

# **Liberalisation of Postal Markets**

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## **Remailing – Catalyst for liberalising the European Postal markets?**

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*"Remail changes the world postal system."  
Ulrich Stumpf<sup>2</sup>*

## 1 Introduction

Like a snowball starting an avalanche that consumes a tranquil Alpine slope, remail, a relatively insignificant innovation in international postal services, prodded European governments into a massive effort to reform and liberalize long frozen postal laws. While many of the boldest reform plans announced by the European Commission have not been realized, core issues presented by remail have resulted in tangible and far reaching changes in postal policy. This paper explains the concept of remail and describes how European authorities struggled to resolve policy questions raised by it.

## 2 International Postal Service c. 1980

By the early 1980s, demands of large customers weighed heavily on domestic postal services but lightly on international services. In the domestic marketplace, major mailers gradually won commitments to better service and discounts for "worksharing", i.e., presorting mail or transporting mail "downstream" to a post office located near addressees prior to tender to the post office. Inexpensive computers allowed mailers to mechanize production of statements of account and raise the efficiency, and hence feasibility, of direct mail solicitations. Suddenly, post offices recognized the special requirements of domestic "bulk mail." International bulk mail received less attention. For most mailers, and for most post offices, international mail was such a small fraction of total mail—less than four percent of mail in most industrialized countries—that reform capital was on each occasion more fruitfully expended on domestic services. Then, too, there were few alternatives to the post office for inexpensive international document delivery. Telex was too cumbersome and courier service too expensive. National post offices could and did charge high rates for poor international service to large mailers and small.

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2 "Remailing in the European Community: Economic Analysis of Alternative Regulatory Environments" in M. Crew and P. Kleindorfer, *Regulation and the Nature of Postal and Delivery Services* (1997).

Not only was the post office the only means of inexpensive international document delivery, there was, for each mailer, only one post office to turn to. International postal services were organized as a comfortable shared monopoly. Each national post office believed that it had a “natural right” to collect and dispatch all outbound international mail produced by individuals and companies residing in its national territory.

As befits a monopoly, transfer pricing for services rendered between production units of the international postal system received little attention. The rate of payment for delivery of international mail seemed unimportant where amounts of international mail were small compared with domestic mail and inbound and outbound volumes were roughly equal, as was true for mail exchanges between most pairs of industrialized countries. Collectively, industrialized countries sent more mail to developing countries than they received, but, given low costs of postal delivery in developing countries, a low fee per kilogram was more than adequate compensation for their extra work. Such a fee, called “terminal dues”, was first introduced in 1969. The absolute level of terminal dues was of little significance for mail exchanged between industrialized countries. On paper, an industrialized country post office charged another industrialized country post office much less than domestic postage for delivery of inbound international mail and covered its losses by overcharging customers for outward international mail services. In reality, post office A had no idea of the actual cost incurred by post office B in delivery of AB international mail and very little idea of its own cost in delivery of inbound BA mail. Post office A set international postage rates not to cover the costs of specific services but to maximize the profitability of outbound and inbound international services collectively.<sup>3</sup>

Divorced from cost considerations and unrelated to domestic postage, terminal dues were set by international negotiation. Senior postal officials spent long weeks in leisurely meetings considering, in a half dozen languages simultaneously, arcane diplomatic and political formulae. In these discussions, net exporters of international mail argued with net importers; generally (but not exclusively) it was the industrialized countries against the developing countries. Meetings took place within the framework of the Universal Postal Union (UPU), an inter-governmental organization dominated by postal officials and

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3 The uniform nature of terminal dues effectively creates a subsidy from high cost post offices to low cost post offices because low cost post offices are obtaining high cost delivery services for their outward mail in exchange for their provision of relatively low cost delivery services for inward mail.

headquartered in Berne, Switzerland. Every five years, UPU delegates gathered in a world capital for four to six weeks in a general congress that revised the legal framework, the Universal Postal Convention. Many UPU delegates had been attending such gatherings for decades.

### **3 Remail and Terminal Dues**

Remail threatened the foundations of the international postal club. In the lexicon of postal officials, "remail" refers to the practice of posting mail in a country other than a country where the sender resides. For example, a company with an office in country A might prepare a large mailing in country A and transport the mail in bulk by private express to country B for posting to addressees in that country or another country. Alternatively, the company could ship the materials for a mailing to a letter shop in country B, hire the letter shop to combine the materials into envelopes, and then tender the mail for posting with post office B. Today, it is also possible to send the information content of the mailing—e.g., data from which statements of account are produced—from one country to another by telecommunications. Using telecommunications, a company in country A can have its mail produced in country B and posted there. Technically, no transportation or telecommunication of mail or mail data is necessary to qualify mail as "remail"; it is only necessary that the mail in question is posted in a country other than the country where the mailer is considered to reside. In any form, remail introduced partial competition into the international postal world. If international mail can be shifted from country to country, national post offices must vie for the mailer's business. Post offices with low prices and efficient international mail forwarding services would gain business at the expense of those with high price and inefficient services. Despite such competition in upstream functions, however, remail did not alter the fact the mail would be finally delivered by the post office in destination country.

International postal officials viewed the prospect of remail competition at the international level with the same alarm and antipathy that domestic postal officials reserved for repeal of the postal monopoly. Remail was condemned in the Universal Postal Convention. Since 1924, the Convention had included a provision to discourage mailers from taking domestic mail out of a country A and posting it with the post office in neighboring country B for delivery as international mail to addressees in A. Such a practice, commonly referred to as

“ABA remail”, was economical case where country A’s *domestic* postage rates exceeded the *international* postage rates of country B. In 1979, this provision was extended to cover “ABC remail”, mail taken from country A to country B for posting to addressees in country C, a third country. To stop remail, the Convention authorized post offices to intercept remail and return it to the origin post office or charge the *addressee* with domestic postage, even though the sender had already paid international postage when the mail was posted. As a German postal official observed in the 1979 congress of the UPU, “The Convention did not deal with competition between administrations.”

