariff.

To compensate member countries for the cost associated with delivering inbound international mail, the UPU authorizes postal administrations to collect "terminal dues" when an administration receives more mail from a particular country than it sends. The current terminal dues rate is a flat rate based on worldwide average cost, which does not fully compensate most industrialized countries for the actual cost of delivery because an industrialized country's cost for delivering inbound international mail is typically above the global average.

In general, the most efficient allocation of economic resources will occur when the price of a product or service is set at its marginal cost. Here, in addition to fostering an inefficient allocation of economic resources, a terminal dues structure that is not based on the cost of actual

delivery can distort competition between remailers and postal administrations, because remailers are not subject to terminal dues. A low terminal dues rate for outbound international mail may provide a postal administration with a competitive advantage over a remailer that, for certain types of remail, may pay as much as the domestic tariff of the destination country. On the other hand, a low terminal dues rate may not fully compensate that postal administration for its actual cost of delivering inbound international mail. This may place the postal administration at a competitive disadvantage if regulations require it to make up this shortfall in its outbound international rates.

Additionally, a terminal dues structure that is not based on the cost of actual delivery can distort the flow of international and domestic mail. For example, if terminal dues rates were set lower than the actual cost of delivery, it might create incentives to direct certain mail through the international mail system, possibly through ABA remail, rather than through the domestic system. Moreover, if the terminal dues rates of only some countries were set lower than the actual cost of delivery, it could create additional incentives to route mail inefficiently, through either ABA remail or ABC remail.

We are pleased with the concession the US Delegation obtained at the Beijing Congress on terminal dues reform. The UPU has endorsed transition to a cost-based assessment, and although the timetable is somewhat longer than the US Delegation proposed, the five-year transition plan reasonably reflects the political realities attending this issue. The Antitrust Division recognizes the concern that too swift a dismantling of protections may result in diversion of domestic mail to ABA remailers, and that this could result in large revenue losses. A cost-based terminal dues structure would eliminate much of the incentives for any such

diversion. We support calls for progress at a pace that is constructive for all parties.

We also support efforts by the State Department to promote competition between postal administrations and remailers in international mail, while ensuring that terminal dues are cost-based. If terminal dues are cost-based, anti-remail penalties can work as a artificial device to protect postal administrations at the expense of consumers and innovative approaches to efficient and economical message transfers. Such restrictions on mail flow can hamper a multinational firm's normal business operations, and likely result in increased costs and fewer service options. Consumers should be free to use the international mail provider that offers the best service at the lowest price, without fear of mail interception or the imposition of additional charges.

CONCLUSION

Competition principles are at the core of the American economy and should be maximized to the fullest extent possible. We look forward to continuing to work with the Subcommittee on the issue of postal reform.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 20, 2000

The Honorable John McHugh
Chairman
Subcommittee on the Postal Service
Committee on Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am forwarding Deputy Assistant Attorney General Patterson's written responses to the follow-up questions enclosed in your April 3, 2000, letter. The Department of Justice appreciates the opportunity to have participated in the subcommittee's March 9, 2000, hearing on International Postal Policy. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Robert Raben".

Robert Raben
Assistant Attorney General

Enclosure

United States Department of Justice
Responses to Questions for the Record

Committee on Government Reform
Subcommittee on the Postal Service

March 9, 2000, Hearing on
International Postal Policy

Questions From the Chairman

Question 1. What are the implications of the European Court of Justice's recent decision in the Deutsche Post-Citicorp re-mailing case? The European Court's February 10 judgment held that in the absence of European Union (EU) rules requiring cost-based terminal dues, EU competition law allowed Germany to apply Article 25 of the Universal Postal Convention to charge internal German postage rates to A-B-A remail from another member state, but the rates had to be reduced by an amount corresponding to any terminal dues paid to Germany by that other state's postal authority. The judgment was based on EU law and is limited to postal rates within the EU; the Court did not interpret EU rules on competition and free movement of goods to enforce a cost-based accounting system.

Question 2. Some have suggested that national antitrust laws should be applied to international postal agreements. Does the Department of Justice support this suggestion? If this were to be done, which current agreements and arrangements would be non-compliant? U.S. antitrust laws do not apply to international agreements entered between sovereign states. The Department of Justice does, however, participate in interagency discussions preparing for the negotiation of such agreements, and advocates pro-competitive outcomes to these negotiations.

Question 3. What steps is the Department of Justice now taking to ensure fair business practices in the international postal and delivery arena? As indicated in the answer to Question 2, U.S. antitrust laws do not apply to foreign government constraints on competition in international postal service and delivery. With respect to allegations enforceable under United States law, the Antitrust Division would apply the same review criteria to complaints stemming from conduct in the postal sector as would apply to allegations from any other industry or sector of the economy.

Questions from Mr. Fattah

Question 1. What concerns should the U.S. government have for U.S. interests now that foreign companies have entered the U.S. international remail market and the U.S. domestic mail market? Competition from foreign companies should contribute to lower costs and greater choices for U.S. consumers. We will, of course, continue to enforce U.S. antitrust laws to ensure that unlawful anticompetitive conduct does not interfere with these benefits. We will work with other U.S. agencies to encourage the opening of foreign postal markets to competition from U.S.-

based service providers.

Question 2. What are your views on accusations that the UPU and other international agreements such as terminal dues and Article 40 are anti-competitive? We regard anti-remail penalties as an artificial device to protect postal administrations at the expense of consumers and therefore support efforts by the State Department to effect repeal of relevant sections of Article 40 permitting the interception of certain remail by postal administrations. We also support the transition to a cost-based terminal dues assessment and regard as pro-competitive the concession obtained by the U.S. delegation at the Beijing Congress.