Traditionally, the UPU provision that authorized interception or surcharging of remail was known by its number in the Universal Postal Convention; in the 1980s it was “Article 23.” of the 1984 Convention. In the 1989 and 1994 Conventions, the corresponding article was Article 25. Article 23 of the 1984 Convention declared as follows. The first three paragraphs embody the 1924 restriction on ABA remail. The fourth paragraph reflects the 1979 amendment.

1. A member country shall not be bound to forward or deliver to the addressee letter-post items which senders resident in its territory post or cause to be posted in a foreign country with the object of profiting by the lower charges in force there. The same shall apply to such items posted in large quantities, whether or not such postings are made with a view to benefitting from lower charges.
2. Paragraph 1 shall be applied without distinction both to correspondence made up in the country where the sender resides and then carried across the frontier and to correspondence made up in a foreign country.
3. The administration concerned may either return its item to origin or charge postage on the items at its internal rates. If the sender refuses to pay the postage, the items may be disposed of in accordance with the internal legislation of the administration concerned.
4. A member country shall not be bound to accept, forward or deliver to the addressees letter-post items which senders post or cause to be posted in large quantities in a country other than the country in which they reside. The administration concerned may send back such items to origin or return them to the senders without repaying the prepaid charge.

In essence, Article 23 was a market allocation agreement enforceable through discretionary actions by individual post offices. The purpose was to ensure that international and domestic mail produced by persons resident in country A is tendered to the national post office of country A. Legally, then, the term “remail”

referred to any international mail that could be intercepted or otherwise penalized by resort to Article 23.

The most powerful and anticompetitive implications of Article 23 derived from its application to what is called "nonphysical remail". By its terms, Article 23 applies not only to mail physically produced in country A and transported to country B for posting but also to mail which "senders resident" in country A "caused to be posted" in country B. Paragraphs 1 to 3 allowed interception or surcharge of "nonphysical ABA remail," i.e., mail which "senders resident" in country A "caused to be posted" in country B to addressees in country A "in large quantities" or "with the object of profiting by the lower charges in force" in country B. Paragraph 4 applied to "nonphysical ABC remail", i.e., mail which "senders resident" in country A "caused to be posted" in country B "in large quantities" for addressees in country B or country C, i.e., large mailings mail normally considered domestic or international mail posted in country B. Whether the "sender" of the mail was "resident" in country A was a matter of interpretation which was decided by the post office that intercepted or surcharged the mail in question. Although post offices adopted different interpretations of "sender" and "resident", many considered a company "resident" in every country in which it had a significant commercial presence. Under this interpretation, a large international company could be considered resident in every country in which it did business.

With the gloss of the nonphysical remail doctrine, Article 23 permits a post office to intercept virtually any large international or domestic mailing posted by an international company. Of course, no post office applied Article 23 consistently. It was used intermittently, as a means of protecting a post office's revenues and commercial position. Production of a large mailing is expensive, and delay in delivery can dissipate some or all of its value of the mailer. Mere threat of interception was enough to keep most large mailers in line.<sup>4</sup>

As public policy issues, Article 23 and economically incorrect terminal dues were two sides of the same coin. Without Article 23, mailers would shift mail

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4 Post offices in all industrialized countries supported Article 23 but their motives varied. A high cost post office (like Germany) used Article 23 to prevent mailers from exporting domestic mail and reimporting it for delivery at terminal dues rates instead of the higher domestic postage rates. A low cost post office (like the United States) supported Article 23 because it sustained a uniform terminal dues rate that effectively subsidized low cost post offices (see footnote 3, above). All post offices feared loss of international outward mail on which high profits were earned.



from post office to post office to take advantage of terminal dues that were too low when compared with domestic postage and to avoid terminal dues that are too high compared with domestic postage. Without economically incorrect terminal dues, post offices would have been hard pressed to justify restrictions on remail that were on their face nakedly anticompetitive.

## **4 Growth of Remail**

Despite the impediments of Article 23, commercial remail services evolved. Misalignment between terminal dues and domestic postage rates was only one of several factors that led to the growth of remail. Remail services achieved additional cost advantages over post offices by negotiating better rates for air transportation and by keeping down other costs. Remail services also offered discounts for bulk international mail that post offices disdained. Moreover, remail companies improved on traditional international postal service by offering additional services: collection of mail at the offices of the sender, sorting of the mail, application of postage, and monthly billing. By using private express companies to ensure expeditious transport of remail to foreign post offices, remail companies were often able to provide international postal service that would both faster and cheaper than normal international mail service.

The earliest remail services were distribution services for publications. As early as the 1930s, European publishers circumvented limitations of the international postal system by using air freight to transport bulk shipments of publications into the United States. These books and magazines were distributed by the U.S. post office. In the late 1950s, McGraw-Hill and KLM Royal Dutch Airlines began experimenting with remail of U.S. publications to Europe via the Dutch post office. Remailing of publications was not considered a threat to post offices because profits on postal services for publications were low. In the early 1980s, however, some post offices, notably the Belgian post office, began to accept letter remail.

The breakthrough for letter remail occurred in 1986 when the U.S. Postal Service, under pressure from Congress and Reagan Administration, modified its postal monopoly regulations and explicitly permitted export of U.S. origin letters for remailing abroad. Because U.S. Postal Service operations focused on serving the needs of domestic mail – international mail is less than 0.5 percent of U.S. mail – remail services from U.S. to Europe were able to provide

international letter delivery services that were both significantly cheaper and faster than the Postal Service's international mail.

For imaginative postal officials, remail of publications and letters was the harbinger of a still more ominous prospect, global postal services. There was no real difference between a private express company collecting remail in country A for tender to post office B and post office B establishing an office in country A. Remail implied that post offices, like international telecommunications and aviation companies, should be free to open offices in each other's territories and compete for international traffic. The inevitable next step would be a demand for the right to deliver international mail in countries where postal delivery was unsatisfactory. Global postal services would ensure. Once established, global postal systems with the ability to collect and deliver cross-border mail could theoretically compete with national post offices for domestic mail. A large domestic mailer in country A might, for example, export his mail to a neighboring country, or produce his mail there, and give it to a global operator for delivery to addressees in country A. In a country where postal service is overpriced or poor in quality, a global postal system could "cream-skim" the domestic market much like a local private express company. Thus, the ultimate threat of remail – and the economic promise of remail – was the possibility that it could lead to efficient global postal services that would not only improve cross-border postal service but also establish competitive alternatives to inefficient national postal services.

## **5 Antiremail Conspiracy**

The prospect of European post offices competing for large quantities of international remail from the United States shocked postal officials in concerted action. On 12 March 1987, the U.K. Post Office wrote to the post offices of Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland and requested a meeting to discuss the increase in remail competition. The letter declared:

Remailing poses a serious threat to the future relationships of postal administrations. Airmail letter traffic, the traditional preserve of postal administrations, is now being strongly attacked by large, multinational companies. . . . [I]t is vital to consider whether there is a common policy we can adopt to counter the activity of these companies.

The first meeting of the Remail Conference, as the U.K. Post Office called the group, convened at a hotel at Heathrow Airport on 22 April 1987.<sup>5</sup> The U.S. Postal Service sent two representatives bringing the active membership in the Remail Conference to fifteen. Sir Ronald Dearing, chairman of the U.K. Post Office, opened the discussions by noting:

We are all aware that remail has existed to a degree in the last decade or so - the traffic segment predominantly involved has been printed papers. Until recently, the traffic volumes and revenue dilution involved have not been sufficiently great to cause the level of concern that has brought us there today. In the last two years the situation has changed dramatically. Remailing firms are now seeking systematically to exploit the availability of cheaper rates in some countries, and the limitations of the present systems of imbalance charges, and they will take whatever profitable traffic they can acquire, be it printed papers or much more significantly, airmail.

They have efficient transportation networks, originally established for parcel and bulk consignment distribution, and they are now using their network strength to very good effect in establishing posting facilities throughout the world.

With the concern being expressed by several administrations we have convened this meeting today to discuss how we should respond to the challenge presented by remail in Europe. Our North American colleagues are here with us as observers as they have a particular interest in this problem; North America offers the remailer a vast market and, as you know, it is currently one of the principal sources of such traffic for European destinations.<sup>6</sup>

The meeting was facilitated by a number of working documents. A paper by the Finnish post office expressed concern that private operators had not "limited themselves" to express services but were beginning to provide alternatives to international postal services which were admittedly unsatisfactory.

A new aspect in this matter has come to light through the increasing interest among the international courier services not to limit themselves to the transportation of documents and small goods door-to-door but also to engage in large scale transportation of mailable matter to countries of destination. Additionally and increasingly, they are also arranging the distribution services itself, often multinationally.

These remailing services are born of the fact that the postal services have not been able to keep up a satisfactory standard of service, and of inflexible

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5 All invited post offices attended except the post offices of Denmark and Ireland; both, however, attended subsequent meetings of the Remail Conference.

6 Remail Conference, Draft minutes of the 22 April 1987 meeting (28 April 1987).

price setting in the tariffication. We may quote as examples the terminal dues, sometimes too high, sometimes too low, and the rates for bulk mail which are not always calculated with regard to the real costs involved.

A contribution by the U.K. Post Office listed the key issues as non-economic terminal dues, non-economic air transportation rates, uncertainty of enforceability of Article 23, and lack of agreement amongst postal administrations. Another U.K. Post Office paper (document 4) outlined possible approaches to terminal dues reform, including the competitively neutral option of relating terminal dues to domestic postage rates.

The Remail Conference appointed a working party composed of the post offices of Sweden (spokesman), France, the Netherlands, and the U.K. The Remail Conference met again in September 1987 in conjunction with a meeting of the Conference of European Postal and Telecommunications Administrations (CEPT), an organization European postal administrations. The working party declared it was, "convinced that remail constitutes a serious threat to postal business and that a vigorous response is urgently needed. It has for that purpose worked out a three-part strategy: a new system of terminal dues, a set of aligned practices, and a new business letter service."<sup>7</sup> Two of the three elements of the "competitive strategy" were self-evidently anticompetitive: the new system of terminal dues and the set of aligned practices.

In October 1987, the Remail Conference working party agreed to a new formula for calculating terminal dues on mail exchanged between parties to the agreement. The new scheme would replace the charge of SDR 2.614 per kilogram established in the 1984 Universal Postal Convention (effective for the period 1 January 1986 to 31 December 1990). The new formula provided a terminal dues charge of SDR 1.225 per kilogram plus SDR 0.121 per item. In one important respect, the new formula was an improvement over the UPU scheme. Since the actual cost of postal delivery varied with the number of items as well as the weight of items delivered, introduction of a charge per item implied that the new formula could produce charges that corresponded more closely to actual cost. Under the new formula, the charge for a 20-gram letter, the approximate weight of a typical cross-border letter, would increase from SDR 0.052 to SDR 0.146, or 178 percent. A lightweight, 10-gram letter, would experience a terminal dues rate increase of 410 percent. Heavier weight letters

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<sup>7</sup> Remail Conference, Report by Sweden Post (10 September 1987), quoted in Case IV/32.791 - Remail, Statement of Objections 36.

faced smaller rate increases or even decreases: 30-gram (101 percent), 50-gram (39 percent), 100-gram (-7 percent), and 200-gram (-30 percent).

Although introduction of an item factor into the terminal dues formula was an improvement in theory, the actual effect of the new formula was anticompetitive: it would substantially raise the cost of remail but not significantly reform the costs of regular international mail exchanged among postal administrations. This effect was accomplished by modifying the *level* of terminal dues charges without changing the *uniformity* of the terminal dues rate. Since remail represented additional mail for the remail post office, increasing the level of the terminal dues charge increased the marginal cost of all remail. On the other hand, since the uniformity of terminal dues rates was left untouched, postal administrations could still trade inward delivery services to compensate for outward delivery services, regardless of the unequal economic value of the two services. Thus, the Remail Conference addressed defects in the 1984 UPU terminal dues system which had a minor, but a competitive, impact but ignored the major economic defect in the 1984 terminal dues scheme, its failure to recognize differences in the costs of inward delivery among postal administrations (within Europe, postal delivery costs varied by a factor of three to one).

The Remail Conference also served as a focus for efforts to discourage remail by pressuring postal administrations to desist from cooperating with private operators. On 12 February 1987, for example, the U.K. Post Office had written to a number of post offices in and out of Europe asking for assistance by enforcement of Article 23:

From the literature we have seen issued by [an express company involved in remail] it would appear that your administration may have some kind of arrangement with that company for forwarding of traffic originating in Great Britain.

While we cannot stop [the express company] taking AO-type traffic out of the UK for remailing, when they take LC . . . I very much hope . . . that your administration will not accept UK-originating LC-type traffic for remailing . . . [W]e would regard it as an unhelpful act on the part of a sister postal administration which would be regrettable in light of our previous excellent relations".

In response to such pleas, in early March 1987, the Singapore post office discontinued accepting all foreign origin mail tendered by private remail companies, citing the objection of the U.K. Post Office. In January 1988, the

Japanese post office notified the Hong Kong Post Office that it will not accept international mail remailed through Hong Kong.

In spring 1988, the German post office invoked Article 23 to restrain remail in two ways. It pointed out Article 23 to German mailers to discourage them from using remail for outbound international mail. It also intercepted and returned inbound international mail posted by Community mailers and destined for German addressees.

After initial meetings of the Remail Conference, members extended their efforts to suppress remail competition to the Universal Postal Union.<sup>8</sup> In May 1987, the UPU Executive Council appointed the U.S. Postal Service to conduct a survey of remailing activities. In August 1987, the Director General of the UPU distributed a circular letter to UPU members expressing concern about remail competition.<sup>9</sup> In September, the UPU distributed to members an initial report and questionnaire prepared by the U.S. Postal Service.<sup>10</sup> Full results of the survey were reported in March 1988. The report outlined competitive difficulties posed by remailing and noted that about half of postal administrations surveyed favored increased use of Article 23. Postal administrations supported greater cooperation among postal administrations "almost unanimously". The report concluded, "On the whole, the remail issue seems to have become a significant problem." At the same time the UPU distributed a second report, also prepared by the U.S. Postal Service, on "other aspects to be considered in the study of terminal dues". This report addressed, among other things, the rise of international competition and the role of the monopoly in opposing such competition.<sup>11</sup>

The depth of concern felt by major post offices over the rise of remail was reflected, as well, in the establishment of the International Post Corporation. At the CEPT meeting held in Copenhagen in September 1987 (the same occasion

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8 The 40-member UPU Executive Council included eight members of the Remail Conference who could, as a practical matter, exert substantial control over the group. The most important Remail Conference members of the Executive Council were the post offices of Germany (chairman), France, and the United States.

9 UPU, International Bureau, Circular No. 0115(B/C)1745 (14 August 1987).

10 UPU, International Bureau, Circular No. 3370(B/C)1790, Annex 1 (2 Sept. 1987).

11 UPU, Executive Council, CE 1988/C5 - Doc 9, "Other aspects to be considered in the study on terminal dues" (30 Mar. 1988). The reason for two reports on the same day on the same subject was apparently to enlist support for antiremail efforts in both Committee 4 (letter post - regulatory aspects) and Committee 5 (letter post/ rate-fixing and payments) of the UPU Executive Council.

as the third meeting of the Remail Conference), the CEPT appointed a special committee to consider a new institutional structure for international postal services. In May 1988, the committee reported to a meeting of postal directors held in Ottawa. The directors approved the committee's proposal to establish a new corporation to take the lead in managing and marketing international postal services. On 5 January 1989, the post offices of Belgium, Cyprus, Denmark, Finland, France, West Germany, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, Portugal, Spain, Sweden, United Kingdom, Canada, Australia, United States, and Japan formed the International Post Corporation (IPC).<sup>12</sup> Its mission included coordination of business policies, harmonization and improvement of international postal services, monitoring of service quality, development of tracking and tracing systems, and planning of competitive responses to remail.<sup>13</sup>

## 6 Remail Case and Postal Green Paper

On 13 July 1988, the International Express Carriers Conference (IECC) formally complained to the European Commission that anti-competitive activities of the Remail Conference were inconsistent with the competition rules of the Treaty of Rome. In the Remail Case,<sup>14</sup> the IECC challenged both the right of the postal administrations to fix terminal dues at rates that discriminated between domestic and cross-border mailers and the right of the postal administrations to use Article 23 of the Universal Postal Convention to intercept or otherwise discourage remail.

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12 More precisely, on 1 January 1989, the post offices established a Dutch holding company, the "International Post Corporation U.A." (IPC) with a statutory seat in Amsterdam, but operating solely in Brussels. On 5 January 1989, IPC and EMS founded a second "International Post Corporation", a Belgian stock corporation with headquarters in Brussels (IPC Brussels). IPC held all but one of the 25 shares of IPC Brussels, the remaining share being held by EMS for reasons of Belgian corporate law. It was intended that EMS will be transformed into a Belgian stock corporation with IPC holding all but one of its shares. On December 28, 1989, the firm name of IPC Brussels was changed into "Uniposte" or Unipost in English.

13 Without waiting for a new structure, on November 12, 1987, ten European post offices and the U.S. Postal Service established EMS International Post Corporation (EMS), an air cargo system dedicated to the transport of postal express mail. EMS established an air transportation hub at Zaventem airport in Brussels. When IPC was established, EMS was merged with IPC. Within two years, EMS operated thirteen aircraft connecting twenty-two major European cities and a transatlantic flight joining the Brussels hub to New York, Montreal, and Toronto. EMS collapsed in 1991 when five key post offices (Canada, France, Germany, the Netherlands, Sweden) bought a half interest in TNT, a worldwide private express company, and shifted their express mail traffic.

14 Case IV/32.791 - Remail.

The IECC complaint quickly stimulated preparation of a Postal Green Paper (PGP). As late as December 1987, the European Commission was uninterested in a "green paper" or comprehensive policy review in the field of postal services.<sup>15</sup> By November 1988, however, the Commission had reversed position and resolved to prepare a Postal Green Paper. The Commission's change of heart seems to have been prompted by postal officials concerned with implications of the IECC complaint. It was no secret that European competition authorities were inclined to agree with legal arguments raised by the IECC against the antiremail conspiracy and ready to move quickly.<sup>16</sup> Meanwhile, postal officials were portraying the consequences of unrestrained remail competition in the darkest terms. "Suicide for the postal services" warned a prominent postal official meeting with the head of the Directorate General III (industrial policy and the common market) in May 1988. Manifestly, the strategy of postal administrations was to seek agreement on a high level of socially necessary, universal postal service before a detailed consideration of Community competition law. Who could disagree with good quality postal service for all citizens? Once a high level of universal service was agreed, post offices could use this social goal to justify limitations on application of the competition rules. Moreover, post offices argued that pendency of a major policy review justified a delay in addressing the IECC complaint. The Commission agreed, and work on the Remail Case was suspended.

In September 1989, the French president of the Telecommunications Council held in Antibes, France, announced the first product of this strategy, a six-page discussion paper, "The Debate", that outlined a proposed approach to the Postal Green Paper. The Debate began by citing events which necessitated a PGP. Notably, most items referred directly or indirectly to remail and the forces that gave rise to remail:

Taking just the mail service into consideration, there have recently been far-reaching changes on the market as a result of a number of events.

- The structure of demand is changing. At the same time as a slight increase in mail between individuals, an enormous increase in mail being received and sent by companies is to be noted.

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15 Presentation of M. Raymond Dumey, Competition Directorate, European Commission, to a Seminar of European Post Offices, Paris, 8 December 1987.

16 On 31 January 1989, the Financial Times reported that European competition officials were reportedly "nearly finished gathering evidence".



- Large quantities of articles and documents can even be produced from far way thanks, among other things, to the recent developments in information and printing technology.
- As a result of the subdivision of the market into several sectors, specialization is increasing all the time. This is particularly striking in the case of “direct mail”, mail-order business, express mail as well as the changed supply and demand in international correspondence.
- The new services are offered, as least in part, outside the state monopoly by private enterprises, some of which come from countries outside the Community and want to use here the experience they have made elsewhere.
- The coordination between the private enterprises (in the case of the non-monopolized services) and the postal administrations does not always run to satisfaction. Besides, it is not common practice of the postal administrations to differentiate between the use of resources (personnel, material) for monopolized services and that for other services.
- In international relations (including relations with other Community countries) coordination between the postal administrations is disrupted in some cases by
  - problems of the UPU in connection with the structure of “terminal dues” (equalization arrangement between the parties concerned prejudices to a great extent the administration that receives the items of mail),
  - problems with respect to the subsequent mailing of items (if cooperation develops between a private delivery service and an administration on the basis of different national rates and different terminal dues arrangements). [paragraph 1.5]

To address problems and needs thus identified, the Debate proposed evolution of standardized European postal monopoly as the centerpiece of Community policy (“to retain within the framework of a regulation concerning the exclusive or special rights a small number of central, reserved services”). Beyond this core of reserved services, the Debate called for separation of commercial and regulatory functions, transparency of accounts, and controls on cross-subsidy. The needs of users were hardly mentioned; nor were the provisions of the Treaty of Rome that guaranteed the free and undistorted trade between Member States.

The Postal Green Paper was not completed until June 1992. As it turned out, the PGP adopted a more competitive stance than envisioned by its original proponents. Although it addressed many postal policy issues, the PGP returned repeatedly to issues raised by the rise of remail: terminal dues, restrictions on

re-mail, the relationship between European law and the Universal Postal Convention, and liberalization of cross-border mail generally. The PGP concluded that terminal dues should not be set at a uniform rate among Community post offices because of the wide disparity in costs among the administrations. The PGP advocated instead that terminal dues be related to the domestic postage rates in each Member State.<sup>17</sup>

With respect to the interception of re-mail, the Postal Green Paper condemned postal resort to Article 25 (of the 1989 Universal Postal Convention) except in the most limited circumstances. The PGP began by observing that re-mail benefits the user. It can overcome delays caused by slow cross-border postal procedures and better accommodate the needs of mailers by adding extra services.<sup>18</sup> Given positive economic benefits and the Treaty's protection of competition, the PGP concluded that application of Article 25 against intra-Community ABC re-mail could never be consistent with the EC Treaty.<sup>19</sup> The PGP also expressed doubts about the lawfulness of using Article 25 to turn back mail that had been physically taken out of Member State A to Member State B and posted back into Member State A. The paper noted that, when applied to such re-mail, Article 25 could be interpreted as an appropriate means of enforcing the postal monopoly. However, the PGP noted that it was the task of appropriate regulatory authorities, not the post office, to enforce the postal monopoly. Then, too, Article 25 was not limited to postal monopoly items. A third difficulty noted by the PGP was that Article 25 could be used to prevent a company from posting its own mail where it deemed appropriate, a use inconsistent with the view that a person should always be able to post his own mail.<sup>20</sup>

The Postal Green Paper considered and dismissed the post offices' claim that "nonphysical re-mail" justified interception of cross-border mail. The PGP recognized that new technologies and centralization of European mail preparation might result in a shift in the movement of mail from domestic distribution to cross-border distribution.

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<sup>17</sup> PGP, chapter 9, recommendations 7, 7.1, 7.2, pages 251-52.

<sup>18</sup> PGP, chapter 5, sections 9-9.3.

<sup>19</sup> PGP, chapter 8, section 11, page 210 (emphasis added).

<sup>20</sup> The PGP left open the question of whether Article 25 could be used to turn back extra-Community ABC re-mail, i.e., mail that any mailer residing in one Member State posts in a country outside the Community for delivery to addressees in another Member State. The Green Paper considered that such practices posed an obvious financial threat to Community post offices. Green Paper, chapter 8, section 11, page 211.

It is not uncommon for publishers to centralise the printing of a European-wide magazine in one location, even if the publication is in different languages. If the material is then posted in the same country as the printer, it should be treated by the receiving administration as ordinary cross-border mail – even though it might otherwise have the appearance of domestic mail in the country of delivery.

This phenomenon of centralised production which could turn domestic mail into cross-border mail is likely to increase as customers modify their location and buying strategies as a result of the Single Market. Thus, a bank might centralise its statement-producing operation in one location (rather than producing the statements in each different country served), and then post all the mail out of the one location. Similarly, an advertiser may wish to produce all its direct mail in one location, and post there.

The fact that such mail might formerly have been domestic and therefore subject to domestic monopolies causes some people to contemplate whether such movements of mail thus caused should be considered an infraction of domestic monopolies unless the items concerned are posted in the country of delivery. Briefly, the question that should be put is as follows: should the single market in printing, electronic data and advertising adjust to possible interpretations of postal rules, or the converse?<sup>21</sup>

The PGP recognized that some post offices considered this trend generated “nonphysical” remail but concluded that if mail is produced in a country A, then it is properly posted in country A regardless of the senders “residence”. Any other view would allow the post offices to distort the Community printing and mail preparation sectors.<sup>22</sup>

In the end, the two most significant reform proposals of the Postal Green Paper were to liberalize cross-border mail and direct mail.<sup>23</sup> The first was a direct descendent of the Remail Case and precisely what post offices officials feared all along. The demise of the national post office was widely predicted.

In the Remail Case, in April 1993, the Commission finally adopted a Statement of Objections, a form of preliminary decision. The Statement of Objections upheld the complaint of the IECC in all respects, strongly condemning the post offices for fixing prices, distorting competition, and allocating markets. The Statement of Objections noted:

A principal object of the CEPT agreement was to neutralise the growing competition from private express companies in the provision of airmail

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<sup>21</sup> PGP, chapter 5, section 9.3, page 135 (emphasis added).

<sup>22</sup> PGP, chapter 8, section 8.3, pages 199-200.

<sup>23</sup> PGP, chapter 9, page 245. Section 2.14 provides a similar recommendation for international mail (i.e., mail between a point in the Community and a point outside the Community).

services. This emerges clearly from the preparatory documents for the early meetings of the Remail Conference.

While revision of the terminal dues system was certainly perceived as necessary in its own right and had been called for by some postal administrations within the UPU as long ago as 1969, no serious attempt was made to devise an alternative system until the increase in private remailers' business came to be perceived as a "threat". . .

This "threat" of remail competition to the ability of postal administrations to assure basic postal services remains unproven. . . . The continued development of remail competition can be expected to lead to cost savings and improved services for bulk mailers, and new business for the international mail system.

The effect of the agreement is to distort competition in the market for bulk transmission of international mail. Although final delivery of international mail to destination remains subject to the legal monopoly of the postal administrations in the Member States, the advent of remail has opened up possibilities for competition in the forwarding of bulk international mail between individual postal administrations on the one hand, and joint arrangements between postal administrations and remailers on the other. . . .

There is no basis under the EC competition rules for one postal administration to turn back mail posted by a private operator who is competing with another postal administration, whether the exclusive rights of the latter are being infringed or not. If the exclusive rights of the outward administration are infringed, it is for the regulatory body in that country to take legal action - not for that administration to seek assistance from another administration whose exclusive rights are not infringed.

The use of powers under Art. 23 (4) UPU by the Bundespost was contrary to [European competition law]. . . .

The invocation of powers to request enforcement of Art. 23(4) UPU constitutes an abuse of this dominant position. In effect Art. 23 UPU supports a market allocation scheme among postal administrations. . . .

Use of Art. 23(4) UPU has the effect of discouraging competition. The British postal administration's requests to third-country postal administrations to intercept UK-origin mail that has been remailed are evidence of an attempt to protect its dominant position in the outbound market.

The German Bundespost cited Art. 23 UPU to outbound mailers, and in addition protected the position of "sister" postal administrations by intercepting and returning foreign-origin remail entering Germany. . . . This amounts to a refusal to deliver mail merely on the grounds that it had been

remailed. Such behaviour similarly limits the market contrary to [European competition law].<sup>24</sup>

## 7 Retreat from General Postal Reform

The 1992 Postal Green Paper and the 1993 Statement of Objections in the Remail Case marked the high tide of postal reform. In mid 1993, the European Commission began to retreat from reform in the face of political influences exercised outside public view.

Notwithstanding its strong condemnation of the post offices' antiremail conspiracy in the 1993 Statement of Objections, in early 1995 the Commission dismissed the IECC's complaint in a series of three short decisions. In essence, obscured in a fog of legalisms, these decisions declared that the Commission would not enforce the competition rules against post offices.

In regard to terminal dues arrangements, the Commission made clear that it regarded the CEPT agreement as inconsistent with the competition rules.<sup>25</sup> Yet, even though post offices engaged in a price-fixing arrangement on a Community wide scale for seven years, the Commission declined to condemn the price fix because, a month earlier, post offices had reached an agreement which reportedly (the Commission had no copy of the agreement) envisioned a new terminal dues agreement that would, at some point in the future, likely resolve competition law issues raised by the IECC complaint. The Commission concluded that requiring the post offices to adhere to the competition rules would, in an unspecified manner, delay correction of competition law violations identified in the complaint.<sup>26</sup>

In regard to the complaint against use of UPU Article 23 to intercept or threaten interception of ABC remail, the Commission declared it would take no action because the post offices had, in 1989, promised not use paragraph 4 of Article 23 to intercept remail and that the IECC had failed to produce subsequent evidence that post offices had failed to live up to this pledge.<sup>27</sup> The Commission's decision is worded carefully at this point. As the Commission was

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<sup>24</sup> Case IV/32.791 - Remail, Statement of Objections (Apr. 5, 1993) at 23-30.

<sup>25</sup> Decision n SG(95)D/1790 of February 17, 1995 at point 5 ("a system of artificially fixed prices rather than competitive prices reflecting the costs of different postal administrations").

<sup>26</sup> Decision SG(95)D/1790 of February 17, 1995 at points 8-9.

<sup>27</sup> Commission Decision SG(95)D/10794 of August 14, 1995 at points 11, 13, and 17.

aware, post offices intended to continue interception ABC remail whenever they considered in their commercial interest to do so and were in fact making or threatening such interceptions. Rather than citing paragraph 4 of Article 25, post offices were citing paragraph 1 and the flexible concept of "nonphysical remail."<sup>28</sup> Indeed, in the 1994 congress of the Universal Postal Union, post offices amended Article 25 to ensure broad applicability of the nonphysical remail concept.<sup>29</sup> Notwithstanding the fact that post offices could and did use Article 25 to intercept ABC remail as "nonphysical remail," the Commission held that the IECC had no "legitimate interest" in interception of nonphysical remail, a legal requirement for a complaint.<sup>30</sup> Further, the Commission held that interception of ABA remail was justified because, under the CEPT agreement, post offices charged less than domestic postage on incoming cross-border mail and therefore lost money on such remail.<sup>31</sup>

The Commission retreated from key reform proposals in the Postal Green Paper in similar fashion. In mid 1993, after a year of consultation, the Commission reported qualified its support for reform; in fact, virtually the only public opponents were post offices and postal unions.<sup>32</sup> In December 1997, after prolonged political struggle, the Commission adopted a Postal Directive that

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28 As noted, ABC remail refers to mail produced in country A, posted in country B, and delivered in country C. If, however, the company producing the mail in country A has a branch office or other commercial presence in country C, then the post office in country C can claim that the office in country C is a "sender" "resident" in country C that has "caused the mail to be posted" in country A. By characterizing the mail in this fashion, the post office in country C can intercept the mail citing its authority under paragraph 1 of Article 23.

29 The 1994 congress expanded the scope of "nonphysical remail" in Article 25 of the 1994 UPU Convention (successor to Article 23 of the 1984 UPU Convention) by changing the word *domiciliés* in the official French text to *résidents*. The UPU Executive Council, which drafted this amendment, explained that this change "allows much wider application of the article, particularly in the case of the various branches of a multinational company." 1994 Seoul Congress, Doc 58, par. 5 (emphasis added).

30 The Commission, for the purposes of decision, adopted the position the term "nonphysical remail" could not, by definition, include mail transported by private express. Commission Decision SG(95)D/4438 of April 6, 1995 at point 7 ("In the Commission's view, . . . so-called "non-physical remail" involves the following scenario: a multinational company . . . , for example, a bank, . . . sets up a central printing and mailing facility in one particular Member State 'A', information is sent by electronic means from all the bank's subsidiaries and branches to the central service centre, where the information is transformed into actual physical letter-items, e.g. bank statements, which are then prepared for postage and submitted to the local postal operator for mailing to the customers of the bank and its subsidiaries or branches in all Member States, including Member State 'B'. . . . there are in our view no indications as to how the IECC's members could be involved in this type of arrangement.")

31 Commission Decision SG(95)D/4438 of April 6, 1995 at point 6.

32 European Commission, "Guidelines for the Development of Community Postal Services" COM(93) 247 final (1993).

retreated from most of the reforms envisioned in the Postal Green Paper. The Postal Directive placed an upper limit on the postal monopoly law in of all Member States. Member States were permitted to reserve collection, transport, and delivery of "items of domestic correspondence" provided two conditions were met: (i) the price of service for each item is less than 5 times the price of a stamp for a first class letter in the lowest weight step and (ii) the weight of each item carried is less than 350 grams. In theory, a reservation of postal service could only be adopted "to the extent necessary to ensure the maintenance of universal service"; in practice, the ceiling allowed Member States to monopolize 98 percent of letter and direct mail. The major initiatives of the Postal Green Paper, liberalization of cross-border mail and direct mail, were abandoned. Failure to liberalize cross-border mail was particularly unjustified since the Postal Directive explicitly found "cross-border postal links do not always meet the expectations of users and European citizens, and performance, in terms of quality of service with regard to Community cross-border postal services, is at the moment unsatisfactory."<sup>33</sup>

## 8 Core Issues of Remail Addressed

The Commission's retreat from earlier visible, broad scale postal reform initiatives did not entirely halt momentum towards reform. Indeed, the Commission and courts have continued to chip away at addressing and resolving the core legal presented by remail.

Prompted by the Remail Case, the Commission ultimately required post offices to align terminal dues with domestic postage, a key goal of the IECC complaint. In December 1995, post offices submitted a tentative REIMS terminal dues agreement to the Commission for approval.<sup>34</sup> In late 1996 or early 1997, the Commission apparently rejected the post offices' application for an exemption from the competition rules without public notice.<sup>35</sup> After almost two more years of negotiations, on September 15, 1999, the European Commission approved a

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<sup>33</sup> Postal Directive, Recital 6.

<sup>34</sup> Commission approval was required because terms of the REIMS agreement remained inconsistent with European competition law, especially provisions for a lengthy "transition" period.

<sup>35</sup> Another factor in the demise of REIMS I was disagreement among the post offices. Several parties conditioned their participation in REIMS on participation by the Spanish Post Office. As it turned out, the Spanish Post Office never agreed to REIMS.

revised "REIMS II" agreement.<sup>36</sup> The revised version, originally submitted for approval in late 1997, shortened the transition period and made other procompetitive changes. In principle, the REIMS II agreement largely eliminated discrimination in the delivery charges for international and domestic mail. On January 1, 2001, terminal dues were supposed to be set at 70 percent of domestic postage rates. Since domestic postage rates include a charge for collection of mail as well as delivery of mail and since cross-border mail is not collected by the destination post office, this formula appears to represent a plausible alignment of terminal dues and domestic postage.

Meanwhile, two judgements in the European courts have curtailed the authority of post offices to intercept remail under authority of the antiremail provision of the Universal Postal Convention. On 16 September 1998, in an appeal of the Remail Case by the IECC, the Court of First Instance reversed a key element in the Commission's decisions dismissing the complaint. The Court held that neither losses resulting from non-cost based terminal dues nor a need to prevent circumvention of the postal monopoly justified a postal interception of ABA remail. The Court pointed out that post offices cannot reasonably justify interception of remail by citing imperfections in a terminal dues agreement which they drafted.<sup>37</sup> The Court further noted the post offices could use other less restrictive means to prevent losses on inbound remail. An appeal of this holding by the German Post Office was rejected by the European Court of Justice on 11 May 2000.<sup>38</sup>

On 10 February 2000, in the GZS case, the European Court of Justice considered whether the German post office could, under authority of Article 25 of the 1989 Universal Postal Convention, require a mailer to pay domestic postage for delivery of nonphysical ABA remail. The mail in question consisted of credit card statements printed in Denmark and the Netherlands and "posted in large quantities" posted to addressees in Germany by two banks, GZS and Citibank, with offices in Germany. The German post office delivered the letters and sued the banks for payment of German domestic postage, citing UPU

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36 Commission Decision of 15 September 1999 approving final version of REIMS, OJ L 275, 26.10.1999, page.17.

37 Joined Cases T-133/95 and T-204/95, IECC v. Commission, [1998] ECR II- at paragraphs 96-102. On appeal, the Court of First Instance deferred, in most respects, deferred to the Commission's discretion not to decline to investigate complaints. The IECC has appealed points on which it lost to the European Court of Justice, which has not yet rendered a final judgement. Cases C-449/97 and C-450/97.

38 Case C-428/98, Deutsche Post AG v. IECC, [2000] ECR I-\_\_\_\_\_.



Article 25, notwithstanding the fact that mailers had already paid postage to the Danish and Dutch post offices for cross-border postal service and these post offices owed the German post office terminal dues for the delivery of such mail. The Court held it was a violation of European competition rules for the German post office to enforce the remedies provided by UPU Article 25(3), i.e., to return the mail to the origin post office or to charge the sender full domestic postage. On the other hand, the Court found that large scale use of nonphysical ABA remail by mailers resident in Germany could render it impossible for the German post office to fulfill its obligation under the Universal Postal Convention to deliver inward international mail. Therefore, the Court held that the German post office may, by way of an exception from the competition rules, charge the mailer the *difference* between the domestic postage that it would have received and the terminal dues that it actually received. In short, the Court found that the German post office would be justified in treating nonphysical ABA remail as domestic mail and charging domestic postage.<sup>39</sup>

In combination, these two judgements imply that post office may not use the antiremail provision of the Universal Postal Convention to intercept remail or impose punitive surcharges on remail. While the cases pertain specifically to ABA remail, there appears no reason to why conclusions should not apply to other remail as well. On the other hand, a post office is now justified in treating inbound international mail which qualifies as "nonphysical ABA remail" in the same manner as domestic mail by charging the sender or the origin post office the difference between terminal dues and the domestic postage it would have received if the mail has been posted domestically. Two further points require clarification. First, is a post office obliged to levy charges which sum to domestic postage on *all* inbound international mail that qualifies as "nonphysical ABA remail"? If so, since the postal concept of "nonphysical ABA remail" is very broad, it would appear that, as a practical matter, a post office should charge domestic postage on all inbound bulk international mail. Since, as the Court found, inbound ABA remail is tantamount to domestic mail, it would appear no more justifiable to discriminate between equivalent tenders of "nonphysical ABA remail" than to discriminate between equivalent tenders of domestic mail. Second, if a post office is obliged to apply domestic postage rates to all (or almost all) inbound bulk international mail, it is justified in applying a lower to

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<sup>39</sup> Joined Cases C-147/97 and C-148/97, *Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH (GZS) and Citicorp Kartenservice GmbH*, [2000] ECR I-\_\_\_\_ (decided 10 February 2000), at paragraphs 50-60. This case involved questions referred to the Court from a German court.

charge to other inbound international mail? Under what circumstances? The decision of the European Court of Justice in the IECC's appeal of the Remail Case from the Court of First Instance may clarify these points.

## **9 Conclusions**

Fifteen years after commencement of the still unfinished European postal reform debate, it is apparent that the precipitating event was the growth of international remail following U.S. liberalization of outbound remail in 1986. In retrospect, most of the European postal reform effort can be recognized as a struggle between advocates for incipient global postal systems, for which remail was the harbinger, and those determined to protect a system that allocates national markets to national post offices. The Remail Case, launched by the IECC in 1988, was the legal center of this debate. The 1992 Postal Green Paper was stimulated by this struggle and a large part of the substance of that document was devoted to issues raised by emergence of cross-border postal services. The Commission's 1993 Statement of Objections in the Remail Case promised a dramatic and conclusive application of the competition rules to the post offices' efforts to suppress remail.

Although the Commission retreated from broad scale or dramatic measures after 1993, the Commission and European courts continued to address, and have now largely resolved, the core legal issues presented by remail and its implications. Moreover, although general postal reform stalled at the European level, substantial national postal reforms have been adopted in Germany, the Netherlands, and the United Kingdom. These were apparently motivated in large measure by the goal of enabling national post offices to participate in the global postal markets foreshadowed by remail.

Thus, while other motivations for postal reform are also evident from the course of European reform – such as the need to prevent cross subsidy from monopoly to competitive markets or the need to equip a national post office for new competition from alternative media – it appears fair to conclude that most of the tangible results of European postal reform to date have been catalyzed by legal and policy initiatives set in motion by the rise of remail.